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CASES

DECIDED IN

THE COURT OF SESSION, COURT OF JUSTICIARY,

AND

HOUSE OF LORDS,

FROM AUGUST 1, 1887, TO AUGUST 10, 1888.

REPORTED BY

MIDDLETON RETTIE, JAMES PATTEN, C. C. MACONOCHIE,
H. J. E. FRASER, AND JOHN DAVID SYM,
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OF THE

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CASES

DECIDED IN

THE HOUSE OF LORDS

1887–88.

No. 1.

July 22, 1887.

M'Clure, Naismith, Brodie, & Macfarlane, v. Stewart.

M'Clure, Naismith, Brodie, & Macfarlane, (Defenders) Appellants. —*Balfour, Q.C.*—*Pearson*—*Haldane.*

Robert Buchanan Stewart, (Pursuer) Respondent.—*Rigby, Q.C.*—*Begg.*

Agent and Client—Reparation—Alleged failure of agent to inform client of material fact—Proof—Onus.—B, a law-agent, was employed by a client to obtain a loan on the security of a patent. S, another client of B, after consulting B, lent £5000. The patent was subsequently found to be invalid, having been anticipated by prior patents. In an action raised by S against B for payment of loss through the transaction, on the ground that the defender had failed to communicate to the pursuer the fact that he had ascertained that the patent could not be relied on as valid without further inquiry than had been made, and had allowed him to advance his money in ignorance of this risk, *held* (*rev.* judgment of First Division) (1) that the *onus* of proving that the communication had not been made lay upon the pursuer; and (2) on the proof (*diss.* the Lord Chancellor) that the pursuer had failed to discharge himself of this *onus*, and that from the facts proved and documents produced it was to be inferred that B did make the communication to his client.

(Reported in the Court of Session, July 7, 1886, 13 R. 1062.)

At delivering judgment,—

Ld. Chancellor (Halsbury).
Ld. Selborne.
Lord Watson.
Ld. Herschell.
Lord Macnaghten.

Lord Chancellor.—My Lords, in this case, with one possible exception, with which I will deal presently, it seems to me that no question of law arises, but that it is one simply of fact.

The history of the case, although it will take some time to go through the details of it, may, I think, shortly be summarised in this way—That from the month of March in the year 1877 down to the month of September in the same year, Mr Brodie, one of the defenders, was endeavouring to procure the sum of £10,000 for the Messrs Martin, who were patentees of improvements in anchors. The original intention had been to create a partnership, and an advertisement issued from Mr Brodie's office inviting persons to become partners and to advance capital. The pursuer, who had been a client for some time of Mr Brodie, was, I think, as early as the month of June in the first instance brought into the matter,

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and after some negotiations with reference to a partnership the question became one of loan, and in the course of the negotiations it became apparent to Mr Brodie that if some lenders could be induced to advance £5000 it would facilitate matters in the success of the adventure in which they were all interested in common. The only person, I think, who can be properly said to have filled the character of lender was the pursuer. By reason of family ties and business ties the others had interests not simply as investors, and Mr Brodie was acting for them. Now, I think it is impossible to deny that the interests of the respective parties were necessarily to some extent of a counter character. Those who were borrowing money had an interest in getting that money lent, and those who were lending it had an interest in seeing that the money so lent was properly secured. The person who was endeavouring to borrow for a client was in this instance the person whose duty it was to see that the security was sufficient. I do not say that it is impossible to reconcile those two positions, but I think it casts upon him the duty of being on his guard against himself, and of seeing that he does not sacrifice the interests of one client to the interests of the other. Whether he did so or did not do so is the question in the cause.

Now, something has been said about the lapse of time which has taken place between the supposed cause of action and the attempt to recover damages for it in a Court of law, but the whole question in the cause is, whether the pursuer did or did not know at the time of the transaction in what way his interests had been regarded by Mr Brodie. A subsequent question arose, about which I will say a word presently. I am not quite certain that the question of the lapse of time is very material except in this sense, that it may render it more difficult for either side to prove their case; but whatever may be said as to lapse of time, not by way of fault on the part of the pursuer, but by reason of the proper and just mode of disposing of the case, those who allege a fact must prove it whatever the lapse of time may be, and no Court of law would be satisfied with less than an adequate amount of proof because time has elapsed.

Before dealing with the facts I wish to say one word about the *onus*. It appears to me that if the Lord President has laid down the rule that in this case the *onus* was on anyone else than the pursuer, he was in error. I cannot acquiesce in that view of the law. I will refer to a case in which a somewhat similar question arose, namely, the case of *Elkin* v. *Janson*, 13 M. & W. 655. There an action being brought upon a policy of insurance, the defendant pleaded that material facts were not disclosed—the plaintiff, in reply, pleaded *de injuria*. It was argued that the person who was bound to establish the fact that the communication was made was the plaintiff, and very much upon this ground—Counsel was commenting on a case in Maule & Selwyn, where it was held upon a conviction against a carrier for having game in his possession that it lay on the defendant to prove the affirmative of his qualification, and not on the informer to prove the negative. Mr Justice Bayley in that case said—"I have always understood it to be a general rule that if a negative averment be made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative is to prove it, and not he who avers the negative." Mr Baron Alderson, upon hearing Mr Justice Bayley's words read, intervened, and said—"I doubt as a general rule whether those expressions are not too strong. They are right as to the weight of the evidence, but there should be some evidence to start it in order to cast the *onus* on the other side." That

I believe to be the accurate rule, and applying it to this case I have no doubt in the world that it lay on the pursuer here to give evidence to shew that the communication which is all important in this case was not made to him. On the other hand, dealing with it simply as a question of the degree of weight which should be attached to each step of evidence in the cause, I think it is important to bear in mind whose duty it was to communicate the fact which was so material in this case.

Now, adverting to the facts, and admitting fully that the *onus* was upon the pursuer in the first instance, the evidence appears to me to come to this—I will say one word about the effect and value of Mr Brodie's entries presently,—but assuming the complexion which those entries take in my view to be the correct one, I will state what appears to me, with the most sincere deference to those who take a different view, to be the effect of the evidence. Mr Brodie in the first instance endeavoured, I have no doubt, to do his duty to his client; he consulted Mr Hunt; he received Mr Hunt's report on the 14th of August, and it is taken as a fact by all who have dealt with this case that from the 14th of August to the 3d of September he made no communication of that fact to the pursuer. Then it appears that though he made no communication of this fact to the pursuer he made entries in his books which shew communications of a very considerable character between himself and Messrs Martin and those who represented them. So, if I am right, Mr Brodie thought it consistent with his duty to the client who was lending his money to enter into these communications and consultations with the borrower of the money, having in his pocket this communication which he had received from Mr Hunt, and never communicating either by word or letter the result of that communication to the man who was trusting him as the person who was to advise him with respect to the advance of his money. Nor, my Lords, does it appear to be a matter of doubt that even when the communication is suggested to have been made (upon the question whether it was made or not I will say one word presently), it was made in a way different from that in which everyone will agree it would have been made if the pursuer had had a solicitor of his own to advise him, and it is not, of course, denied that where a person is undertaking the double capacity of advising persons who may have adverse interests his duty towards each of them is not lessened by the double capacity which he affects to fill. The result of that appears to be that the first communication made (if any was made) by Mr Brodie to the pursuer was made in the presence of all the other parties, and at a meeting at which all the other parties were to attend, and he was to be presented with these alternatives—"Either the matter must go off, or you must accept Messrs Tongue & Birkbeck's report." Now, I say that those are alternatives which ought not to have been so presented to him, because from the beginning to the end of the transaction it is not suggested that by word or letter Mr Brodie ever gave the pursuer an opportunity of considering this matter. And one test which I would apply would be this—suppose Mr Brodie had been only the adviser of the pursuer, is it conceivable that he would not have had communications with him either by word or letter, and consultations with him apart from the other party to the transaction, so as to give him an opportunity of deliberating over and considering the very important investment which he was about to make?

Well, my Lords, that is so far what I may call the admitted complexion of the facts, but I cannot help thinking that that admitted complexion of the facts reflects some light upon the question whether or not we are to assume that that

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communication which is here suggested to have been made was in fact made. Now, upon that matter it is a remarkable fact that of all the persons present there is not one of them, with the exception of the defender himself, who will allege that that communication was made. And even when one speaks of the defender himself it must be said that he very candidly declined to pledge himself that by any effort of memory he could recall a state of facts upon which he could aver that the communication was made, but he says that seeing a condition of things so novel, and placing his mind so far as he can in the condition of a person who would be subjected to great loss by reason of the neglect of a precaution which ought to have been taken, he is satisfied that he could not have permitted his client to enter into that transaction without having made the communication in question. So that of all the persons present there is really not one who will say as matter of memory that that communication took place.

Now, my Lords, I am not disposed to undervalue the record made at the time; it is most important, and I do not undervalue its importance, but it must be taken with this qualification—if its purport is to be a historical record of everything that took place, and if you are not to suppose that it was not made at the time (which I think no one has suggested)—remembering the object and purpose for which it was made, you may attach credit to it. But I think a greater effect than is just is given to the language in which it is conveyed. The object and purpose of this record is an entirely proper one, namely, to keep an account of the business done on behalf of the Messrs Martin, and to charge them with the amount of work which is done. It is in the ordinary course of the entries made for the purpose of afterwards making out a solicitor's bill, but in the end it does not purport that at the time it was anything like an exhaustive description of everything which was done, and indeed if one translate it by comparing those things which are in it, together with matters which still survive, they enable us to judge of the true effect and meaning of what those entries were intended to convey, and to see that words in the entries which speak of full explanations are satisfied by something which is neither full nor which explains. I will take, for example, the last of the entries which are under the date of the 15th of August—"Writing Mr Stewart, explaining and arranging meeting." Now, if that letter had not been extant, and had not been before us, it probably would have been argued, or it certainly might have been argued with some force, as it has been argued with regard to some other entries, that when Mr Brodie wrote that entry, "Writing Mr Stewart, explaining and arranging meeting," he must have explained in that letter the information which he had received from Mr Hunt (which was in truth the reason of the postponement of the meeting), and explained the difficulty which had arisen. As a matter of fact the letter survives, and we see that the letter contains no such explanation. But no one will suggest that that entry was made with a fraudulent design to misrepresent the character of the letter therein referred to. So when one refers to the entry of the 17th of August, "Attending meeting of all parties" (giving the parties) "and making full explanations," if the letter of the 20th had not been written I suppose it would have been irrefragable evidence, according to the argument which is suggested, that the whole of Mr Hunt's communications to Mr Brodie were then explained. The evidence shewed that they were not. Again, I say no one will suggest that that entry was made with a fraudulent design to represent explanations as having been made which were not made, but, as I say, having reference to the object and purpose with which such entries are made, it ex-

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plains the nature of the business which was done. I think that they ought not to be carried further than this, that some business, corresponding generally to the character of what is therein described, was done, for which Mr Brodie had a right and a proper desire to make a charge against the person who was responsible for payment for the business which had been done.

My Lords, I am aware that it is said—"If you suppose that this information was withheld, you are making a serious charge of fraud against Mr Brodie." Now, everyone—counsel, Judges, and everyone else—is very reluctant indeed to charge fraud. A person who charges fraud undertakes a heavy burden, and the tendency of all Courts is certainly not to make light of it. Therefore, the learned counsel who attended at your Lordships' bar have not only with great propriety, but with great prudence also, declined to accept that issue, which in truth is an issue that ought not to be put upon those who are complaining of breach of duty if a breach of duty has been committed. If it involves the person complained of, the character which it assumes is immaterial except in this respect, namely, what I may call the not unnatural tendency of all Courts to refuse to act upon anything which is not satisfactory evidence in the cause. The question really is, whether a breach of duty was committed, and if a breach of duty was committed, whether it is charged as fraud or as negligence, is, so far as the pursuer is concerned, immaterial; but, for my own part, I do not think that it is a just observation to say that people may not, in the position which Mr Brodie had voluntarily entered into, possibly commit grave errors of judgment which, if they had the independent view in their minds which they ought to have had, they would recognise as not just to one or other of their clients. Mr Brodie had been from the month of March endeavouring to effect this loan. It is quite possible that with a perfect desire to help both parties, and thinking that everything would go right, he may not have given all the information and advice to the pursuer which he should have done, and yet not have been conscious of sacrificing the interests of his client. I quite admit the broad proposition, apart from the circumstances, apart from the mode in which a man gradually slides from negligence in the earlier stage to something which afterwards assumes the complexion of fraud. I think that in human nature it is very likely that a man in Mr Brodie's position, who begins with a real desire to do what is right at the time, may gradually slide into what is not just to one of his clients, because he is endeavouring to reconcile the interests of both. But however that may be, my Lords, taking the impression upon my mind from what I may describe as the counsels which, apart from the pursuer, Mr Brodie carried on with Mr Martin, and considering the admitted facts proved by the letter, that he had made up his mind without consultation with the pursuer himself, to advise the pursuer to waive any further inquiry and to accept the report of Messrs Tongue & Birkbeck, and looking at the circumstances under which he exposed his client to admitted difficulty without previous consultation with himself and apart from the other persons interested in this transaction, the alternative being suddenly placed before him of either accepting or rejecting a profitable investment which was almost within his grasp, I have come to the conclusion, as a matter of fact, that Mr Brodie did not make the communication which I think his sense of duty ought to have led him to make, and if he did not make that communication I believe all your Lordships are of opinion that he would be responsible in damages for the loss of this money.

My Lords, I have thought it right to make these observations, not that I have

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so much confidence in my own judgment as to suppose that I am right when your Lordships take a different view, but I thought it was only just to the learned Judges below, who have shared the view which I take, shortly to express the grounds upon which I have come to the same conclusion as they have. I am quite aware that the result of the ultimate deliberation will be to overrule the judgment of those learned Judges and to re-establish the judgment of the Lord Ordinary.

Earl of Selborne.—My Lords, I am glad that this case has been twice argued, because it would not have been satisfactory that a unanimous judgment of this nature of the First Division of the Court of Session should be reversed either by a small number of your Lordships not unanimous, or without very full consideration; but for my own part I see no reason, after having heard the second argument in this case, to alter the opinion which I formed upon the occasion of the first hearing, which was in the appellants' favour.

The Lord Ordinary and the Inner-House of the Court of Session have differed upon a question, not of law but of fact. I cannot, in any case, dissent from an opinion in which four learned Judges have been agreed without much and careful consideration, but in this instance I have been led, after repeated consideration, to the same conclusions as the Lord Ordinary. The question seems to me to depend very much less upon the oral evidence of the parties and witnesses (speaking on both sides, after a lapse of eight years, from a confessedly imperfect recollection of what had passed in conversations at that distance of time) than upon the confirmation which the statements on one side or on the other receive or fail to receive from documentary evidence contemporaneous with the transaction in question, and the reasonable presumptions from uncontested facts. Of the parole evidence in this case (so far as it depends upon unaided memory) I should be disposed to say that it would not by itself on either side furnish at all a satisfactory basis for judgment, and that if the balance had not been turned by the documents (in which I include the entries in the appellants' books, which are among the evidence on the record, and were referred to in Mr Brodie's testimony), and by those considerations which fairly arise out of the probabilities of the case, much might have depended upon the *onus probandi.* The pursuer's evidence may have been (I assume that it was) sufficient to throw upon the defenders the burden of producing some evidence on the other side to shew that those communications, which the pursuer denies, were made in point of fact, but it is not positive in that sense which would make a conviction for perjury possible if the fact were ever so clearly established against him. The state of Mr Brodie's memory in 1885, if not aided by letters and entries in his books, might not have enabled him to satisfy the burden of proof which, as I have assumed, was thrown upon him; but I am of opinion that the entries in his books ought to receive credit, and ought to be considered in connection with his evidence, and I cannot help adding that they appear to me to have received less consideration than I think due to them in the Court from which the appeal is brought.

The action was for negligence in the discharge of a duty undertaken by the appellants as law-agents for the pursuer on the occasion of his becoming a contributor in the autumn of 1877 to a loan of £10,000, made to two French gentlemen named Martin upon the security of a patent or patents taken out by the Martins in 1872 for certain improvements in anchors. The pursuer (respon-

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dent here) contributed £5000; the rest was found by Messrs Miller, ironfounders in Glasgow, and some friends of theirs whom they induced to join. Throughout that transaction the appellants' firm acted as law-agents for all parties, and by the interlocutor appealed from they have been ordered to make good to the pursuer the whole loss which he has sustained by failure of the security, for the patents being disputed three years afterwards turned out to be bad. Mr Brodie was the partner in the appellants' firm who acted in this transaction, and the conclusion drawn by the Lord President (with the concurrence of at least two of the other Judges of the First Division) from the whole evidence was that Mr Brodie "concealed" from the pursuer some very material facts which ought to have been disclosed to him, and that "the interest of one client was sacrificed for that of another."

The Lord President justly said that this was "a very serious matter," and it is on that account necessary to be careful and vigilant, lest injustice should be done to Mr Brodie by affirming such a condemnation upon insufficient grounds. In the language of those Courts of this country with which I have been most familiar, concealment of material facts by a solicitor from one of his clients in order to promote at his expense the interest of another client, would generally be called fraud, and no doubt the averments of the pursuer in his amended condescendence do cover such a case of fraud though the word is not used. The respondent's counsel at your Lordships' bar declined studiously and emphatically to impute fraud, but they did not suggest an omission of duty arising out of mere oversight or inadvertence; they admitted that the non-communication of the matter in question to the pursuer (if it was not communicated) must have been intentional, and they did not give up any part of the substance of the pursuer's allegations, whatever judicial estimate might be formed of them. I do not say that such a line as this, if taken out of tenderness towards the feelings and reputation of a former friend, ought to operate in any way to the pursuer's prejudice; but the appellants are entitled under such circumstances to the full benefit of all ordinary and reasonable presumptions consistent with the proved facts of the case in favour of their honesty and good faith, and I think it right to add, that I could not myself reconcile the non-communication of those things which the pursuer says were not communicated to him under the actual circumstances with honesty and good faith on Mr Brodie's part, especially having regard to the terms of the entry in the appellants' books of the 3d September 1887. That entry is in these words,—"Long meeting with parties interested; going over draft agreement and draft assignment, and previously reporting fully as to what had taken place in regard to inquiries as to the patents, and when it was resolved to accept report of patent-agents in London as furnished—nearly three hours." Mr Stewart and the other proposed lenders of the £10,000 were present at that meeting. What had happened "in regard to inquiries as to the patents," and as to the report of the patent-agents in London then furnished, was this—Mr Brodie of his own accord wrote on the 11th August to Mr Hunt, a patent-agent in Glasgow (whose place of business was very near his own), a letter. On the 14th of August he saw Mr Hunt, and what then took place appears by Mr Hunt's entries in his books, and by Mr Brodie's letter to Mr J. R. Miller of the 20th August. Mr Brodie ascertained in this way that there were some patents earlier than 1872, not which did, but which possibly might, affect the value of the proposed security, and he thought (as Mr Hunt also did) that it would be "necessary to have a distinct report by the patent-agent" (by

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which expression he then meant Mr Hunt, but it is obvious that Mr Hunt wa not the only patent-agent in the world from whom such a report might be sufficient) "before proceeding further." This (he said) would require time, and a it would be attended with expense (which Mr Martin would have to bear), "the authority of Mr Martin must be obtained." With this view a series of communications followed between Mr Brodie, Mr Martin, and Mr Buckland, who was Martin's agent; the first on the 15th of August (the day after the interview with Mr Hunt), and the last (as I collect from the entries in the appellants' books) on the 29th of that month. Mr Martin before the 24th August (on which day there was a conference on the subject between Mr Morrison, the appellants' clerk, and Mr Buckland) had proposed, as Mr Morrison then understood, that "counsel's opinion" should be "accepted in view of report from Mr Hunt." It is not, however, unlikely that Mr Martin may have meant (whether using inaccurately the word "counsel" or not) the opinion which he did obtain from his own patent-agents, Messrs Tongue & Birkbeck, and which is dated on the 24th of August. At a subsequent meeting (either on the 25th or on the 27th August), Mr Buckland placed in Mr Brodie's hand that opinion, or (as Mr Martin called it) "report" of Messrs Tongue & Birkbeck, and communicated to him a letter to himself (Buckland) from Martin in which it was enclosed, and in which Martin said,—"If this is not sufficient and satisfactory to the utmost we must give up without the least hesitation." From what passed during that or the following interview Mr Buckland inferred that Mr Brodie would "advise the contributors that the report was satisfactory," and would "endeavour to get them together as soon as possible," so that they might "either reject or consent then and there," and so Mr Buckland, in a letter from Glasgow, dated the 27th August (which I accept as evidence, finding it on the record, though in strictness it might have been objected to by the appellants), informed Mr Martin. Mr Brodie, however, did not accept that "report" as satisfactory, without first making an independent inquiry through his own London correspondents, Messrs Anderson & Sons, as to the reputation and standing as patent-agents of Messrs Tongue & Birkbeck, and Messrs Anderson & Sons received from Messrs Carpmael (very good authority on such a subject) a quite satisfactory account of them, which they duly reported to Mr Brodie.

The meeting of the 3d September (a meeting of Mr Brodie and all the lenders) was then appointed to take place "in order" (as explained by Mr Brodie to Mr J. R. Miller) "that the drafts might be submitted and a report made as to what had taken place since the last meeting, which had to be postponed." A meeting which had been appointed (on the 17th) for the 24th August, had been in fact postponed on account of what passed between Mr Brodie and Mr Hunt, as was clearly explained to Mr J. R. Miller in Mr Brodie's letter of the 20th August already mentioned. I assume in the respondent's favour that no similar or equally full explanation was given before the 3d September to anyone else.

These being the circumstances which led up to the meeting of the 3d September 1887, I am clearly of opinion that if Mr Brodie did not communicate to the parties, who then decided to accept Messrs Tongue & Birkbeck's report as sufficient for their purpose, the material inquiries as to the patents which had led to that report being obtained and offered to them by the Martins, and especially the substance of what passed between Mr Brodie himself and Mr Hunt, the entry of the 3d of September in the appellant's books was not true, and could not have been honestly made. That entry is not similar to that of the 17th of

August; it is not expressed in vague or equivocal terms. It says that Mr Brodie then "reported fully as to what had taken place in regard to inquiries as to the patents," and this as introductory to the question whether the "report of patent-agents in London as furnished" should be accepted. That could not have been done without stating the inquiries made in the first instance through Mr Hunt, and what followed thereon, and I think it impossible (independently of that entry), that facts so material to the question which the parties had to consider and determine at that meeting could have been kept under the circumstances from the knowledge of the parties then assembled without some improper motive.

Is it then a just conclusion from the materials before your Lordships that there was a suppression of those facts, and that the entry of the 3d September ought to be rejected as false, or as not extending in its fair and natural import to the matter now in question? On the one side there is nothing except the postponement of any communication of the facts to more than one of the lenders until that time, and the terms of the letter of the 20th August by which they were communicated to Mr J. R. Miller; on the other side (as it seems to me), are all the probabilities and ascertained facts of the case pointing to the conclusion that the entry is entitled to credit, and that the proper communications were made. The statements of Mr Brodie, confirmed by those of Mr John Ritchie Miller, appear to me to be quite enough to support the entry as honest and true, and also to shew (as far as the recollection of those witnesses goes) that the explanations given were such in all respects as they ought to have been.

There is no suggestion and no probability of any motive operating, or which can be conceived as likely to have operated, on Mr Brodie's mind to pervert his judgment, or obscure his sense of duty, or lead him to prefer the interest of the borrowing to that of the lending clients. He had long known the pursuer, and was on friendly terms with him; his acquaintance with the borrowers was recent, and in this transaction only. The appellants entered into this business without knowing anything more of the patent than that it was commercially successful, and had been in use without challenge for five years, and that the Messrs Miller, who had manufactured anchors for the patentees under it, thought so well of it as to be disposed to lend their own money, and to induce some of their friends to do the same. Whether the treaty for the loan was completed or went off, the appellants' costs would at all events be paid.

The general facts do not tend to shew that in this matter the appellants thought only of the borrowers' or neglected the lenders' interest. When they consulted Mr Hunt (as they did spontaneously on the 11th of August), they were manifestly acting *bona fide* not in the borrowers' but in the lenders' interest, and the "jottings" also prove that during the period between the 24th of August and the 1st of September they were still continuing to seek information on various points in the lenders' interest, and theirs only. In the same interest they inquired through their London correspondents as to Messrs Tongue & Birkbeck's position and character. What reason can be suggested for their acting otherwise at the meeting of the 3d of September? I am content to take it as a just inference, from the terms of the letter of the 20th of August, that they did not enter into this matter with their clients at the first meeting held after their interview with Mr Hunt on the 17th August. It is also true that when informing Mr J. R. Miller of the most material facts in their letter of the 20th August, as constituting reasons for the postponement of the meeting then

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fixed for the 24th, they said,—"Inform Mr Caird and the others, except Mr Stewart, simply saying that it has been found necessary to postpone the meeting fixed for Friday." If those circumstances were not open to any honest and rational explanation, and if the case were made that Mr Brodie and Mr J. R. Miller were acting in collusion together for the borrowers' interest, there would be force in the observations of the Judges of the First Division on this part of the case. But no such imputation on Mr J. R. Miller was made or insinuated, nor can I see the least ground for it, although he was connected as a manufacturer of anchors under the patent with the Martins, and had on their behalf introduced this business to the appellants' firm. He was not likely for that reason to be willing to lend his own money, still less to advise his friends to lend theirs, without necessity, upon the security of a bad patent. In the absence of such collusion between them it is impossible to suppose either that Mr Brodie, having written as he did to Mr J. R. Miller on the 20th of August, could have been silent as to the material facts mentioned in that letter at the meeting of the 3d of September, or that, if he had been then silent, Mr Miller, as an honest man, would have held his peace on that subject during the whole three hours while the meeting lasted.

The non-communication of the whole facts to any of the lenders except Mr J. R. Miller before the 3d September, and the suggestion to Mr J. R. Miller that he should "simply" inform his friends of the postponement of the meeting fixed for the 24th of August (without entering into the reasons for it), seem to me to admit of an easy and natural explanation, consistent with the indifferent and impartial performance of his duty by Mr Brodie towards all his clients. The communications with the borrowers, arising out of what passed between him and Mr Hunt, had begun just two days before the meeting of the 17th August, and were still depending and in an early stage of progress. Mr Brodie, if he expected that they would have a satisfactory result, might well think, and might honestly and reasonably act on the opinion, that it was not necessary or desirable in the meantime to enter into partial explanations or discussions on that subject upon imperfect materials. He had initiated those inquiries without previous instructions from or communication with his clients, and they had not yet been brought to a point; it was impossible on the 17th of August to know with certainty what might result from them; the result, when arrived at, ought to be communicated, but in the meantime other things might well go forward. It is consistent with the whole evidence that Mr Brodie may have said at that meeting enough to make all present understand that there might be matters not then ripe for consideration which might come before the next meeting: even if he did not say so, I could not infer from his silence at that stage of the matter any purpose of suppression. The same reasons might lead him to think it unnecessary for Mr J. R. Miller to explain to his friends the causes of the postponement of the meeting fixed for the 24th August, and to prefer doing so at the proper time himself. As for the exception of Mr Stewart in the letter, I am satisfied (as the Lord Ordinary was) with Mr Brodie's explanation, although he did not give Mr Stewart any notice of the postponement until the day appointed, when Mr Stewart was informed of it, with some reasons then given by Mr Morrison, Mr Brodie's clerk, whom I assume not to have entered into any unnecessary particulars, though I do not doubt the truth of the entry made by him in the appellants' books.

The Lord President appears to have thought that nothing short of some written communications on this subject to the pursuer (and I presume also to all the other lenders) ought to be held sufficient. With that view I am unable to agree. If all the material facts were communicated to the lenders when assembled at the meeting of the 3d September, the duty of the law-agents was, in my opinion, sufficiently performed. His Lordship also thought that there was some concealment by Mr Brodie of his own opinion as to the necessity of additional inquiry for the lenders' protection. From that opinion I am also compelled to differ, unless it ought to be concluded that Mr Brodie considered—or as a reasonable man of business was bound to consider—Messrs Tongue & Birkbeck's letter insufficient for that purpose. That letter, besides referring to the undisputed and successful user of the patent for five years as affording (which it certainly did) strong practical grounds for a belief in its validity, went on to state the opinion of those patent-agents (whose standing and reputation was attested by the high authority of Messrs Carpmael), "that no previous patents taken for improvements in the construction of anchors could affect in any way the validity of the patent of 1872," and that they "believed the principles embodied in that patent to be essentially novel." To myself it never would have occurred as a possible supposition (and therefore I cannot think it was actionable negligence in Mr Brodie if it did not in September 1877 occur to him) that competent and respectable patent-agents could put their names to such an opinion without having first looked into the "previous patents taken for improvements in the construction of anchors," or without applying their skill and judgment to the consideration of the question of the novelty of the invention of 1872 with reference to those previous patents. That letter or "report" was, in my judgment, equivalent to a representation that they had done so, with a result altogether favourable to the patent of 1872. The specifications of all the previous patents were as accessible to Messrs Tongue & Birkbeck in London as they could have been to Mr Hunt at Glasgow, or to any other patent-agents whom the appellants might have consulted there or elsewhere. Nor does it appear to me that either Mr Brodie or his clients had any reasonable ground for distrusting Messrs Tongue & Birkbeck's opinion, because it had been obtained by the patentees themselves, and was embodied in a letter addressed to them. The patentees had as much right to receive from any competent patent-agent whom they consulted on such a subject honest and proper advice as any independent person would have had, and nothing had occurred which could at that time suggest a doubt to any reasonable mind as to the good faith of the patentees in the whole course of the negotiation. That Mr Stewart might have forgotten what was said about Mr Hunt is likely enough, although everything ought to have been explained, for he himself says that Mr Hunt "was at the time quite unknown to him," and that "Mr Hunt's name might have been mentioned without exciting his attention." In connection with this point it is not immaterial to observe that the facts which Mr Hunt had ascertained and communicated to Mr Brodie did not "excite a doubt" (as Mr Hunt himself says) as to the validity of the patent, but only "a feeling that further search was necessary." All who are conversant with patents must know that it has been an extremely common thing for the most successful and important patents to be disputed on the ground of anticipation by previous patents, often plausibly, but seldom with success. The appellants might therefore well retain and continue to act upon the presumption and belief that their patent (which had stood the test of five years' public and extensive use without challenge) was good and valid pending the inquiries which they still thought it necessary to make, and they might in the meantime quite consistently proceed with the preparation of all necessary instruments so as to be ready for the completion of the loan at the proper time. I cannot, under the circumstances, impute it to them as actionable negligence if they (explaining in a proper manner what had previously occurred) regarded Messrs Tongue & Birkbeck's report as substantially the thing wanted, and as a report which their clients might, if they thought fit, accept as safely as if it had proceeded from Mr Hunt or from any other patent-agent in Glasgow or in London of their own or any other person's choice.

My conclusion is, that the Lord Ordinary was right, and that the interlocutor appealed from ought to be reversed with costs, and the interlocutor of the Lord Ordinary restored, and I so move your Lordships.

Lord Watson.—The divided state of judicial opinion in the Court of Session, as well as in your Lordships' House, sufficiently indicates that the present case is one by no means unattended with difficulty. At the close of the argument yesterday I had formed an opinion, which I have seen no reason to alter, to the effect that the interlocutor of the Inner-House ought to be reversed and that of the Lord Ordinary restored. Having since had the advantage of reading in print the judgment which has just been delivered, I shall not enter upon an examination of the evidence, and shall content myself with expressing my entire concurrence in the reasoning and conclusions of the noble and learned Earl.

Lord Herschell.—I also entirely concur in the opinion which has been expressed by the noble and learned Earl opposite. I can entertain no doubt that in this case the burden lay upon the pursuer of establishing that breach of duty on the part of the appellants which was the foundation of this action. His case was that the appellant had omitted to disclose certain material facts of which upon all hands it is admitted it was his duty to make full disclosure. Now, my Lords, it appears to me that unless the pursuer established that fact he made out no case at all against the appellants, and I am at a loss to understand why in this case, any more than in any other case where a breach of duty or negligence is alleged, it should not lie upon the person making that charge to establish it by proof.

My Lords, when I examine the proof led by the respondent I am unable to find any satisfactory evidence that the breach of duty alleged was committed. No single witness (I include the respondent himself) pledges his memory upon oath to the fact that the failure to disclose which is the foundation of the action really occurred. Mr Stewart uses language such as this—"Nothing was said at that meeting on the 3d, so far as I know, as to Mr Hunt having been consulted"; "He did not say anything about employing any other expert, so far as I remember"; "I am not conscious of having heard of Mr Hunt having been employed until the case against Wright & Company was going into Court"; "I think that no communication was made affecting in any way the validity of the patent"; "I do not remember whether I was aware before the transaction was closed that Mr Hunt had been consulted; I am not prepared to say definitely that his name was not mentioned to me; it may have been mentioned and made no impression"; "So far as my memory goes, I was not aware of any inquiry having been made at a patent-agent's relative to this patent except that which appeared upon Tongue & Birkbeck's letter."

Now, my Lords, I think I have read all the passages from the respondent's evidence upon which his action is founded, and there is no evidence more clear or conclusive given by any of the witnesses whom he calls, and I confess it appears to me that it would be a somewhat strong measure, if the matter stood there alone without any further evidence, to hold upon evidence such as that that the pursuer had established the breach of duty which he alleges. Certainly his memory as to what passed is somewhat imperfect, because he states that until quite a recent period he was in ignorance of the fact that the letter from Tongue & Birkbeck had been got by Martin; he was under the impression that it had been got by Mr Brodie's firm. Now, he states himself that the letter was read to him at that meeting, and the letter begins in these terms,—"Gentlemen,—With regard to our opinion as to the validity of your patents." Now, how any person hearing that letter read could doubt for a moment that it was addressed to the patentees and not to the law-agent I am at a loss to understand.

So much with reference to the case as made out by the pursuer. But when we contrast with that the evidence on the other side, borne out as it is by the entries in the books, it appears to me that it would be acting not only upon unsatisfactory evidence, but acting in defiance of evidence of a much more satisfactory character the other way, if it was held in this case that the pursuer had made out the charges which he has alleged against the appellants.

Under these circumstances, my Lords, I entirely concur in the judgment which has been moved.

Lord Macnaghten.—In 1877 the respondent, Mr Stewart, and four other persons, employed the appellant Mr Brodie, and his partners, as their law-agents in the matter of a loan on the security of a patent relating to improvements in the construction of anchors. The borrowers were Messrs Martin. Mr Brodie's firm acted for them also. The patent afterwards turned out to be invalid.

Mr Stewart maintains that in the course of his employment Mr Brodie was guilty of professional negligence, owing to which he suffered pecuniary loss. For that loss the judgment under the appeal holds Mr Brodie and his firm responsible.

The point of the case is this. It is alleged by Mr Stewart, and admitted by Mr Brodie, that before the loan was completed Mr Brodie was advised by Mr Hunt, a patent-agent whom he consulted, that a search ought to be made for the purpose of ascertaining the validity of the patent. It is further alleged by Mr Stewart, but denied by Mr Brodie, that this advice was concealed from Mr Stewart. Mr Stewart asserts that by reason of this concealment, and in ignorance of the warning which Mr Hunt's advice conveyed, he was led to advance his money on a worthless security.

There is no doubt or dispute as to the duty which under the circumstances was cast upon Mr Brodie. The only question is, whether that duty was freely discharged? To determine that question your Lordships are called upon to review occurrences which took place so far back as 1877. The materials for such a review consist partly of the oral examination of Mr Stewart, Mr Brodie, and some, but not all, of the other persons concerned in the transaction, partly of letters, some of which were written at the time and some at a later date, when Mr Stewart's claim was first put forward, and partly of entries contained in the law-agent's books. The recollection of the witnesses examined was extremely hazy and imperfect. Very few of the letters are material. The later letters are, I think, wholly unimportant. Under these circumstances much, as it seems to me, must depend on the entries in the law-agent's books. They were made at the time, and their general accuracy is vouched for in the usual way. If they are to be relied upon they afford the most trustworthy evidence of what occurred.

It is important to bear in mind that Mr Brodie is not charged with anything approaching intentional dishonesty. The respondent's counsel, who argued the case with equal fairness and ability, disclaimed any imputation on Mr Brodie's integrity. But it was said that his own judgment, which would naturally have led him to make a frank and full disclosure, was somehow overborne by others who were interested in having the matter carried through at all hazards, or at anyrate interested in having it carried through without a due consideration of the risk involved. At the same time it is not suggested that Mr Brodie was in any way deficient in professional skill or in business capacity, or that he was a man of less than ordinary independence of character and firmness of purpose. The conduct which, if the respondent be right, casts on Mr Brodie the heavy liability with which he has been charged is attributed to the fact of his having been employed by the borrowers as well as by the lenders, and is said to be the natural consequence of his having acted in that double capacity.

Professional men who undertake to act for persons having different and possibly conflicting interests do undoubtedly place themselves in a position of great difficulty. Sometimes throughout the transaction they regard one of their clients as having a paramount right to their services, and they treat the interests of the other as of secondary importance. That is not the case here. Sometimes a sudden conflict of interests arises, and on the spur of the moment even a prudent and capable person is embarrassed and perplexed, and is driven to take a wrong course. That, again, is not the case your Lordships have to consider. The case presented to your Lordships is singular in one respect; if Mr Brodie erred, as it is alleged he did, he certainly showed on two distinct occasions immediately before the error was committed that he fully understood and appreciated his duty to the client whose interest he is said to have sacrificed apparently from no adequate motive. That no doubt is a conceivable case, but I imagine it is one of rare and exceptional occurrence.

Of the five lenders Mr Stewart is the only one who complains. He advanced £5000. The others, who provided £5000 among them, were in a somewhat different position. Apart from the loan Mr Stewart had no interest in the success of the patent. Mr Forsyth and Mr Miller as a firm advanced £2000, but they were manufacturers who had been employed in making the patented article, and they hoped by means of the advance to have their business extended. Mr James Miller, who found £1000, was a brother of Mr Miller. Mr Caird, who found £2000, was his father-in-law. It is said that these four were a family party to whom it was a matter of little or no importance to ascertain whether the proposed security was good or bad. I think this argument was pushed too far. Mr James Miller and Mr Caird certainly seem to have given themselves very little trouble about the matter. Probably they trusted to Mr Miller, but I can see no reason for assuming that Mr Miller and Mr Forsyth were indifferent to the question whether the security was a good one or not, however anxious they might be to increase their business. Mr Miller suggests that owing to his brother and father-in-law being brought in he wanted to keep clear of the matter. But this reason, whatever its force may be, does not apply to Mr Forsyth.

With these preliminary remarks, I propose very briefly to review the history of the transaction in question. The important chapter in that history opens with the letter to Mr Hunt of the 11th of August 1877. Admittedly it was a perfectly honest letter. In it Mr Brodie treats himself as acting solely for the lenders, and states that for their information and protection he wishes to ascertain two things—(1) Whether there were any prior deeds affecting the patents proposed to be assigned as security; and (2) whether there were any prior patents affecting their validity. At that time the proposal was to include in the security three patents, one of 1864, and two of 1872. The 1864 patent and the second patent of 1872, which related to chain cables, were comparatively unimportant. Nothing could be more proper than this letter. It is not, perhaps, immaterial *to observe* in connection with the respondent's view of Mr Miller's position that it should appear from his evidence that the letter was written after consultation or communication with him.

Mr Hunt communicated with his agents in London. On the 14th of August, having heard from them, he had an interview with Mr Brodie. It happened that the patent of 1864, which had nearly run out, had been charged or dealt with by several instruments, a note of which was given to Mr Brodie. As regards the other matter in reference to which Mr Hunt was consulted, he told Mr Brodie that in his opinion further search was necessary. He had been furnished by his London agents with a printed abridgment of specifications relating to anchors. He had glanced through it hurriedly, and that was the result at which he had arrived. It is I think very important to keep in view what Mr Hunt's opinion and advice came to. As to the validity of the patent he had formed no opinion one way or the other. In answer to the Court he says,—"I would not say that that glance through the abridgment excited a doubt in my mind, but it excited in my mind a feeling that further search was necessary." At that interview, or perhaps shortly afterwards, Mr Brodie obtained the abridgment from Mr Hunt, but it does not appear that he saw him again.

On the same day, and after the meeting with Mr Hunt, the assignation of the letters-patent was drawn. On the next day—the 15th of August—there is an entry of a long meeting with Mr Martin and Mr Buckland, who was Martin's manager or agent, "in regard to patents, making inquiries, and receiving explanations in regard to same matters." But I think it is to be inferred that this interview related mainly, if not entirely, to the 1864 patent and the charges upon it.

On the same day there is the entry—"Writing Mr Stewart, explaining and arranging meeting." The letter to Mr Stewart referred to in that entry is in evidence. It makes an appointment for a meeting on Friday the 17th, and explains the occasion of the meeting. Mr Martin had come from London, and it was thought desirable that all the parties should meet him at Mr Brodie's office. It was said by the counsel for the respondent in the first argument that that letter, taken in connection with the entry, throws some doubt on the accuracy of the law-agent's books—apparently for no reason except that, with the knowledge which we now possess, and having regard to the importance which subsequent events have given to Mr Brodie's interview with Mr Hunt, it might possibly have been inferred from the entry, standing alone, that the explanation referred to had something to do with Mr Hunt's suggestion or advice. I think there was no ground for this attack on the accuracy of the

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books. The letter does explain why the meeting was summoned, and havin regard to what appears in the letter, I think the entry perfectly accurate.

The proposed meeting took place on the 17th. All the persons concerne were present except Mr James Miller, who was represented by a Mr Drummond There was a preliminary meeting with Mr Stewart, Mr Caird, and Mr Miller Mr Brodie pointed out the risks necessarily incident to such a transaction. Bu I think it may be inferred from the letter written on the 20th to Mr Mille that neither during the preliminary discussion nor at the meeting afterward was any reference—or at anyrate any pointed reference—made to Mr Hunt o to the advice which he had given as to a further search being necessary. Mr Hunt's advice could not have been forgotten. But no action had been taken upon it. Nor could any advantage, that I can see, have been gained by discussing it at that stage of the proceedings. Mr Martin had come from London, and the important thing was, to agree upon the security and settle the terms between the borrowers and the lenders. The meeting was a long one, and it was finally arranged to meet again on Friday the 24th for settlement. That was allowing a week for completion of the drafts, and for clearing up the point suggested by Mr Hunt.

On Monday the 20th the minute of agreement between Mr Martin and the lenders relative to the assignation of letters-patent and the terms on which the loan was made was drawn in Mr Brodie's office. And then it would appear that all other questions having been disposed of, Mr Brodie took up the matter which had been suggested at the interview with Mr Hunt, and he wrote to Mr Miller the letter of the 20th of August. This letter was severely commented upon by the learned Judges of the First Division. As I have said, I think it may be inferred from it that Mr Hunt's advice was not discussed or mentioned at the meeting of the 17th. Considering that Mr Brodie's honesty is not questioned, I do not think that any adverse inference can be drawn from the circumstance that Mr Miller was directed to postpone the meeting without giving any reason for the postponement. Nothing, I think, would have been gained by communicating at that stage to the different lenders the reason for the postponement. The exception of Mr Stewart is, I think, satisfactorily accounted for by the reason given by Mr Brodie that he lived just opposite, and that it would be no trouble to him to come over, when he would receive a personal explanation.

It turned out that on the 20th, and before he received Mr Brodie's letter, Mr Miller went to Peterhead. He did not return till Monday the 3d of September. Mr Brodie therefore had no opportunity of communicating orally with him in the meantime.

One thing certainly appears clearly from the letter of the 20th, and that is, that at that time Mr Brodie was impressed with the idea that it would be necessary to obtain a distinct report by Mr Hunt as to the validity of the patent, and that his view on that point was then at least as strong as it could have been immediately after the interview with Mr Hunt.

Of course it was necessary, as Mr Brodie said, to obtain the authority of Mr Martin before consulting Mr Hunt, as the expense would fall upon him.

During the next fortnight several meetings took place between Mr Brodie and Mr Buckland on the subject of the difficulty which had occurred. Mr Martin seems to have objected on the score of expense. At one time it was proposed that counsel's opinion should be obtained in lieu of Mr Hunt's report. That proposal was not carried out, and ultimately Mr Martin, through Mr

Buckland, furnished Mr Brodie with a letter or report written by Messrs Tongue & Birkbeck, his own patent-agents. It was proposed that the lenders should accept this letter in lieu of what Mr Brodie required. Mr Brodie was *not informed* of the circumstances under which Messrs Tongue & Birkbeck's *letter had* been procured. He satisfied himself by inquiry through his own agents that Messrs Tongue & Birkbeck bore a respectable character, and having learned that Mr Tongue had been for twenty years mechanical draughtsman in the office of one of the first—if not the first—patent-agents in London, he was favourably impressed with Tongue & Birkbeck's letter, and he consented to call a meeting for the purpose of submitting it to the persons concerned, and concluding the matter if they thought fit to accept it.

We know now that Tongue & Birkbeck's letter was absolutely worthless, and it is impossible to speak too strongly of the conduct of the writer. But on the assumption that the writer was an honest and respectable person possessed of information, without which no honest person could have written the letter, Mr Brodie was not, in my opinion, to blame for thinking that the document was one which the lenders might at anyrate consider with a view of accepting it in lieu of the formal report which Mr Hunt had recommended, and which Mr Brodie himself had at one time thought necessary.

Under the circumstances an appointment was made for completion for the 3d September. The real question is, what took place at that meeting?

In the interval Mr Forsyth had certainly been informed of the difficulty which had occurred, and probably Mr Stewart, when he came to attend the meeting which was postponed, was told something about it. He did not see Mr Brodie; he saw Mr Morrison. Mr Morrison's recollection is not very clear, and though Mr Hunt's name was probably mentioned to Mr Stewart, I do not think that any reliance can be placed on what passed on that occasion.

I now come to the important meeting of the 3d of September. On the morning of that day Mr Miller came up from Peterhead to attend the meeting, and he saw Mr Brodie before the meeting took place. I do not think there can be any doubt that Brodie then told Mr Miller in substance everything that had occurred. But apparently, if Mr Miller's recollection is to be relied upon, Mr Brodie did not get much help from him. Mr Miller suggests that he felt some delicacy in taking any part in determining what to do as his brother and father-in-law were putting their money into the adventure, and he preferred therefore that Mr Brodie should act on his own responsibility.

The meeting then took place. Now, it is to be observed that whatever Mr Brodie said was said in the presence of Mr Miller and Mr Forsyth. Both of them must have been acquainted with all the circumstances of the case. One of them, if he correctly represents his state of mind at the time, must have been desirous, for the sake of his brother and father-in-law, that the matter should be fairly put before the meeting. He would, I should think, have been struck by any material omission on Mr Brodie's part, especially when he found that Mr Brodie was throwing on the meeting that responsibility which he wished Mr Brodie to take on himself.

The entry of the meeting in the law-agents' book is thus,—"Long meeting with parties interested, going over draft agreement and draft assignment, and previously reporting fully as to what had taken place in regard to inquiries as to the patents, and when it was resolved to accept report of patent-agents in London as furnished—nearly three hours."

Now, it seems to me that if this entry is to be relied upon Mr Brodie must have told the whole story. He could not have avoided placing before that meeting his interview with Mr Hunt, Mr Hunt's advice, and the opinion which at one time at anyrate he himself strongly held. Without these details his report to the meeting would be imperfect and misleading, and as Mr Brodie admittedly was honest and not incompetent, I come to the conclusion that the whole matter was fairly put before the meeting.

The oral evidence is very imperfect, but Mr J. R. Miller does say,—"The alternative was put before us either of further investigation or to take Tongue & Birkbeck's letter as sufficient, and we decided to accept Tongue & Birkbeck's letter. I think it must have been Mr Brodie who proposed a further investigation; I think we did absolve him from having any further investigation, and accepted Tongue & Birkbeck's letter."

Mr Stewart says that to the best of his belief Mr Hunt's name was not mentioned at that meeting, but in substance his evidence only comes to this,—"Nothing was said at that meeting calculated in any degree to excite alarm; if Mr Hunt's advice had been mentioned it would have excited my alarm, and therefore I feel certain that it was not mentioned." Otherwise, though he seems to accept the information disclosed by the documents recovered in the suit, *his* recollection of the meeting is a perfect blank.

Now, I do not see why at that time a faithful and exact account of the interview between Mr Brodie and Mr Hunt should have excited any alarm. Mr Hunt had not formed an opinion adverse to the patent. It would not have been accurate to say he had. He had not even formed a doubt in his mind; all he said was that in his opinion a further search was necessary. Mr Stewart at that time knew nothing of Mr Hunt. As he says himself,—"Mr Hunt at that time was quite unknown to me, and Mr Hunt's name might have been mentioned without exciting any attention"; and again,—"I do not remember whether I was aware before the transaction was closed that Mr Hunt had been consulted. I am not prepared to say definitely that his name was not mentioned to me. It may have been mentioned and made no impression."

Mr Brodie says that he has no doubt he told the meeting that Tongue & Birkbeck's report was got in lieu of a report of Mr Hunt which he had previously considered necessary; he could not indeed charge his memory with having told them so. The entry led him to think he did it.

My Lords, in this state of the evidence it appears to me that if you were to assume that Mr Brodie abstained from communicating to the meeting the report of his interview with Mr Hunt, Mr Hunt's opinion and the opinion which he himself had formed at an earlier stage of the proceedings, you would not only be coming to a conclusion for which there is no evidence, but you would be assuming a state of things which is contradicted by the entry in the law-agents' books, and which is incompatible with the honesty with which admittedly Mr Brodie is to be credited.

In the result, therefore, I am unable to concur in the interlocutor under appeal.

The case, I admit, is one of difficulty, and it is impossible to dissent from the unanimous decision of the Judges of the First Division without some misgiving. I have therefore considered the case with great anxiety, and I have endeavoured to note the different steps in their reasoning, which I am unable to follow. I find attributed to Mr Brodie a desire for concealment, for which I can discover no reason, and of which I fail to see any evidence. I find that to Mr Hunt's

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opinion there is ascribed a much more serious and alarming character than I think it deserves. I find it suggested that Mr Brodie was bound to communicate in writing the information which he is said to have withheld, and it seems to be supposed that verbal explanations would have been insufficient. That point counsel for the respondent declined to argue. Above all, I find that the entries in the law-agents' books are treated as of little or no account, when in my opinion they afford important and trustworthy evidence. And on the whole, after much consideration, I am unable to decide in favour of the pursuer without doing that which Mr Rigby very properly refused to do, but which I think the Judges of the First Division have in substance done, attributing to Mr Brodie something akin to dishonesty.

Interlocutor appealed from reversed; interlocutor of the Lord Ordinary restored, the respondent to pay to the appellants the costs both here and in the Court below.

Grahames, Currey, & Spens—J. W. & J. Mackenzie, W.S.—Clayton, Sons, & Fargus—Bruce & Kerr, W.S.

No. 2.
Nov. 15, 1887.
Duchess of Montrose v. Stuart.

The Dowager Duchess of Montrose, Third Party (Appellant).—
Sir Horace Davey, Q.C.—J. B. Balfour, Q.C.—Rigby, Q.C.
W. S. Stirling Crawfurd's Trustees, First Parties (Appellants).
William Crawfurd Stirling Stuart, Second Party (Respondent).—
Sol.-Gen. Robertson—E. W. Byrne—C. K. Mackenzie.

Heir and Executor—Warrandice—By whom obligation of warrandice prestable—Catholic security.—An obligation to free lands of debt arising under the warrandice clause of a disposition falls to be satisfied by the executor of the granter of the disposition in a question between him and the heir.

In a trust-disposition and settlement, executed in 1853, the granter conveyed his whole estate, heritable and moveable, to trustees, for the purpose, *inter alia*, failing heirs of his body, of conveying his estate of M, and his other lands in the county of L, to his brother, and the heirs of his body, under the fetters of an entail. By the same deed he directed his trustees, failing his own issue, to make over the whole residue of his estate to the person who should succeed to M. By a codicil, dated in 1876, he disponed to his wife, in the event of her surviving him, the lands of B and A (which were among the lands originally directed to be entailed), and bequeathed to her the whole residue of his estate. The disposition of B and A contained a clause of warrandice in ordinary form under the Titles to Land Consolidation Act, 1868 (31 and 32 Vict. cap. 101), which imports absolute warrandice. In 1882 the truster granted a bond and disposition in security for £250,000 over the estates of M, B, and A.

On the truster's death, his widow maintained that the obligation of warrandice in the disposition of B and A shewed the truster's intention that she should be relieved of the heritable debt, which she would not be if she had to pay it out of the residue. *Held* (*aff.* judgment of Second Division) that the obligation of warrandice was a personal obligation which fell to be satisfied out of the moveable estate before the residue could be ascertained, and that she was not entitled to be relieved by the truster's heir.

Ld. Chancellor (Halsbury).
Lord Watson.
Lord Macnaghten.

(In the Court of Session 26th November 1886, 14 R. 131.)

The Dowager Duchess of Montrose and Mr Stirling Crawfurd's trustees appealed.

Mr William Crawfurd Stirling Stuart, only son of Captain James Stirling Stirling Stuart, became respondent on the death of his father.

Lord Chancellor.—My Lords, in this case the question for your Lordships' decision appears to me to be clear beyond all doubt. Mr Stirling Crawfurd

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Nov. 15, 1887.
Duchess of Montrose v. Stuart.

appears to have left three estates, which were charged with a sum of £250,000. With respect to two of them he left them to his widow, the present appellant, with a clause of warrandice that they should be free from all obligations, of course including the proportionate part of this £250,000 to which by law they would be liable.

It is not denied that if nothing more appeared each of these three estates, the one (Milton) which went to the testator's brother and heir-at-law, and which was left to him by a sufficient disposition and not as heir-at-law, and the two which went to his widow, would be rateably chargeable with the payment of this £250,000. It is further apparently admitted that, if the residuary estate had gone to a different person than the widow no such question as has been submitted at your Lordships' bar could have arisen. The fulfilment of that clause of warrandice would have been a personal charge and would have been a primary charge upon the executor, to be met out of personal estate. The only point which appears to be suggested is this, that inasmuch as the person who occupies the position of disponee of these two smaller estates is also executrix and residuary legatee, one must construe the testamentary disposition as a whole, and look at all that it was intended to operate, and that, although there is no express disposition to that effect, we must read into these testamentary dispositions such operative words as will free these smaller estates from the obligation which would otherwise rest upon them. That contention appears to be grounded upon a misuse, I think, of the words "residuary estate." I could imagine a case being presented to your Lordships in which, if the facts could be established to raise such an argument, it might be plausibly contended that it would be impossible to suppose that the testator meant to render null and of no effect a disposition which he had made; and if it could be established that to the knowledge of the testator these two estates would be entirely swallowed up by the obligations which were charged upon them, and that the effect of the disposition when looked at as a whole would be to give his widow absolutely nothing, it would be a plausible argument to contend that we must suppose that he had some object in making the disposition to his widow, and that he could not have intended merely to make a disposition on paper, the result of which, taken as a whole, would be to give her absolutely nothing.

My Lords, no such case arises here before your Lordships. The legal operation and effect of the language used and its technical import are not denied. And when one speaks of the residuary estate it is a fallacy to speak of the residuary estate as if it were an ascertained something. The residuary estate, although it is a compendious and convenient form of expression, means that which remains after the obligations which primarily rest upon the personalty have been discharged; and it seems to me that there is no inconsistency in reading the two propositions together:—"I leave one of these two estates to my widow, and after she has discharged all the legal obligations, including this and all other legal obligations to which the personalty is liable, I also make her the person who shall benefit by my bounty in receiving all that remains after the discharge of this obligation." My Lords, that seems to me to be the rational mode of dealing with these dispositions, reading these testamentary instruments together. Under those circumstances it appears to me that the supposed inconsistency is entirely disposed of.

My Lords, I therefore agree entirely with the judgment pronounced by the Court of Session, which I think, following the language of the question put to them by the parties, is sufficiently accurate to shew what they intended to convey; and under these circumstances I move that the appeal before your Lordships be dismissed, and the interlocutor affirmed, with costs.

Lord Watson.—My Lords, I agree with the Lord Chancellor in thinking that this is a very simple case. I have heard nothing in the course of the ingenious arguments of the learned counsel to suggest any doubt as to the propriety of the judgment of the Court of Session.

The various writings which have been brought under the notice of your Lordships must, I think, be read as one deed constituting the settlement of Mr Stirling Crawfurd. In noticing the terms of his settlement it is sufficient to refer to those provisions which directly bear upon the question argued before us with regard to the warrandice of the conveyance to the lands of Balornock and others. He constitutes the appellant his executrix and universal trustee of his estate, which imposes upon her the character of his personal representative liable to the payment of his moveable debts. Then he gives her a legacy payable by herself in that character of £20,000. Then he conveys to her two estates with warrandice, and imposes upon her as his personal representative, in language technical and of well-known application in the law of Scotland, an obligation to make good that warrandice; and after all these provisions are made he bequeaths to her the whole residue of his estate. What is the residue of his estate? It is simply so much of his personal means as may remain after the whole antecedent purposes of the deed have been effected—after debts and legacies have been paid, and the obligation of warrandice discharged.

But it is urged that as the result of these provisions, we must in point of fact infer that the testator did not mean to charge his personal representative with the burden of the warrandice, and that he meant to impose the obligation upon the fee of the entailed estate. If that was his meaning, it is a singular thing that he should have used words which are ineffectual to create a real burden, and are constantly used by Scotch conveyancers to import an obligation affecting personal representatives.

Lord Macnaghten concurred.

Interlocutor appealed from affirmed, and appeal dismissed, with costs.

Grahames, Currey, & Spens—John Clerk Brodie & Sons, W.S.—Baileys, Shaw, & Gillett—Graham, Johnston, & Fleming, W.S.

No. 3.

Feb. 24, 1888.
Cooper v. Cooper.

Mrs M. J. Butler or Cooper, Pursuer (Appellant).—*Rigby, Q.C.*—*Salvesen*—*W. F. Hamilton.*

W. S. Cooper and Others (H. R. Cooper's Trustees), Defenders (Respondents).—*Sol.-Gen. Robertson*—*E. W. Byrne.*

Foreign—Domicile—Capacity to contract—Minor.—When a contract is executed in a country by a person domiciled there, who by the law of the country has not the capacity to contract, the contract will not be valid in any country.

Appeal—Competency—Question of Irish law not argued in or dealt with by Court of Session—Minor—Domicile.—In an action brought in the Court of Session by the widow of a Scotsman against her husband's testamentary trustees for reduction of an antenuptial contract of marriage signed by her in Ireland in 1846, by which she renounced for a small annuity terce and *jus relictæ*, the pursuer averred that when she signed the contract she was under nineteen years of age, and that according to the law of Ireland she was

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an infant; that it was the purpose and intention of the spouses when they married that they should reside in Scotland; that she was ignorant of the rights of a Scottish widow, and had discharged terce and *jus relictæ* for a very inadequate consideration. In answer to an averment by the defenders that according to the law of Ireland the contract was not reducible on the grounds stated by the pursuer, the pursuer stated—"(Assuming, but not admitting, that the law of Ireland is applicable), it is denied that the law of Ireland is as stated; and it is explained that according to that law the pursuer, being an infant in 1846, was incapable of contracting to the effect of discharging or renouncing terce or *jus relictæ*"; and that further, by the law of Ireland the contract was reducible on other grounds. The pursuer pleaded—1, The contract of 1846 should be reduced, in respect (1) that the pursuer was at its date in minority; (2) lesion—inasmuch as the provision thereby made to her was grossly inadequate; (3) that she was in ignorance of her husband's pecuniary circumstances and of her legal rights, and had no legal guardian.

After a proof, in which no evidence was led as to the law of Ireland, the Court found that the pursuer had failed to instruct lesion, and assoilzied the defenders.

In an appeal to the House of Lords the pursuer contended that the marriage-contract should be reduced, on the ground that, by the law of Ireland, the pursuer being a minor had not the capacity to enter into a contract.

The defenders objected to the competency of raising this plea, on the ground that no evidence had been laid before the Scottish Court as to the law of Ireland, and that the proof was closed, and that it was not open to the House of Lords to consider the question.

Held (1) that the plea of minority apart from lesion was sufficiently raised upon the record, and that although the question as to the law of Ireland was a question of fact for the Court of Session, the House could dispose of it as a question of law; and (2) that by the law of Ireland the pursuer, as a minor, had not the capacity to enter into the contract, which was therefore invalid.

Opinion, per Lord Watson, that a deed in the form of an antenuptial marriage-contract might receive effect as such if signed immediately after the marriage ceremony.

Per Lord Macnaghten,—"I should venture to doubt whether a contract executed after the status of the contracting party had been definitely altered by marriage could be regarded as an antenuptial contract."

Ld. Chancellor
(Halsbury).
Lord Watson.
Lord Macnaghten.

(In the Court of Session, 9th January 1885, 12 R. 473.)

On 15th October 1846, Henry Ritchie Cooper of Ballindalloch, Stirlingshire, married in Dublin Miss Mary Jane Butler, a lady domiciled in Ireland. On the day of the marriage an antenuptial contract of marriage in the Scotch form was signed by the spouses. Mrs Cooper was at the time under nineteen years of age, and had no legal guardian.

By the marriage-contract Mr Cooper provided an annuity of £80 for his widow, and his spouse accepted this provision as in full of all legal rights.

In 1863, by a bond of provision (a unilateral deed), Mr Cooper increased the annuity to £200, but declared that this was in full of all legal claims competent to his widow.

Mr Cooper died on 14th June 1882. In June 1883 Mrs Cooper raised this action against Mr Cooper's testamentary trustees and the children of the marriage, concluding for reduction of the marriage-contract and of the bond of provision, in so far as affecting the pursuer, and for declarator that she was entitled to terce and *jus relictæ*.

The pursuer averred;—(Cond. 1) "The said deceased Henry Ritchie Cooper and the pursuer Mrs Mary Jane Butler were married in Dublin on 15th October 1846. The pursuer was at that time under nineteen years of age, having been born on 11th November 1827. . . . . The pursuer was the only daughter and only child of Mr Gerald Butler, merchant in Dublin, . . . and she resided in Peter Street, Dublin, with her mother. The pursuer, at the date of her marriage, was according to the law of Ireland an infant, and she had no legal guardian. It was the purpose and intention of the said spouses when they married that they should thereafter reside in Scotland, which they accordingly did . . . ." (Cond. 6) ". . . The said contract was subscribed after the marriage, and in so far as it affects the pursuer's legal rights as widow of Mr Cooper she revokes the same as a donation *inter virum et uxorem.* Before subscribing the said contract its terms had not been made known to or considered by the pursuer. Its provisions in her favour were grossly inadequate. The pursuer was at the time a *minor pubes,* she subscribed the document at the request of Mr Cooper, in total ignorance of what her common law rights as the wife or widow of a Scotchman were or would be, and in ignorance also of Mr Cooper's pecuniary position at the time, and his pecuniary prospects for the future. . . . Mr Cooper's pecuniary position at the date of his marriage was very good, with the prospect of improving considerably, as in point of fact it subsequently did." In cond. 22 the pursuer, after stating that she repudiated the provisions made for her by her husband and claimed terce and *jus relictæ,* further averred,—" With reference to the addition to their answer made by the defenders by way of amendment (and assuming, but not admitting, that the law of Ireland is applicable), it is denied that the law of Ireland is as stated, and it is explained that according to that law the pursuer, being an infant in 1846, was incapable of contracting to the effect of discharging or renouncing the claims that would according to the law of Scotland be competent to her if she survived her husband for *jus relictæ,* terce, and aliment; and farther, that by the law of Ireland her acceptance of the £80 a-year in lieu of these claims is reducible in respect that that annuity was neither certain nor competent, meaning thereby that it was precarious, unsecured, and inadequate, and, *separatim,* in respect that she was in ignorance of Mr Cooper's pecuniary circumstances and of her legal rights, and had no legal guardian." (Ans. 22) "Denied that the pursuer was entitled to make any of the said claims put forward by her. Explained that the pursuer was at the date of the marriage a domiciled Irishwoman. So far as regards her capacity to enter into an antenuptial contract with her intended husband, in reference to the provision to be made by him for her in the event of his death, the pursuer was subject to the law of Ireland. By the said law the pursuer was capable of entering into the contract now under reduction, and by the said law the contract so entered into by her was not reducible on any of the grounds alleged by the pursuer."

The pursuer stated, *inter alia,* the following pleas ;—(1) The contract of 1846 should be reduced and set aside in respect (*a*) that the pursuer was at its date in minority; (*b*) lesion—inasmuch as the provision thereby made to her was grossly inadequate, precarious, and unsecured; (*c*) that she was in ignorance of Mr Cooper's pecuniary circumstances and of her legal rights, and had no legal guardians; (2) *Separatim,* The said contract having been executed after the marriage, is not binding on the pursuer, who revokes the same in so far as it surrenders any of her legal rights as being a donation *inter virum et uxorem ;* (4) the bond of provision by Mr Cooper being a unilateral deed, the pursuer is not bound by anything it contains; and in any view, as she repudiates and revokes it, she is entitled to have it reduced and set aside, in so far as it bears that the provision it purports to make for her is in full of her terce and *jus relictæ.*

There was no express reference to the law of Ireland in any of the pleas.

The defenders pleaded, *inter alia ;*—(3) The pursuer having been a domiciled Irishwoman at the date of her marriage, and the deeds libelled not being reducible by the pursuer by the law of Ireland on any of the

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grounds stated by the pursuer, the defenders are entitled to absolvitor from the reductive conclusions of the summons.

On 31st May 1884 the Lord Ordinary (Fraser) repelled this plea. His Lordship in his note stated as the ground of judgment that the fact that the contract could not be reduced according to the law of Ireland did not prevent its being reducible in Scotland, the place where the parties had contracted that it should receive effect.

A proof was then led before the Lord Ordinary as to minority and lesion, but no evidence was adduced as to the law of Ireland.

On 31st July 1884 the Lord Ordinary pronounced an interlocutor, in which he found:—"That in the circumstances of this case there has not been lesion so as to entitle the pursuer to reduction of the contract; therefore assoilzies the defenders from the conclusions for reduction of the said contract of marriage."

On 9th January 1885 the Second Division adhered to the Lord Ordinary's interlocutor.

The pursuer appealed against these interlocutors, and also against the Lord Ordinary's interlocutor of 31st May 1884 (not reclaimed against), and against a finding of expenses by the Lord Ordinary on 31st January 1885.

The appellant, Mrs Cooper, maintained (1) That by the law of Ireland a minor had not the capacity to enter into any contract. The marriage-contract was therefore *ab initio* invalid. (2) That the contract had been signed after the marriage, and was therefore revocable as a donation *inter virum et uxorem.* (3) That lesion had been proved, and that the contract was reducible by the law of Scotland.[1]

The respondent objected to the competency of the appellant raising the plea that the contract was reducible by Irish law on the ground of minority. Her case in the Court of Session had been rested entirely on the law of Scotland, and she had closed the proof without leading evidence as to the law of Ireland.[2]

She had not asked the judgment of the Court below upon the point, and was now precluded from raising it.

Lord Chancellor.—My Lords, in this case the appellant, the widow of a domiciled Scotsman, seeks to set aside an antenuptial contract executed by her on the day of her marriage.

A question has been raised whether the contract was not in fact executed after the celebration of the marriage; but, without minutely considering the evidence, I am satisfied with the conclusion of the Lord Ordinary that the contract was executed before the marriage, a conclusion which indeed is but feebly contested on the other side.

A Scottish widow is entitled to her *jus relictæ* and to her terce, unless they have been discharged; and the appellant seeks to remove the bar to these rights by setting aside the contract in question which, if unimpeached, discharges these rights.

My Lords, I think there has been some slight confusion between the question what *forum* can decide the controversy between the parties and what law that *forum* should administer in deciding it. Now, it is admitted that the appellant was a domiciled Irishwoman at the time she executed the instrument in question. It is admitted she was a minor; and apart altogether from the remedy peculiar to Scottish jurisprudence of setting aside a contract which operates to the enorm lesion of a minor, a question to be determined in a great measure by the position of the parties and the provisions of the contract itself, the first question arises here whether a domiciled Irishwoman could bind herself at all, while a minor, by a contract executed in Ireland.

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[1] On the competency of raising the question on the law of Ireland—Gemmill v. M'Alister, Feb. 23, 1863, 1 Macph. (H. L.) 1, 4 Macq. 458; Alexander v. Officers of State, March 30, 1868, 6 Macph. (H. L.) 54, 1 Macq. 458, L. R. 1 (H. L.) Sc. 276; Macpherson v. Macpherson, June 11, 1852, 1 Macq. 248, 24 Scot. Jur. 508; Luke v. Magistrates of Edinburgh, Aug. 15, 1832, 6 W. and S. 241; Longworth v. Yelverton, July 28, 1864, 4 Macq. 745, 2 Macph. (H. L.) 49, 36 Scot. Jur. 716.

[2] 48 Geo. III. c. 151, sec. 15; Pursell v. Elder, March 24, 1865, 3 Macph. (H. L.) 59, 37 Scot. Jur. 39.

There can be no doubt as to what would be the rule of English law in this respect. The series of cases which was brought to your Lordships' attention upon the subject of provisions whereby the common law right of dower was extinguished seem to me beside any question in this case. The statute created the power of extinguishing the right to dower, and Courts of Equity have from time to time considered and acted upon their view how far the provision for the wife has complied with the conditions of the statute; but such cases have no relation to the question of a minor's capacity by his or her act to part with rights with which the law would otherwise invest them. None of these cases relate to the question of incapacity to contract by reason of minority, and the capacity to contract is regulated by the law of domicile. Story has with his usual precision laid down the rule (Conflict of Laws, sec. 64) that if a person is under an incapacity to do any act by the law of his domicile, the act when done there will be governed by the same law wherever its validity may come into contestation with any other country: "quando lex in personam dirigitur respiciendum est ad leges illius civitatis quæ personam habet subjectam."

There is an unusual concurrence in this view amongst the writers on international law; "qua ætate minor contrahere possit et ejusmodi respicere oportet ad legem, cujusque domicilii": Burgundus, Tract 2, n. 6. "C'est ainsi que la majorité et la minorité du domicile ont lieu partout même pour les biens situés ailleurs": 1 Boullenois, Princip. Gen. 6. "Quotiescunque de habilitate aut de inhabilitate personarum quæratur, toties domicilii leges et statuta spectanda": D'Argentré. So also J. Voet, ad Pand. 4, 1, 29: "Quoties in quæstione, an quis minor vel majorennis sit, obtinuit, id dijudicandum esse ex lege domicilii; sicut in loco domicilii minorennis, ubique terrarum pro tali habendus sit, et contra."

It is said that the familiar exception of the place where the contract is to be performed prevents the application of the general rule, and that as both parties contemplated a Scottish married life, and as a consequence a Scottish domicile, the principle I have spoken of does not regulate the contract relations of these two persons. I think two answers may be given to this contention. In the first place, I think it is a misapplication of the principle upon which the exception is founded. Here there is no contractual obligation to make Scotland the domicile, nor is there any part of the contract which could not and ought not to receive complete fulfilment even if (contrary to what I admit was the contemplation of both the parties) they had remained in Ireland after their marriage or had emigrated to some other country.

But another and a more overwhelming answer is to be found in this, that the argument assumes a binding contract, and if one of the parties was under incapacity the whole foundation of the argument fails.

Two other considerations remain to be noticed. The first, and what I confess has caused me most difficulty, is whether the question is open for your Lordships

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on this record, or whether the parties have not concluded themselves by their pleadings to the sole question whether, assuming the Scottish law to apply, there has been enough to set aside the contract on the ground of the lesion of the minor. Undoubtedly that does seem to have been the leading contention, and it is the ground upon which the Judges have in the Court below determined the case.

Upon considering the first plea in law carefully in its several parts, I think it is intended to raise the question of whether minority alone apart from lesion does not invalidate the contract, and therefore I agree that the question is open upon this record; and I also agree that the Lord Ordinary's interlocutor and the annexed note shew that in his Lordship's opinion the contract made in Dublin and by a minor domiciled there would not deprive her of the right to sue for reduction if there were grounds for it, though it should be held that the minor was capable of entering into such a contract. It therefore becomes unnecessary to consider how far this appeal opens up every interlocutor for review as it would have been if one had stood in the way of your Lordships giving judgment upon the appeal actually before the House.

The only remaining question is one which I certainly do not think one of difficult solution, though the statement of it appears to involve a somewhat anomalous state of things. Your Lordships sitting here require no evidence, indeed can receive no evidence, of English or Scottish law. If in the Scottish Courts evidence had been given of English law and no evidence adduced to contradict it, it would nevertheless be incumbent on your Lordships to decide according to your own views as to what the law of England is, even if it should be in absolute contradiction to all the evidence that had been received by the Scottish Courts; and it is manifest therefore that if all the facts are before your Lordships for decision, and the point is open (and I have endeavoured to shew that it is open), then, it is not only competent, but incumbent upon this House, to decide upon the true view of what legal rights these facts establish, although what was a question of fact in the Court of Session was not there mooted but is for the first time argued here before your Lordships.

This may affect the costs, and I think ought to affect the costs to the extent that the successful appellant ought not to get the costs of an appeal which was brought and successfully argued upon a point not pressed upon the Court below either by argument or evidence; but it cannot, in my judgment, affect the right of the parties in the judgment which your Lordships ought to pronounce.

I designedly abstain from expressing my opinion upon the divergent views of the learned Judges in the Courts below. All the judgments assume as their foundation the validity, subject to reduction upon the ground of enorm lesion, of the contract in question; but in the view I have expressed as to that matter any opinion I might give upon the very difficult question as to what constitutes enorm lesion so as to justify the reduction of a minor's contract would be unnecessary and therefore improper in deciding this case.

I therefore move your Lordships that the interlocutor appealed from be reversed, but that the appellant should have no costs either here or below.

Lord Watson.—My Lords, the appellant, Mrs Cooper, was married in Dublin on the 15th of October 1846, to the late Henry Ritchie Cooper of Ballindalloch, who died on the 14th of June 1882. At the time of the marriage the appellant, who was about eighteen years of age, and without legal guardians, was domiciled in Ireland. The domicile of the husband was in Scotland, and both the parties contemplated, in accordance with what proved to be the fact, that their married life would be spent in that country.

Upon the same day on which the marriage ceremony was performed the parties entered into a written contract, which bears to have been executed *intuitu matrimonii*. The only provision thereby made in the wife's favour is a personal obligation, prestable by the heir and executor of the husband, to make payment to the appellant, in the event of her surviving him, of an annuity of £80; and, in consideration of that provision the appellant discharges her legal rights of terce and *jus relictæ*, and all other claims competent to her upon his predecease, excepting such provisions as he might give her of his own free will. By his trust-disposition and settlement Mr Cooper directed his trustees to pay to the appellant, out of the rents of his lands of Ballindalloch and others an annuity of £200 in lieu of all claims and provisions, whether legal or conventional.

This action was brought by the appellant, after her husband's death, for the purpose of reducing and setting aside the discharge contained in the marriage-contract of the 15th of October 1846, and of enforcing her legal rights.

The facts of the case, so far as I have already stated them, are matter of admission upon the record. The condescendence and pleas in law for the appellant, when fairly construed, disclose three separate grounds of reduction, all of which are disputed by the respondents. Taking the appellant's averments, not in the order in which they occur, but according to their logical sequence, it is alleged—first, that the contract sought to be reduced was executed by the spouses (or at all events by the appellant) after the marriage; secondly, that the appellant being an infant was, by the law of Ireland, "incapable of contracting to the effect of discharging or renouncing the claims that would according to the law of Scotland be competent to her if she survived her husband"; and thirdly, that assuming the contract to be antenuptial and valid, the discharge of her legal rights was to her enorm lesion.

The first and second of these grounds of action go to the very root of the case. If the marriage-contract was, notwithstanding its tenor, postnuptial, then the discharge is revocable by the appellant as a *donatio inter virum et uxorem*. If the capacity of the appellant to contract must be determined by Irish, or (what is the same thing) by English law, and she was according to that law incapable of binding herself, the discharge cannot stand in the way of her legal rights.

In my opinion the appellant has failed to prove that the contract was executed after marriage. The only evidence bearing upon that part of her case is to be found in the testimony of the appellant herself and of Mr Horan, both of whom signed the deed under reduction, the one as a contracting party and the other as a witness. Their recollection of other circumstances occurring at the time is not very distinct; and I do not think that their reminiscences as to the signing of the deed, however honest, can be held after the lapse of eight-and-thirty years sufficient to displace a material fact appearing from the tenor of a probative deed which they attested by their subscriptions. Had it been proved that in point of fact the parties adhibited their signatures immediately after the ceremony was concluded, I should still have been of opinion that the deed was not thereby deprived of its antenuptial character.

The respondents argued that the second ground of reduction is excluded from this appeal, and that your Lordships have not jurisdiction to determine either the applicability of English law or its effect as regards the appellant's capacity to contract. In the course of the argument it was suggested that the appellant's case, so far as it is based on the law of England, was disposed of by an interlocutor of the Lord Ordinary, dated the 31st of May 1884, which simply repels the third plea in law for the respondents. That interlocutor has been appealed from, although it was not submitted to the review of the Inner-House. Taken by itself it does no more than affirm in general terms the relevancy of the appellant's action as laid; but the annexed note shews that the Lord Ordinary merely intended to decide, on the assumption of the Irish contract being valid, that the appellant was nevertheless entitled to sue for the remedy of reduction, on the head of minority and lesion, according to the law of Scotland, her matrimonial domicile. That being so, the interlocutor contains no adjudication either upon the applicability or the effect of the law of Ireland as pleaded upon the record.

It is admitted that the appellant did not ask the judgment either of the Lord Ordinary or of the Inner-House upon the merits of her objection to the contract founded upon English law. But, according to the ruling of the Lord Chancellor (Brougham) in *Luke* v. *Magistrates of Edinburgh*,[1] that circumstance of itself does not necessarily prevent your Lordships from considering the objection now, if it be sufficiently raised on record. The peculiarity of the present case, upon which the respondents strongly relied, consists in this, that in the Courts of Scotland English law is treated as matter of fact, and must be proved as well as averred in order to enable the Judges to give a decision upon it. The appellant adduced no evidence as to the law of England, and was therefore not in a position to press her objection before the Court of Session. On the other hand, this House, as the *commune forum* of the three countries, deals with such an objection as matter not of fact but of law, and gives its decision upon the legal issues raised without regard to evidence led in the Court below.

I am of opinion with your Lordships that the objection may be competently disposed of by the House. If the question had been one of fact we could not, in the absence of proof, have entertained it. I think, however, that as the case stands, the appellant is not in a worse position than she would have occupied if she had brought forward evidence of English law, and had then failed to submit it to the judgment of the Courts below. That course was actually followed by the pursuer and appellant in the case of *Longworth* v. *Yelverton*,[2] who not only pleaded that she was married to the defender according to one or other of three modes permitted by the law of Scotland, but averred and brought legal evidence to prove the constitution of a fourth marriage in Ireland according to the law of that country. The weight of the evidence being against her, she refrained from pleading upon it before the Scottish Courts; and in her appeal against their final judgment, which was unfavourable to her, she pressed the Irish marriage in argument for the first time. The Lord Chancellor (Westbury) observed,[3]—"The respondent also affirms on the record that a religious ceremony took place between the parties in Ireland which amounted to a marriage if there was none before; but she was content in the Court below to have it assumed that this ceremony did not *per se* constitute a valid marriage, and having so submitted, it is not competent to her to maintain a different view of the case before this House as a Court of Appeal." The language of the noble Lord very concisely states the substance of the respondents' argument in this appeal. But the other noble Lords present did not adopt the view of the Lord Chancellor; and Lords Wensleydale, Chelmsford, and Kingsdown entertained the question of the alleged Irish marriage, and gave judgment on its merits against the appellant. I need scarcely add that, so far as concerns the matter of competency, it is immaterial on which side judgment was given.

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[1] 6 W. & S. 241, Aug. 15, 1832.

[2] 4 Macq. 745, June 28, 1864.

[3] 4 Macq. at p. 832.

Whether the capacity of a minor to bind himself by personal contract ought to be determined by the law of his domicile or by the *lex loci contractus* has been a fertile subject of controversy. In the present case it is unnecessary to decide the point, because Ireland was the country of the appellant's domicile, and also the place where the contract was made. It was argued, however, for the respondents, that the appellant's objection to the contract, although it rests upon her alleged incapacity to give consent, must be decided by the law of Scotland, as the *lex loci solutionis.* I am by no means satisfied that Scotland was, in the proper sense of the phrase, the place of performance of the contract. The spouses no doubt intended to reside in Scotland, but they must also have intended that the contract should remain in force and be performed in any other country where they might, from choice or necessity, take up their abode. Apart from that consideration, and assuming Scotland to have been, in the strictest sense of the term, the *locus solutionis,* I think the argument of the respondents is untenable. The principle of international private law, which makes, in certain cases, the law of the place where it is to be performed the legal test of the validity of a contract, rests, in the first place, upon the assumption that the parties were, at the time when they contracted, both capable of giving an effectual consent, and, in the second place, upon an inference derived from the terms of the document, or from the circumstances of the case, that they mutually agreed to be bound by the *lex loci solutionis* in all questions touching its validity. That principle can, in my opinion, have no application to a case in which, at the time when they professed to contract, one of the parties was, according to the law of that party's domicile and also of the place of contracting, incapable of giving consent.

Being of opinion that the capacity of the appellant to bind herself by the marriage-contract must be determined by the law of England, I agree with your Lordships that the discharge which she seeks to set aside cannot stand in the way of her claiming her legal rights as a Scottish widow. The rule seems to be clear that an infant cannot, during minority, effectually subject herself to any contractual obligation which cannot be shewn to have been for her benefit. She may ratify the contract, after attaining majority, and so become liable to implement it, but, in the circumstances of the present case, any such ratification of the contract would, according to the law of Scotland, have been revocable by her as a donation *inter virum et uxorem.* The respondents argued, from the supposed analogy of the case of settlements in bar of dower, that the provisions made by her husband in the appellant's favour by the marriage-contract, and by his trust-disposition, ought to have the effect, according to English law, of excluding her legal claims. In reality no such analogy exists. The rule which enables a husband by his own act to exclude the peculiar right of dower rests upon statute, although the Court of Chancery has, from equitable considerations, enlarged the scope of its enactments, so far as regards the character of the provisions which are to be deemed as in satisfaction of the widow's right. But these enactments, as well as the decisions of the Court, leave untouched the

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personal incapacity of the minor; and cannot, in my opinion, be extended to terce and *jus relictæ*, which are rights essentially differing from that of dower.

These considerations are sufficient for the disposal of the whole merits of this appeal. It is therefore unnecessary to determine whether the marriage-contract is reducible on the head of minority and lesion, which was the only question argued and decided in the Court of Session. All I shall say upon that point is, that had it been necessary to decide it, I should, as at present advised, have hesitated to disturb the judgment of the Court below. I think the appellant is greatly to blame for having kept back her leading ground of reduction until she appeared at your Lordships' bar, and that she ought not to have the costs incurred by her either in the Court of Session or in this appeal.

I accordingly concur in the judgment which has been moved by the Lord Chancellor.

Lord Macnaghten.—My Lords, in this case Mrs Cooper, the widow of a domiciled Scotsman, but an Irishwoman by birth, challenges on various grounds the validity of a settlement made on the occasion of her marriage, by which she purported to discharge her legal right—her terce and her *jus relictæ*. It seems to me to be satisfactorily proved by the evidence that the settlement was executed before the ceremony of marriage took place. I mention this because, notwithstanding the opinion of two of the learned judges and the opinion just expressed by my noble and learned friend opposite (Lord Watson), I should venture to doubt whether a contract executed after the status of the contracting party had been definitely altered by marriage could be regarded as an antenuptial contract. Be that as it may, it is not disputed that at the time of the execution of the contract the lady was an infant; and it is averred by the defenders and admitted by the pursuer that "the pursuer was at the date of the marriage a domiciled Irishwoman."

As regards the contracts of infants the law of Ireland, which does not differ that of England, is well settled. Infants are incapable, speaking generally, of binding themselves absolutely by contract. A settlement on marriage not being a settlement under the Infants Settlement Act (18 and 19 Vict. c. 43) forms no exception to the rule. *Prima facie*, therefore, Mrs Cooper was not bound by the settlement in question. *Prima facie* it was voidable by her. And she has elected to avoid it. It is not alleged that she has done any act to confirm it if not binding upon her at the time of its execution.

This was the main ground of appeal before this House.

Three answers were suggested on behalf of the respondents. In the first place it was said that this was a Scottish marriage-contract, that the domicile of the intended husband was Scottish, and that Scotland was the place where the contract was to be fulfilled, that is, where the parties intended to reside after marriage. All that is very true. But it is difficult to see how it can affect the question.

It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made, or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad seems to be in favour of the law of the domicile. It may be that all cases are not to be governed by one and the same rule. But when the contract is made in the place where the person whose capacity is in question is domiciled, there can be no room for dispute. It is difficult to suppose that Mrs Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicile.

In the next place it was argued, though somewhat faintly, that the contract ought to be held binding on Mrs Cooper by analogy to those cases where before the Dower Act a provision, not amounting to a bar to dower under the statute of Henry VIII., was yet held to be a bar in equity. This is certainly a very refined argument. Moreover, the foundation for it seems to be wanting. Undoubtedly, even in the case of an infant, a reasonable provision by antenuptial contract was held to be an equitable bar to dower. But no decision was cited to your Lordships, nor am I aware of any, in which the doctrine was recognised where the father or guardian of the infant did not concur in the contract. "A female infant," says Sir John Leach in *Simson* v. *Jones*,[1] "is bound by the settlement made on her marriage as to dower and thirds, not by force of her agreement in the settlement, but by reason of the consent of her parents and guardians, and of the Statute of Henry VIII." Here the father of the infant was dead, and it is admitted that she had no legal guardian.

The third answer on the part of the respondents seems at first sight more formidable. It was said that the point was not argued before the Lord Ordinary or in the Court of Session, and that the appellant has deliberately excluded the consideration of Irish law. It is true that in the Courts below there was no evidence of what the law of Ireland was, and those Courts therefore were unable to consider the question. But there is enough upon the pleadings to raise the point; and the peculiarity of the case is that what must necessarily have been a question of fact in the Courts below becomes a question of law in your Lordships' House. It is not competent to your Lordships on an Irish question, though involved in a Scotch appeal, to shut your eyes to the law of Ireland, and to determine the rights of the parties in the dark, as the Courts below were compelled to do. The authorities cited by the learned counsel for the appellant seem to shew conclusively that in a case like the present your Lordships cannot divest yourselves of your judicial knowledge of Irish law.

The interlocutor of the 31st of May 1884, whether it be now appealable or not, does not, I think, present any difficulty. The interlocutor itself does not touch the question. There are expressions in the opinion of the Lord Ordinary which, taken apart from the context, seem to be unfavourable to the view now presented by the appellant. But the opinion was directed to a wholly different point. Proceeding on an erroneous assumption of what the law of Ireland was, the defenders pleaded that the law of Ireland was a bar to the pursuer's remedy in a Scottish Court. And to that the opinion of the Lord Ordinary was addressed.

Upon these grounds, without expressing any opinion on the reasons upon which the decisions of the Lord Ordinary and the Court of Session are founded, I concur in the conclusion that the appeal ought to be allowed; and I agree as to costs.

ORDERED AND ADJUDGED:—"That the interlocutor of the Lord Ordinary of the 31st of July 1884, and also the interlocutor of the

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[1] 2 R. and My. 365, March 25, 1831.

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Lords of Session of the Second Division of the 9th of Janua 1885, and also the interlocutor of the Lord Ordinary of the 31 of January 1885, so far as the said interlocutors are appealed fro be reversed: And it is declared that the appellant is not barre by the marriage-contract sought to be reduced, from now electin to take her legal rights as the widow of the deceased Henr Ritchie Cooper; and it is further ordered, subject to the foregoin declaration, that the cause be remitted back to the Second Divisio to proceed therein as may be just, neither party being foun entitled to the costs hitherto incurred by them in the Court o Session; and it is further ordered that there be no costs to eithe party in this House: And it is further ordered that the respondents do pay to the appellant any expenses already paid to them by the appellant under the interlocutors now reversed."

ANDREW BEVERIDGE—H. B. & F. J. DEWAR, W.S.—GRAHAMES, CURREY, & SPENS—
WEBSTER, WILL, & RITCHIE, S.S.C.

No. 4.

Mar. 8, 1888.
Young v. North British Railway Co.

ROBERT WILLIAM YOUNG, Petitioner.
NORTH BRITISH RAILWAY COMPANY, Respondents.

Expenses—Property—Taking of land compulsorily—Lands Clauses Consolidation (Scotland) Act, 1845 (*Act* 8 *Vict. c.* 19), *sec.* 119.—A proprietor of lands brought an action against the Crown and against a railway company, concluding for declarator that he had right to the foreshore *ex adverso* of his lands, and for interdict against the railway company entering upon it. The pursuer obtained decree in his favour in the Court of Session, and in appeals by both defenders to the House of Lords, with a finding against the appellants for costs in the appeals. The railway company having then served on the proprietor a notice under the Lands Clauses Act of their intention to take the foreshore, the latter presented a petition to the House of Lords against the railway company praying that the costs in the appeal should be taxed as between agent and client in terms of section 119 of the Lands Clauses Act.* The Appeal Committee were of opinion that the costs in the railway company's appeal should be taxed as between agent and client.

Appeal Committee of House of Lords.
Ld. Chancellor (Halsbury).
Lord Watson.
Ld. Fitzgerald.

(IN the Court of Session, 8th December 1885, 13 R. 314; affd. 1st August 1887, 14 R. (H. L.) 53.)

In this case, both in the Court of Session and in the House of Lords, the pursuer, Robert William Young, obtained decree of declarator that the foreshore *ex adverso* of his lands pertained heritably in property and belonged exclusively to him subject to the rights of the public therein, and also interdict against the North British Railway from entering on the shore ground in question and proceeding to construct certain railway works thereon.

By the judgment pronounced by the House of Lords, the respective appellants, the Crown and the railway company, were ordered to pay to the pursuer and respondent the costs incurred in respect of the two appeals, —the amount thereof to be certified by the Clerk of the Parliaments.

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* 8 Vict. c. 19, section 119.—"In addition to the said purchase-money, compensation, or satisfaction, and before the promoters of the undertaking shall become absolutely entitled to any such estate, interest, or charge, or to have the same merged or extinguished for their benefit, they shall, when the right to any such estate, interest, or charge, shall have been disputed by the company, and determined in favour of the party claiming the same, pay the full expenses of any proceedings at law or in equity for the determination or recovery of the same to the parties with whom any such litigation in respect thereof shall have taken place, and such expenses shall, in case the same shall be disputed, be settled by the proper officer of the Court in which such litigation took place."

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The North British Railway Company subsequently served on Mr Young a notice of their intention to take the foreshore *ex adverso* of the lands in question under sections 117 and 118 of the Lands Clauses Consolidation (Scotland) Act, 1845.

The pursuer thereafter, on 17th February 1888, presented a petition to the House of Lords against the railway company praying that "the costs of the said two appeals and of this application may be taxed by the taxing officer of your Right Honourable House as between agent and client."

The petitioner founded upon the 119th section of the Lands Clauses Consolidation (Scotland) Act, 1845,* and upon the case of *Hyde* v. *The Mayor of Manchester* [1] in which it was decided that the expression "full costs" in the corresponding section of the Land Clauses Act, 1845, applicable to England meant costs as between solicitor and client, and submitted that his right to the foreshore having been determined in his favour he was under that section entitled to the full expenses of the litigation, and to have these taxed as between agent and client.

The North British Railway Company submitted in answer that the petition was irregular and incompetent, and ought to be refused, because (1) the matters set forth in it were irrelevant to the subject-matter of the appeals; (2) the questions as to the amount of compensation under the 117th and 118th sections, and as to the amount of expenses under the 119th section of the Lands Clauses Act had not arisen during the dependence of the appeals, and could not be raised after the judgment of the House of Lords, and further the petitioner had agreed to refer the claim under the Lands Clauses Act which had now been served upon him to arbitration, and the matter of expenses could only be dealt with in that arbitration; and (3) the provisions of the 119th section were not applicable to the subject-matter of the appeals, and did not affect their Lordships' finding as to costs, which could not be limited in any way.

After some discussion before the Committee the following order was pronounced:—"The Committee are of opinion that the costs of the appeal, North British Railway Company against Young, should be taxed by the taxing-officer of this House as between agent and client, such costs to include the respondents' costs in respect of this application."

Grahames, Currey, & Spens—Cowan & Dalmahoy—W. A. Loch—
W. White Millar, S.S.C.

No. 5.

Mar. 12, 1888.
Edward v.
Cheyne.

Allan Edward (Mrs Baxter's Executor), (Claimant in Multiplepoinding) Appellant.—*Sir H. Davey, Q.C.—M'Clymont—Rutherford.*

John Cheyne and Another (Dr Boyd Baxter's Trustees), (Claimants) Respondents.—*Asher, Q.C.—H. Johnston.*

Husband and Wife—Jus relictæ—Implied renunciation—Wife's signature to husband's settlement.—A husband by his trust-disposition and settlement gave his wife the liferent of his whole means and estate, and in the fourth purpose directed his trustees, "after the death of the survivor of me and my said wife, and with her consent and full approval (in token of which she has subscribed

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* *Supra*, p. 32.

[1] Hyde v. The Mayor of Manchester, June 9, 1852, 12 C. B., Scott's Reps. 474.

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this deed)," to pay over a large number of legacies, many of them to relatives his wife. By the fifth purpose he directed that after the death of his widow h household furniture should be divided among certain of her relatives. The r sidue was to be devoted to religious and charitable purposes. The **wife** *signe* the deed. She survived her husband only a few weeks. Her **executor,** in multiplepoinding brought by the husband's trustees, claimed her **terce and** *j relictæ*, maintaining that her consent had been given to the legacies **only,** an not to the whole settlement. *Held* (in *aff.* judgment of Second **Division)** tha although it could not be inferred from the wife's signature to the **deed** *that sh* gave any consent thereto further than the deed bore, her consent to **the fourt** purpose implied an acceptance of the liferent provided to her in **the deed** i lieu of terce and *jus relictæ*.

(In the Court of Session, June 27, 1884, 11 R. 996.)

Mr Allan Edward, Mrs Baxter's executor, appealed against the judgment in the action of multiplepoinding, reported 11 R. 996, and als against a judgment at the same time pronounced in an action of declarator previously brought by him raising the same questions.

The appeals were conjoined.

At delivering judgment,—

Ld. Chancellor (Halsbury).
Lord Watson.
Lord Macnaghten.

Lord Watson.—I have come, without difficulty, to the conclusion that the interlocutors appealed from ought not to be disturbed.

The general principles of law applicable to the case have not been disputed. When there is no antenuptial contract, and the husband makes a voluntary provision in favour of his widow, as in full of her legal claims, she is put to her election upon his predecease; and, in the event of her death before she has had the opportunity of making her choice, the right of election passes to her representatives. On the other hand, if the wife has, during the subsistence of the marriage, consented to accept the provision in substitution for her legal claims, she may retract her consent as a *donatio inter virum et uxorem*, but her right of revocation being strictly personal cannot be exercised by her representatives.

The case of *Borrie* v. *Coldstream*[1] is an authority to the effect that the consent of the wife may be effectually given by her subscribing, for that purpose, a testamentary deed of the husband standing unrevoked at the time of his death. The same point was decided by this House in *Dunlop* v. *Boyd*,[2] where it was held that the wife's consent remained valid and binding on her representatives, although the husband had subsequently revoked certain portions of the deed which did not affect the wife's provision, or the conditions upon which her consent was given. In *Leighton* v. *Russell*[3] Lord Fullerton expressed an opinion that a wife's consent expressed by her signature to a deed, revocable at the will of the husband, ought not to exclude her legal rights; but his opinion was not shared by the majority of the Court, and it is in direct conflict with the subsequent decision of this House in *Dunlop* v. *Boyd*.[2] The points actually decided in *Leighton* v. *Russell*[3] do not appear to me to touch the present case. There the husband survived his wife, and after her decease he revoked all prior settlements executed by him, and made a new testamentary disposition of his whole means and estate. After his death the wife's next of kin sued his executor for their share of the goods in communion at the time of her death, the defence of the executor being that the claim was extinguished by the wife's consent to the revoked settlement. It was admitted that the revoked deed was not extant, and the executor, in order to instruct his defence, brought an action for the purpose of proving its tenor. The majority of the Court gave judgment in favour of the wife's next of kin upon these two grounds: (1) that the efficacy of her consent was dependent upon the deed becoming operative; and (2) that, assuming its tenor to have been as alleged by the executor, her consent related exclusively to her legal rights in the event of the husband dying before her, and had no reference to the rights arising to her next of kin upon her own predecease.

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[1] June 30, 1843, 5 D. 1297.

[2] Nov. 2, 1863, 2 Macph. 1, affirmed June 2, 1865, 3 *ibid.* (H.L.) 46, 37 Scot. Jur. 470.

[3] Dec. 1, 1852, 15 D. p. 133.

By his trust-disposition and deed of settlement the late Dr Baxter conveyed his whole estate, heritable and moveable, to the respondents as his trustees, with directions, first to pay debts; secondly to make certain payments to a college in Dundee; and thirdly, to pay over the free annual proceeds or income of his estate to his wife, in the event of her survivance, during the whole period of her life. The fourth purpose of the trust runs thus :—"I direct and empower my said trustees, after the death of the longest liver of me and my said wife, to realise and convert into money all my estate and effects, or such part or parts thereof as they may think proper, or in such manner, and at such time or times, and at such prices, as they think fit; and after the death of the survivor of me and my said wife, and with her consent and full approval (in token of which she has subscribed this deed) I direct and appoint my said trustees as soon as they conveniently can, or at such time or times as they consider proper, with full power to postpone the payment of any of the legacies underwritten if my trustees think it expedient to do so, to pay to the institutions, societies and persons after mentioned, or to hold in trust for behoof of such females as are after specified, whose husbands' rights are excluded, the following sums or legacies which I hereby legate and bequeath to them respectively." Then follows an enumeration of legacies to certain institutions and individuals, to the amount in all of £26,750, of which £16,000 is given to relatives of the wife. The fifth purpose of the trust makes specific bequests of household articles and other personal effects; and by the sixth purpose the testator bequeaths the residue of his estate to such charitable uses as may be selected by his trustees.

Apart from any consent given by Mrs Baxter to her husband's trust-deed, it is clear that had she survived him she would have been put to her election between the liferent thereby provided to her and her legal rights as widow; and the only point arising for decision is, whether Mrs Baxter, by her subscribing the deed, consented to accept the liferent, and thereby deprived the appellant as her executor, of the right, which he would otherwise have had, to make an election now. That is a question depending upon the construction of the deed.

I cannot assent to the argument submitted for the respondents, to the effect that Mrs Baxter by subscribing the settlement as one of the parties to its execution, without any limitation appearing in the testing-clause, became a consenter to all its terms and provisions. It is unnecessary to consider what would have been the effect of her subscription if there had been no reference in the body of the deed to the purpose for which it was adhibited; because part of the deed, the fourth purpose, expressly bears to have been made "with her consent and full approval (in token of which she has subscribed this deed)." I think that

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declaration must be taken to be conclusive as to the purpose for which sh signed, and I am consequently of opinion that her consent cannot be carrie beyond the fourth purpose, except in so far as her assent to its provision necessarily implies approval of other parts of the deed. It appears to me, however, that the fourth purpose, and the antecedent provision of liferent in the third purpose, are so intimately connected with each other that Mrs Baxter must be held by plain implication to have accepted that provision. In the event of he being the survivor of the spouses, payment of the legacies bequeathed by the fourth purpose is deferred until her death; and upon the occurrence of that event, they are made a first charge upon the estate to be held at that time by the trustees, consisting of the *universitas* of the testator's estate, under deduction only of proper debts. In my opinion, her consent to that arrangement plainly implies that Mrs Baxter not only agreed that the legacies should be paid, but made it a condition of her agreement that they should not be paid until the expiry of the liferent right provided to her by the third purpose of the settlement.

I accordingly move that the interlocutors appealed from be affirmed, and the appeal dismissed.

LORD MACNAGHTEN.—Mr Baxter's trust-disposition states the purpose which Mrs Baxter had in view in affixing her signature to it. That being so, it appears to me that it would not be proper to attribute to her signature a purpose wider than that which is expressed on the face of the document. Her consent and approval must, I think, be limited to the directions given to the trustees with respect to the payment of the legacies mentioned in the fourth purpose of the trust-disposition. But, even so limited, her consent and approval appear to me to be inconsistent with the present claim set up by her representatives. The legacies in question are to be paid after Mrs Baxter's death. They are to be paid out of the *universitas* of the testator's estate, which is to be kept together during Mrs Baxter's life. This appears to me to be inconsistent with the claim put forward on her behalf to withdraw from the operation of the will one moiety of the testator's estate, and to leave the legacies payable out of the dead's part only.

For these reasons, though not agreeing wholly with the grounds on which the decisions of the Courts below have been rested, I concur in thinking that the appeal must be dismissed.

The LORD CHANCELLOR concurred.

> INTERLOCUTORS complained of in the conjoined appeals affirmed; and the conjoined appeals dismissed, the costs incurred by both parties in respect of the conjoined appeals to be provided out of the estate.*

A. BEVERIDGE—A. P. PURVES, W.S.—W. A. LOCH—MACKENZIE & KERMACK, W.S.

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* On delivering judgment in this appeal, it was not stated that the costs of the appeals were to come out of the estate, but on the 4th of May 1888, Lord Watson stated to the Appeal Committee (on the matter being brought under their notice) that that was the intention of the House, and an order to that effect was pronounced.

ALLAN EDWARD (Mrs Baxter's Executor), (Pursuer) Appellant.— *Sir H. Davey, Q.C.—M'Clymont—Rutherford.*
JOHN CHEYNE AND ANOTHER (Dr Boyd Baxter's Trustees), (Defenders) Respondents.—*Asher, Q.C.—H. Johnston.*

No. 6.

Mar. 12, 1888.
Edward v. Cheyne.

Husband and Wife—Implied donation of wife's income to husband.—A lady who was married in 1827 had right for her separate use to the income of £12,000, held by testamentary trustees, one of whom was her husband. For a time prior to 1860 the income was placed in a bank account in the wife's name. In 1860 that account was closed, and the balance carried to a new account in the joint names of the husband and wife, with power to either to draw upon it. This account was closed in November 1865, when the balance was transferred to the husband's bank account. From that time to the date of the husband's death, in August 1882, the wife's separate income was placed to the husband's account, and mixed with his funds.

The only child of the marriage died without issue in 1867. The spouses lived in great harmony, and in 1871 the wife executed a will leaving her whole property to her husband, on the understanding that he should leave a settlement to take effect at his death "in terms known to us both," "with this duty he is solely and confidently intrusted." The husband predeceased his wife in August 1882, leaving a large moveable estate, a great part of which consisted of accumulations from his wife's income.

In an action brought by the widow's executor against the husband's trustees *held* (in *aff.* judgment of the First Division) that the facts shewed that the wife had made a gift to her husband of her whole separate income, and that the gift not having been revoked by her was effectual.

Per Lord Watson,—"By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband, with this difference, that by Scotch law she has the privilege, even after her husband's death, of reclaiming the subject of her gift in so far as it has not been *bona fide* consumed. The wife's consent to give need not be in writing, nor in terms express, but may be matter of inference from the circumstances of the case or the conduct of the spouses. . . . There can be no reason why the same circumstances, which are in England held to imply donation, should be deemed insufficient to sustain a similar inference in the Court of Session."

Per Lord Macnaghten,—"In England the rule in equity is clear from the earliest times that when husband and wife have lived together, the wife cannot charge her husband or her husband's estate as her debtor for arrears of her separate income which she has permitted him to receive. . . . To displace the rule it is not sufficient to shew that the wife's separate income has accumulated in the husband's hands and remains unspent—*Beresford* v. *Archbishop of Armagh*, 13 Simons, 643—or that the husband is himself a trustee of the wife's separate income—*Caton* v. *Rideout*, 1 M. and G. 599—or that the wife is restrained from anticipation by the terms of the instrument under which her title is derived—*Rowley* v. *Unwin*, 2 K. and J. 138."

(IN the Court of Session, July 20, 1886, 13 R. 1209.)
Mr Allan Edward, Mrs Baxter's executor, appealed.
At delivering judgment,—

Ld. Chancellor (Halsbury).
Lord Watson.
Lord Macnaghten.

LORD WATSON.—Dr John Boyd Baxter was married to Margaret Edward in the year 1827, and from that time they continued to live in family together, until his death in August 1882. Mrs Baxter died on the 15th of the following October. There was no marriage-contract between the spouses, and the only child of the marriage died before his parents, without issue, in March 1867.

Under the trust-settlement of her brother David Edward, who died in December 1857, Mrs Baxter became entitled, after the lapse of two years from the truster's decease, to the life interest of a fifth share of the residue. The provision was declared to be alimentary, exclusive of the *jus mariti* and adminis-

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tration of her husband, and free from liability for his debts or the diligence of his creditors.

Dr Baxter was one of the accepting trustees of David Edward's settlement, and also acted as factor for the trust; and on the death of Allan Edward, in June 1874, he became sole trustee. There appears to have been considerable but unavoidable delay in realising the trust-estate, and a final division was not made until the 11th of April 1866, when the trustees fixed and set apart funds and stocks to the value of £12,382 as the share of residue liferented by Mrs Baxter, and appointed the interest to be paid to her during her life.

Between 1859 and 1865 the trustees made payments to Mrs Baxter from time to time on account of her liferent interest. These payments were at first placed to the credit of an account-current with the National Bank in her name, which was closed on the 10th of December 1860, and the balance standing at her credit transferred to a new account with the same bank in name of both spouses, but bearing to be payable to either of them. Dr Baxter alone drew upon this last account, all cheques being signed by him "pro Mrs Baxter," and it was closed by a draft dated the 11th of November 1865, for £409, 1s. 6d. From the allocation of the residue in April 1866 until the death of Allan Edward in 1874 the income arising from Mrs Baxter's fifth was paid by the trustees to Dr Baxter, who placed it to the credit of his private bank account; and the same course was followed after Dr Baxter had become the sole trustee.

The appellant, as executor-dative of Mrs Baxter, now sues the respondents, who are the testamentary trustees of her husband, for an account of his intromissions with her separate income derived from her brother David's trust. In bar of an accounting, the respondents maintain, in the first place, that Mrs Baxter made a donation to her husband, which stands unrevoked by her, of all moneys which came to him from David Edward's trust, excepting such sums as he paid to her for her own use; and, in the second place, and alternatively, that such portions of her income as were in his possession at the time of his death were disposed of, with her consent, by his trust-disposition and settlement. The appellant disputes both of these propositions; and, with respect to the period preceding 1866, he contends that there are four sums with which Dr Baxter became chargeable as her trustee or agent. It is not said that Dr Baxter intromitted with any part of her income arising before 1866, other than these sums, and, in that condition of the argument, I think it will be convenient, first of all, to deal with the income arising after the allotment of the share of residue liferented by Mrs Baxter.

By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband; with this difference, that by Scotch law she has the privilege, even after her husband's death, of reclaiming the subject of her gift, in so far as it has not been *bona fide* consumed. The wife's consent to give need not be in writing nor in terms express, but may be matter of inference from the circumstances of the case, or the conduct of the spouses. So far as I am aware there is no case in which the Court of Session has had occasion to determine what conduct or circumstances will imply a gift by the wife, unless the case of *Hutchison* v. *Hutchison*[1] is to be regarded as an authority, but English Courts of Equity have frequently considered the point; and their decisions, being *in pari materia*, are, in my opinion, applicable to the present case. There can be no reason why the same circumstances, which are in England held to imply donation, should be deemed insufficient to sustain a similar inference in the Court of Session.

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[1] June 10, 1842, 4 D. 1399, and Feb. 1, 1843, 5 D. 469.

In *Caton* v. *Rideout*[1] a widow objected to being charged, as executrix of her husband, with a cash balance of £555 standing at the credit of the deceased with Child & Co. The lady had a separate right to the dividends of stock standing in the name of trustees, of whom her husband was one. The trustees kept their banking account with Currie & Co., who at first paid the dividends to Child & Co. on her account, but for fourteen years before his death it had been their uniform practice to pay to Child's on the husband's account; and the sum in question was admittedly part of the dividends so paid to him. Knight Bruce, V.-C., was of opinion that, in these circumstances it had not been made out that the husband had received the dividends in any other character than that of her trustee or agent; but his judgment was reversed by the Lord Chancellor (Cottenham), who thus stated the rule applicable to such cases: "If the husband and wife living together have for a long time so dealt with the separate income of the wife as to shew that they must have agreed that it should come to the hands of the husband to be used by him (of course for their joint purposes), that would amount to evidence of a direction on her part that the separate income which she would otherwise be entitled to should be received by him." His Lordship also said that "separate money of the wife, paid to the husband with her concurrence or direct authority, to be inferred from their mode of dealing with each other, cannot be recalled. If I were to hold the contrary, I do not know to what extent such a decision would go. In ninety-nine cases out of a hundred separate property which is introduced as a protection to the wife, does not take effect; all things going right, and no distinction being made, the question of separate property does not arise; the property is used as a common fund for the benefit of the family, and in that way naturally falls under the control and management of the husband."

The expression "of course for their joint purposes" occurring in the first of these quotations, may appear to be somewhat ambiguous; but it is obvious from his decision that the noble and learned Lord merely intended to say that the wife's tacit assent to her husband's receiving and using her separate income for joint family or other purposes would constitute an effectual gift, whether the sums received by her husband were expended on these purposes or were allowed to accumulate.

In *Beresford* v. *Archbishop of Armagh*[2] Shadwell, V.-C., in similar circumstances sustained the right of a husband's executor to a sum of £11,000, being the balance of the wife's separate income received by him, and remaining unspent at the time of his death. In Scotland the claim made by the surviving wife in *Caton* v. *Rideout*[1] would have been sustained, not because there had been no gift, but on the ground that she had power to recall it; but the claim made by the wife's executor in *Beresford* v. *Archbishop of Armagh*[2] could not have been sustained, because the power of revocation is personal to the wife, and cannot be exercised by her representatives.

Hutchison v. *Hutchison*[3] has not a very direct bearing upon the present case, although it does illustrate the principle upon which such questions are dealt

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[1] Dec. 14, 1849, 1 Mac. & G. 599, pp. 601, 603.

[2] Jan. 17, 1844, 13 Sim. 643.

[3] 4 D. 1399, 5 D. 469.

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with between husband and wife. In that case a widow sued her husband's representatives for an account of his intromissions with certain rents and interests from which his *jus mariti* was excluded. She alleged that the moneys had been received and accumulated by her husband, and were still extant; whereas it was averred by the defenders that they had been spent by him for family purposes. Her right to recover the moneys, so far as these remained unconsumed, and could be traced, was not in dispute. When the case first came before them the Second Division [1] recalled the Lord Ordinary's finding, that the wife was not bound to contribute out of her separate estate towards the maintenance of the family, and remitted to him to hear parties as to the legal presumptions applicable to the case, and as to the relevancy of any offer of proof made by either party. When the case went back to him the Lord Ordinary found that it was relevant for the defenders to aver that such parts of the pursuer's income as were applied by her husband to the maintenance of the family were applied with her knowledge and consent; and also that her knowledge and consent might be competently proved by facts and circumstances only, as well as by direct evidence. The defenders reclaimed on the ground that the *onus* of proof was laid upon them; and the Second Division decided [2] that it was incumbent upon the widow to prove that the money was applied by the husband to increase his own funds, and was not used for family expenditure. Their Lordships also decided that if the widow failed in such proof, effect must be given to the presumption that all sums received by him had been used and consumed with her sanction and concurrence.

So far as it relates to Dr Baxter's intromissions with his wife's income between 1866 and the time of his death, I am unable to distinguish the present case from *Caton* v. *Rideout.*[3] For eight years the interest of her fifth share of residue was regularly paid to him by David Edward's trustees as it accrued, and was by him at once mixed with his own funds, and dealt with in all respects as his own property; and the same practice was invariably followed after he became the sole trustee. It must, in my opinion, be presumed (in the absence of evidence to rebut the presumption) that the uniform course of dealing, which was continued for sixteen consecutive years without any assertion of her separate right by Mrs Baxter, had all along her consent, or at least her tacit acquiescence. Proof has been adduced by both parties, but it does not appear to me to alter the aspect of the case. The bulk of it consists of the personal impressions (which are not evidence) of individuals connected with the family, derived from their observation of the terms upon which the spouses lived together, and from expressions used by Mrs Baxter in their hearing. These expressions are quite consistent with the theory of Mrs Baxter having consented to place her separate income at the absolute disposal of her husband.

I shall now advert to the facts connected with the specific sums which, the appellant argues, were held by Dr Baxter as trustee or agent for his wife. On the 10th of December 1860, Mrs Baxter drew £280, 10s. from her own bank account, which was on the same day applied to the purchase of thirty shares of the Dundee and Arbroath Railway Company. Owing to that undertaking having been amalgamated with the Scottish North-Eastern, which in its turn was absorbed by the Caledonian Railway Company, it has become impossible to discover in whose name the investment was made; and there is no evidence to shew that Dr Baxter received the proceeds. On the 9th of June 1862, £500 of Mrs Baxter's money was lent to the Dundee and Arbroath Company upon a mortgage in her own name. The money was repaid on the 17th of May 1869, when it was received by Dr Baxter, and mixed with his own funds. On the 11th of November 1864, another sum of £1000 was invested in a mortgage of the North-Eastern Railway Company, payable to the spouses jointly, or the survivor of them. It was repaid at Martinmas 1867, when the proceeds were not reinvested in similar terms, but were paid into Dr Baxter's private account, and dealt with as part of his own funds. Again on the 9th of November 1865, £625 of Mrs Baxter's money was lent, along with £375 of her husband's, on a mortgage of the North-Eastern Company, payable in the same terms as the preceding. That mortgage was paid off by the company in November 1868, but there is no evidence to shew how the proceeds were disposed of.

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[1] 4 D. 1399.

[2] 5 D. 469.

[3] 1 Mac. & G. 599.

The appellant has thus failed to establish the receipt by Dr Baxter either of the £280, 10s. invested in 1860, or of the £625 invested in the year 1865. Assuming, however, that he did receive all of the four sums in question at the time when the investments were realised, I think that, in the circumstances of this case, the presumption must be that they were received by him as his own, for family or other purposes, with the knowledge and acquiescence of Mrs Baxter. Without her intervention they could not have been realised; and, in my opinion, she cannot presumably have been ignorant of the manner in which the proceeds were thenceforth dealt with by her husband. The first investment in railway shares has not been traced, but the three subsequent mortgages were paid up in 1867, 1868, and 1869 respectively. During these years Mrs Baxter was in the practice of giving to her husband, for some purpose or other, the whole of her separate income from her brother David's trust-estate, then amounting to nearly £500 per annum, a practice which continued until his death in 1882; and it appears to me to be neither an improbable nor an unreasonable inference from the facts proved, that she also gave him her savings during the time when her separate income from that source was much less than it became after 1866.

I am accordingly of opinion that the whole funds of which the appellant demands an account in this action were vested in Dr Baxter as his own property at the time of his death, and now belong to the respondents as trustees under his disposition and settlement. In that view it is unnecessary for the disposal of this appeal to enter upon the second branch of the argument submitted by the respondents in support of the judgments of the Courts below. But having heard a full argument upon that part of the case, I desire to say that if there had not been a complete gift of these funds to Dr Baxter, or if they had merely been placed in his hands with a view to their being disposed of by the testamentary disposition of both spouses, I should have been of opinion that the appellant was entitled to judgment. I had occasion to express in another case, and need not here repeat, my opinion as to the legal effect of Mrs Baxter's signing her husband's settlement in token of her consent. The instrument does not profess to deal with any estate except that of the husband; and I do not think that Mrs Baxter's signature could have been held as implying her assent to the disposal of any part of her separate estate then subject to her dominion which she had agreed to settle by a joint deed.

I therefore think the interlocutors appealed from ought to be affirmed, and the appeal dismissed, and I move accordingly.

Lord Macnaghten.—In this case the executor-dative of Mrs Baxter seeks to recover from the testamentary trustees and executors of her husband, John Boyd Baxter, the aggregate amount of the income of a share of the estate of her brother, David Edward, to which she was entitled for life, for her separate use, under her brother's will.

Mr and Mrs Baxter were married in 1827 without antenuptial contract. Mr Baxter died in August 1882. Mrs Baxter survived her husband for a short time, but during that period she was not competent to do any act affecting her rights. The question, therefore, must depend on the rights of the parties at the date of the husband's death.

The facts of the case are few, and not really in dispute. The dispute is as to the proper inference to be drawn from the facts.

David Edward died in 1857. But several years elapsed before his estate was realised. It was not until 1866 that the securities representing Mrs Baxter's share, which amounted in value to about £12,000, were set apart. Mr Baxter was a trustee, and after the 16th of June 1874 the sole trustee, of David Edward's estate. He was also factor to the trust. It cannot be doubted that Mrs Baxter was aware generally of her rights under her brother's will. For a time the intention seems to have been to preserve her separate title to the moneys coming to her from the trust. On the first division of income an account was opened in her name with the National Bank, and for a time her share of the income, with the exception of what was paid to her personally, was placed to that account. In December 1860 the account was closed, and the balance was carried to a new account, opened in the joint names of Mr and Mrs Baxter, with power to either to draw upon it. This account was closed in November 1865, when the balance was transferred to Mr Baxter's banking account. From that time Mrs Baxter's separate income was paid directly to Mr Baxter's account, and mixed with his moneys. From 1869 to 1880 inclusive, deposits were made from time to time in Mrs Baxter's name with the National Bank. In July 1881 the ultimate balance standing to the deposit account was drawn out and paid to Mr Baxter's account.

In four instances, the latest of which occurred in November 1865, sums derived from Mrs Baxter's separate income are traced into investments either made in Mrs Baxter's name or in which she was recognised as having an interest. But these investments in course of time were realised or paid off, and it may be inferred, if it be not proved, that the proceeds came into Mr Baxter's account and under his sole dominion.

Mr and Mrs Baxter lived together on most affectionate terms. They lived frugally. Mr Baxter's own income was quite sufficient to meet their joint expenditure, and the result was that at his death the property, of which he was at least the ostensible and apparent owner, was largely composed of funds derived from Mrs Baxter's separate income.

What is the proper inference from these facts? On the one side it is said that Mr Baxter was never divested of the character of trustee, that he acted as his wife's banker, and that her representatives are therefore creditors on his estate for so much of her separate income as may appear to have been received by him, and not duly accounted for. It was contended that at the very least his estate ought to be held liable for the proceeds of the four investments of her separate property which came into his hands. On the other side it was not disputed that originally Mrs Baxter intended to keep her own property to herself, but it was said that she drifted away from that purpose, and finally abandoned it altogether. A reason for this change, it was suggested, might be found in the death of the only child of the marriage, who died without issue in March 1867. After that event Mrs Baxter could have no object in keeping her property separate. And it was argued that the proper inference from the facts and circumstances of the case was that Mrs Baxter made a gift of her separate income to her husband.

In Scotland there seems to be no reported decision bearing directly upon the point. Where donations between husband and wife are liable to be revoked during the lifetime of the donor, the question could only arise in an exceptional case like the present, and so the dearth of authority is not to be wondered at.

In England from early times there have been numerous decisions and *dicta* upon the subject, where husband and wife have lived together and the husband has received the income of his wife's separate estate without objection on her part. In the older cases, generally speaking, no distinction appears to have been drawn between pin-money and other separate income of the wife, and in some it is laid down that the wife shall have no account against her husband or her husband's representatives, in others it is said that the Court will only give the account for one year. Subject to these observations the rule in equity is clear from the earliest times (and the cases go back to the time of Lord Macclesfield), that when husband and wife have lived together, the wife cannot charge her husband or her husband's estate as her debtor for arrears of her separate income which she has permitted him to receive. The object of the rule, according to Lord Hardwicke, was "to prevent such accounts between husband and wife which it is impossible to determine according to the rights after death of the parties": *Peacock* v. *Monk.*[1] Since the Duchess of Northumberland's case, *Howard* v. *Lord Digby*,[2] which was before this House in 1834, a distinction between pin-money and other separate income of the wife has always been recognised, and since that case there is no English decision, so far as I am aware, which lends countenance to the notion that the Court will give any account against the husband or his representatives in respect of arrears of the wife's separate income, not pin-money, received by him with her express or implied permission.

Where the circumstances are such that the wife's consent or acquiescence may fairly be presumed, the presumption arises immediately on each receipt by the husband, and bars all claim on the part of the wife or her representatives. To displace the rule it is not sufficient to shew that the wife's separate income has accumulated in the husband's hands and remains unspent—*Beresford* v. *Archbishop of Armagh*[3]; or that the husband is himself a trustee of the wife's separate income—*Caton* v. *Rideout*[4]; or that the wife is restrained from anticipation by the terms of the instrument under which her title is derived—*Rowley* v. *Unwin.*[5] *Caton* v. *Rideout*[4] is generally referred to as the leading case upon the subject. There was no question or dispute there as to the rule; the difficulty arose simply from the position of the husband, who was one of the wife's trustees. Lord Cottenham there held, under circumstances similar to those in the present case, that the payment with which the wife sought to charge her husband's representatives was made to him as husband, and not as trustee. He states the rule to be that "separate money of the wife paid to the husband with her concurrence or by her direct authority, to be inferred from their mode of dealing with each other, cannot be recalled"; and he adds, that "the practice between the husband and the wife is proper evidence to shew acquiescence and concurrence." Lord Cottenham refers the foundation of the rule to broad grounds of convenience and practice, and points out that the rule is necessary for the peace of families. Indeed, if the rule were otherwise it would be, as his Lordship observes, "impossible to tell what confusion might not be introduced into a family." It appears to me that a rule which rests on such a basis is a safe guide in considering a case to the circumstances of which, if it had occurred in England, the rule would undoubtedly have been applicable.

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[1] Feb. 27, 1750, 2 Ves. Sen. 190.

[2] June 19, 1834, 2 Cl. & F. 634, 8 Bli. (N.S.) 224.

[3] 13 Sim. 643.

[4] 1 Mac. & G. 599.

[5] Dec. 14, 1855, 2 K. & J. 138.

There remains to be considered the minor point as regards the proceeds of the four investments of moneys derived from Mrs Baxter's separate income, a point which does not seem to have been pressed in the Court below. It appears to me that these proceeds fall within the same rule. Assuming, in accordance with the principle laid down in *Rich* v. *Cockell*,[1] that it is incumbent on the husband's representatives to shew by clear evidence that the separate trust in these moneys has been destroyed, I think the evidence is sufficient for the purpose. The investments represented accumulations of income. After Mrs Baxter consented, as it must be taken she did, to her husband receiving her separate income, and dealing with it as his own, there was no reason for making a distinction between accruing income and income that had already accumulated when the accumulations were turned into money. As and when the investments representing these accumulations were realised, Mrs Baxter's receipt must have been required and obtained. It is impossible to doubt that the payment to Mr Baxter in each case was made with his wife's concurrence, that he received the proceeds in the character in which he was at the time receiving her separate income, and that he was intended to be as free from liability to account in the one case as he was in the other.

For these reasons I am of opinion that the appeal must be dismissed.

LORD CHANCELLOR.—I only desire to say that had it been necessary to decide any question with reference to the signature to the will, I should have been entirely of the same opinion as my noble and learned friends; but it seems to me that neither in the present case, nor in that which we have just disposed of, is there any real doubt upon the principles of law on which it ought to be decided. The questions are simply questions of fact. I entirely concur in the view which has been taken of those questions of fact by my noble and learned friends, and I merely wish to add my assent to the judgment proposed and the reasons which have been given for it.

INTERLOCUTORS appealed from affirmed, and appeal dismissed; the costs incurred by both parties in respect of this appeal to be provided out of the estate.

A. BEVERIDGE—A. P. PURVES, W.S.—W. A. LOCH—MACKENZIE & KERMACK, W.S.

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[1] Nov. 12, 1802, 9 Ves. 369.

No. 7.

Mar. 12, 1888.
United Horse Shoe and Nail Co., Limited, v. Stewart & Co.

THE UNITED HORSE SHOE AND NAIL COMPANY, LIMITED, (Pursuers) Appellants.—*Rigby, Q.C.—Guthrie Smith.*
JOHN STEWART AND COMPANY, (Defenders) Respondents.—*Finlay, Q.C.—Bigham, Q.C.—Ure.*

Patent—Infringement—Damages.—In an action brought by a manufacturer, who held a patent for a machine for making horse-shoe nails of a special description, against another manufacturer, for damages arising from the sale by him of nails of the same description made by a machine which to a limited extent infringed the pursuer's patent, the defender, while admitting the sale of a certain quantity of nails which had been produced by the pirated machine, maintained that as he could have manufactured the same kind of nails by other machinery without infringing the patent, the pursuer had suffered no loss by the sale, and that the damage was nominal.

Held (rev. judgment of the First Division) (1) that the defender was liable for the loss sustained by the pursuer by the sale of the nails illegally made; (2) that as it had been proved that nails of the description in question had a preference in the market over other classes of nails, the sale of the pirated nails had restricted the sale of the pursuer's nails; and (3) that the measure of the pursuer's damage was the profit he would have made in selling the quantity of nails sold by the defender after deducting a percentage for sales which might be due to the special exertions of the defender.

Patent—Infringement—Profits or damages.—A patentee complaining of infringement of his patent cannot claim profits derived from the infringement and also damages, but must elect between them.

(IN the Court of Session, 17th December 1886, 14 R. 266.)
The pursuers appealed.

Ld. Chancellor (Halsbury).
Lord Watson.
Lord Macnaghten.

LORD CHANCELLOR.—My Lords, no question arises in this case as to the title of the pursuers to recover from the defenders such an amount of damages as the pursuers can establish to have been sustained by the infringement of the patent right whereof the pursuers are possessed.

I am unable to see the object of the minute and very careful examination which has been made by some of the learned Judges below as to the particulars of the patent or patents that have been infringed.

The actual infringement complained of consists of the sale of cases of nails produced by patent machines which are admitted to be infringements of the pursuers' patents. Every nail thus produced was an infringement of the pursuers' patent, the sale of which could have been interdicted, and would give a right of action against all concerned in its production and sale.

The question appears to me to arise solely on the assessment of damages. But I think the admissions in this case render unnecessary, and indeed irrelevant, an examination into the various parts of the patents.

The cases of nails *tales quales* were infringements, and in so far as these nails, such as they were, interfered with the sale of the pursuers' own goods, they were properly the measure of the damages which the pursuers were entitled to obtain. I say so far as they interfered with the sale of the pursuers' own goods, and while I agree with the Lord Ordinary that the pursuers can only recover compensation for the actual loss which they have sustained, the estimate of the particular sum which is to be arrived at when assessing compensation for the injury is purely a matter for a jury, and can rarely be made the subject of exact arithmetical calculation.

I am satisfied, however, that the boxes and cases of nails sold by the defenders did, in fact, interfere with the pursuers' sale. I am unable to agree with Lord Adam that there is nothing in the proof to shew or make it probabl that the pursuers would have made these sales,—I do not say all these sales. I think there is considerable evidence to shew that purchasers generally would have sought that particular nail, and I do infer that the pursuers, but for the intervention of the defenders, would have effected a large part of these sales. And I certainly find from the evidence that the competing nails in the market were not all equally sought after, but that the pursuers' nails had a higher reputation. I think it is nothing to the purpose to shew, if it is shewn, that the defenders might have made nails equally good and equally cheap without infringing the pursuers' patent at all. I will assume that to be proved, but if one assumes that the nails which were in fact made by the pirated machines injured the pursuers' sales, what does it matter if it is ever so much established that the loss which the pursuers have sustained by the unlawful act of the defenders might also have been sustained by them under such circumstances as would give the pursuers no right of action?

Your Lordships have to deal with the facts as they exist, and those facts, as I say, are that the defenders have, in derogation of the pursuers' rights, sold cases of nails which they had no right to sell, and for which to the extent to which they have interfered with the sale of the pursuers' patented nails the pursuers are entitled to damages.

The difficulty I have had in the conclusion at which one should arrive in this case consists in this: that while the only ground upon which I can suppose the judgment appealed against could be supported would be that there was a bare infringement of right without any proof of damages, the judgment for £50 appears to me not to be reconcilable with the idea of nominal damages. And the judgment of the Lord Ordinary, with which I concur, that the pursuers were entitled to recover substantial damages hardly appears to me adequately to represent the amount of damages which the learned Judge held to be proved. In short, the judgment of nominal damages results in a judgment for damages that are not nominal, and the judgment for substantial damages results in a judgment for damages which are hardly substantial. But I so far agree with the Lord Ordinary that, in arriving at the exact figure, it is extremely difficult without further materials to arrive with any confidence at a different sum to that which the Lord Ordinary has assessed. I have come to the conclusion, therefore, that I must treat the question as treated by the learned Judges below as being a question between substantial and nominal damages, and if the former then we must restore the judgment of the Lord Ordinary, even as to amount, though with some hesitation, for the reason I have indicated, as to whether the precise amount arrived at is that which a very minute examination of the evidence would altogether justify.

I therefore move your Lordships that the interlocutor appealed from be reversed, and that the judgment of the Lord Ordinary be restored; but inasmuch as the litigation has resulted in a restoration of the judgment arrived at by the Lord Ordinary, and as the appellants were those who first appealed against that judgment, I think there should be no costs beyond the costs originally incurred, that is to say, that the appellants should have the costs of the proceedings before the Lord Ordinary, but not further.

Lord Watson.—My Lords, the appellants' company sell through their agents, John Donald & Son, of Glasgow, horse-shoe nails made at their works in Sweden; and for the purposes of their manufacture they retain the exclusive use of two patents for improved machinery to which they have acquired right by assignment. Messrs Kollen, who are also nail manufacturers in Sweden, between February 1883 and March 1885 supplied to the respondents 6215 boxes, each containing 25 lbs. weight of horse-shoe nails produced by machinery which violated the appellants' patent rights; and of these 5752 boxes were sold by the respondents before the 20th of March 1885. On that date the appellants obtained a decree interdicting the respondents from selling or using any horse-shoe nails made in accordance with the patents. The respondents thereupon ceased to sell the nails in question.

The present action was brought by the appellants for damages in respect of injury to their trade occasioned by the competition which they encountered in the Scotch market from the nails illegally sold by the respondents. They allege that their average sales were thereby diminished, at least to the extent of the 5752 boxes actually sold by the respondents; that they were compelled to dispose of their own nails at lower prices than they would otherwise have obtained, and that notwithstanding the withdrawal of the interdicted nails from the market, their trade will not recover its former position, either as regards extent of sales or prices, for a considerable time. The respondents do not impeach the decree of interdict, which is now *res judicata;* but they maintain that this is a case of *damnum sine injuria,* and that the appellants can only recover nominal damages.

The Lord Ordinary (Kinnear), after a proof had been taken before him, assessed damages at £530. The appellants being dissatisfied with the sum awarded them, presented a reclaiming note, of which the respondents likewise availed themselves; the result being that the judges of the First Division unanimously altered the Lord Ordinary's interlocutor, and reduced the damages to £50.

It is hardly disputed that as a matter of fact the sale of the respondents' nails which were known as the "Shoe" brand, did interfere with the appellants' sale of their "Globe" nails, manufactured by their patent machinery. The goods were of much the same quality; and the respondents' own witnesses state that they were in the habit of purchasing whichever of the two nails was at the time the lowest priced. The evidence of Mr Lamb, the respondents' traveller, shews that their goods were in constant and direct competition with those of the appellants. On one occasion he had to discontinue his attempts to sell his "Shoe" brand, in consequence of a recent reduction in the price of the "Globe" nails; and he accordingly communicated with the respondents, and "got a reply to sell at the same prices as the 'Globe.'" It is also established that the appellants' sales, which in 1882 had reached an average of 1268 boxes per month, were reduced during their two years of competition with the "Shoe" nails to a monthly average little exceeding 1000 boxes, which were disposed of at lower prices than they had previously been able to obtain. These are facts which *prima facie* entitle the appellants to substantial and not merely to nominal damages. The grounds upon which the learned Judges of the First Division have held that only nominal damages are due appear to be these: that the Messrs Kollen in the manufacture of the "Shoe" brand nails used a very inconsiderable part of the appellants' patents, and that if they had not infringed at all they would still have produced nails of the same class, which would have competed as successfully with the appellants' goods as the nails which they illegally sold.

Lord Adam, who delivered the leading judgment, said,—"On the whole matter I have come to the conclusion that if the patent is used exactly as described in the letters-patent, no saving is effected, but the reverse, and that, in any view, the saving is so immaterial that I have no doubt the defenders, without its use, would still have manufactured their nails, and competed with the pursuers, just as they are doing now." The Lord President and Lord Mure concurred in the views expressed by Lord Adam. Lord Shand was of opinion that it had not been shewn that the adoption of parts of the appellants' patents was of material advantage to the respondents; and that had the interdict been granted at the date when that process was brought into Court, and the invasion of the patents then discontinued, the respondents would have been in the market "as competitors, all the same, with nails in all respects the same, but manufactured without the use of the parts of the patents already noticed."

Towards the close of his judgment Lord Adam expresses the opinion that the appellants were entitled to the profits derived from the illegal use of their patents; and cites a decision of the supreme Court of the United States, *Mowry* v. *Whitney*,[1] to the effect that the measure of profits recoverable is the saving in the cost of manufacture effected by such use; and it is on that footing, apparently, that his Lordship arrived at the estimate of £50. Lord Shand adopts the same principle, which is manifestly erroneous. It was held by this House in *Neilson* v. *Betts*[2] that a patentee cannot claim both profits and damages, but must choose between them; and the appellants have made their election by raising the present action.

When a patentee elects to claim the profits made by the unauthorised use of his machinery, it becomes material to ascertain how much of his invention was actually appropriated, in order to determine what proportion of the net profits realised by the infringer was attributable to its use. It would be unreasonable to give the patentee profits which were not earned by the use of his invention. But the case is altogether different when the patentee of machinery, who does not grant licences, claims damages from an infringing manufacturer who competes with him by selling the same class of goods in the same market. In that case the profit made by the infringer is a matter of no consequence. However large his gains, he is only liable in nominal damages so long as his illegal sales do not injure the trade of the patentee; and however great his loss he cannot escape from liability to make full compensation for the injury which his competition may have occasioned. Every sale of goods manufactured without licence by patent machinery is and must be treated as an illegal transaction in a question with the patentee; and its inherent illegality is not affected by the circumstance that the infringement consisted in using a small, and it may be, the least useful part of the invention. When it had been conclusively found that they infringed, it was no longer open to the respondents to impeach the utility of those parts of the appellants' patents which were copied in the Messrs Kollen's machines. If these parts are not commercially useful,—if, as Lord Adam holds, they effect no saving in the manufacture of nails, but the reverse,—it would necessarily follow, either that the patent was wholly void, or that there was no substantial infringement which could entitle the patentees to an interdict.

The object of inquiry, in a case like the present, is the quantum of injury done to the trade of the patentee by the illegal sales of the infringer. That must always be more or less matter of estimate, because it is impossible to ascertain, with arithmetical precision, what in the ordinary course of business would have been the amount of the patentees' sales and profits. When the product of patented machinery is a new and special article, which cannot be successfully imitated without its use, the process of estimation is comparatively simple; but that is not the case with horse-shoe nails. The appellants had many rivals in their trade, and it is conceded that, in estimating their damage, there must be taken into account all legitimate competition to which they would have been exposed if Kollen's nails had not been in the market. I am clearly of opinion that the respondents are not entitled to assail these patents, and cannot be heard to say that the invention, so far as appropriated by the Kollens, was of no advantage to their manufacture. But I am unable to go the full length contended for by the appellants, and to treat the case on the footing of leaving altogether out of view the fact that, if the respondents had not sold the "Shoe" brand, they would have been in the market, as they had been previously, selling other nails. That fact appears to me to be beyond dispute, and I think that to ignore it would be tantamount to giving the appellants not compensation merely, but profits which they would never have earned if the respondents had not infringed.

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[1] Dec. 1871, U. S. R. 14 Wallace, 620. [2] March 6, 1870, Law Rep. 5 H. L. 1.

Assuming that the respondents might possibly have produced nails of similar quality with the "Globe" brand, by means of machinery which did not infringe these patents, I do not think it is proved, or ought to be presumed in favour of infringers, that they would certainly have done so; and I have come to the conclusion that the sum of £530, fixed by the Lord Ordinary, fairly represents the damage sustained by the appellants. I should have been inclined to assess damages at a higher figure, had it not been for these considerations. The appellants' sales had, in the year 1882, risen to 1268 boxes per month; and yet the combined sales of both parties in 1883 and 1884, according to the most favourable estimate, did not exceed 1310 boxes monthly, notwithstanding the way in which these sales were pressed in the market, and the frequent reductions made in price. That circumstance, of itself, indicates the presence of other formidable competitors in the Scotch market, and leads me to infer that, even in the absence of competition by the respondents, the appellants' sales would not have exceeded the limit they had attained in 1882, and that their average could not have been maintained without a reduction of price. Again, it appears to me that the appellants have failed to establish that, after the respondents' illegal competition ceased, they continued to suffer from its effects. On the contrary, I think it is probable, if not proved, that after the date of the interdict they derived pecuniary benefit from the respondents' outlay and exertions in pushing the sale of their "Shoe" brand nails.

I am, accordingly, of opinion that the interlocutor of the First Division ought to be reversed, and that of the Lord Ordinary restored; and I agree that neither party ought to have costs after the date of the Lord Ordinary's judgment.

LORD MACNAGHTEN.—My Lords, the appellants' claim for damages comes under two heads—loss of sales and fall in prices.

The Lord Ordinary assessed the damages at £530. He arrived at that figure in this way. The total number of boxes sold by the respondents during the period of interference was 5752. From that number he struck off 700 as having been imported before the 27th of June 1883, the date on which the appellants acquired title to their patents, and he calculated that the appellants would have realised the sum of £530 as the amount of profit on the sale of the remaining

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5052 boxes, if they had sold those boxes themselves. There were two other elements which the Lord Ordinary took into consideration. On the one hand it was not certain that the appellants would have made the whole of those sales themselves. On the other the competition of the respondents might to some extent have lowered the selling price of the nails in the market. But in the result those considerations were allowed to balance each other.

On the reclaiming note the Judges of the First Division reduced the damages to £50. They entered into an elaborate inquiry as to the utility of those parts of the patents which the respondents were found to have infringed. They pronounced those parts to be only subsidiary and unimportant, and so they came to the conclusion that if the interdict had been granted at an earlier date, or if the respondents had been better advised they might have been in the market with nails in all respects the same, but manufactured without the use of those parts of the patents which they had no right to use. On this ground they held the first branch of the appellants' claim untenable.

As regards the claim in respect of reduction of price, the learned Judges did not reject it as being too remote, but they thought that it had not been proved that the competition of the respondents was really the cause of bringing down the price. They considered the reduction attributable in a great measure to the competition of other nail manufacturers. In the result they seem to have been of opinion that the appellants were only entitled to nominal damages, which, somewhat singularly, they assessed at the sum of £50, as being the measure of the advantage which the respondents gained by the infringement.

I am unable to agree with this view. The decision in the patent action and the minute of admission in the present case establish beyond question that in selling the " Shoe " brand nails the respondents infringed the appellants' rights. The sale of each and all of those nails was unlawful. It appears to be beside the mark to say that the respondents might have arrived at the same result by lawful means, and that, without infringing the appellants' rights, they might have produced a nail which would have proved an equally dangerous rival of the " Globe " nail.

The sole question is, what was the loss sustained by the appellants by reason of the unlawful sale of the respondents' nails? The loss must be the natural and direct consequence of the respondents' acts. In the first place, I think the claim for loss of profit by reason of the reduction of price must be rejected. I do not think that was the natural or direct result of the respondents' acts. The appellants seem to have had no difficulty in ascertaining where the competing nails were made, and in coming to the conclusion that they were produced by machinery which infringed their patent rights. The appellants must be taken to have believed in their case. If they believed that the respondents were infringing their rights, and relied on obtaining redress in due course of law, it appears to me that it was not a reasonable course on their part to reduce the price so as to injure their own trade. On establishing their rights they would be entitled either to the profits which the respondents had made, or to the damages which they could prove they had sustained. In lowering their prices they seem to me to have been prompted by a desire to provide for the contingency of their failing in their action, and by an anxiety to drive their rivals from the field, whether they were right or wrong.

There remains the other head of damage—loss of sales by reason of the competition of the respondents.

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I think the appellants are entitled to take into account the total quantity of nails sold by the respondents and that they are not limited, as the Lord Ordinary held they were, to the period commencing on the 27th of June 1883. Although that was the date on which the appellants acquired their title to the patents, they succeeded to the rights and to the property of their predecessors in title.

Then comes the question to what extent did the wrongful acts of the respondents operate to prevent sales by the appellants? I think it would be going too far to say that if the respondents had not been in the field the appellants would have sold an additional quantity equal to the amount sold by the respondents. But considering that the respondents seem to have worked the ground occupied by the appellants, and having regard to the progressive increase in sales during the previous years, and to the fact that the sales of the appellants and of the respondents taken together did not largely exceed the appellants' sales in 1882, I think it is a fair inference that if the appellants had been left undisturbed the natural increase of their business would have come near the aggregate of the quantity sold by the appellants and respondents together.

If it were assumed that but for the interference of the respondents the appellants would have sold 5752 boxes in addition to what they actually sold, their loss, taking the actual prices, would be £611. I think it would be reasonable to strike off from that amount a moderate percentage, as representing sales due to increased activity produced by the rivalry of two competitors. This would reduce the damages very much to the amount found by the Lord Ordinary, though he has arrived at the result in a somewhat different way.

The amount of damages is not a matter of exact calculation, and your Lordships have not got before you all the materials which would be required to arrive at the most accurate estimate that could be formed, nor indeed all the materials that were before the Lord Ordinary. But it appears to me that substantial justice will be done if your Lordships confirm the amount that the Lord Ordinary has awarded. It would be lamentable to condemn the parties to further litigation.

As regards costs, it seems to me that the respondents ought to pay the costs of the trial before the Lord Ordinary, but that there ought to be no costs of the subsequent proceedings.

THE interlocutor appealed from reversed, and the judgment of the Lord Ordinary restored: Respondents to pay the costs of the trial before the Lord Ordinary; but neither party to have their costs in the subsequent proceedings.

SLADE & MUNK—GILL & PRINGLE, W.S.—W. A. LOCH—MACONOCHIE & HARE, W.S.

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April 26, 1888.
Russell v. Town and County Bank.

JAMES RUSSELL, Surveyor of Taxes, Appellant.—*Att.-Gen. Sir R. Webster —Lord Adv. Macdonald—Sol.-Gen. Robertson— W. J. Mure.*

TOWN AND COUNTY BANK, Respondents.—*Sir Horace Davey, Q.C.— Murray.*

Revenue—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *Schedule D, Cases I. and II., Rule first—Bank premises occupied by manager.*—A bank was charged with income-tax under schedule A of the Income-Tax Act, 1842, on certain premises belonging to it in which it carried on its business, and which were also to some extent occupied as dwelling-houses by the manager and agents, that accommodation being given by the bank to them as part of their emoluments.

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In assessing the bank for income-tax under schedule D, the Income-Tax Commissioners refused to allow deduction from the gross profits of the bank of the annual value of these premises, in so far as they were occupied as dwelling-houses. *Held* (*aff.* judgment of First Division) that the bank was entitled to deduct the annual value of the whole premises in question.

Observations (*per* Lord Herschell) on the question whether the officers of the bank occupying bank premises as dwelling-houses are liable for income-tax for the premises so occupied by them.

Ld. Herschell.
Ld. Fitzgerald.
Lord Macnaghten.

(In the Court of Session 4th March 1887, 14 R. 528.)
The Surveyor of Taxes appealed.

Lord Herschell.—My Lords, this is an appeal from a judgment of the First Division of the Court of Session sitting as the Court of Exchequer in Scotland, reversing the decision of the Income-Tax Commissioners with reference to the liability of the respondents to pay a certain amount of income-tax claimed. The facts are very shortly stated. The respondents are an incorporated company carrying on the business of banking, and they own certain premises which they use for their business purposes, and those premises (to quote the language of the case) "contain certain accommodation occupied as a dwelling-house by the manager or resident agent of the bank." The respondents claim to deduct the entire annual value of the bank premises, including the portion so occupied by the manager or resident agent. The Crown, on the other hand, contend that the portion of the premises occupied for that purpose ought to be dealt with separately from what they term the bank premises proper, and that no deduction ought to be allowed in respect of the annual value of that portion of the premises belonging to the respondents.

The question turns upon the construction to be put upon the 100th section of the Income-Tax Act of 5 and 6 Vict. c. 35. The case is a case under schedule D, and to be dealt with according to the rules provided in relation to that schedule. It is asserted on behalf of the appellant that the rules prohibit all deductions except those which are expressly authorised by the Act, and that this deduction not being a deduction allowed, the respondents are not entitled to insist upon it.

The duty is to be charged upon "a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern"; and it appears to me that that language implies that for the purpose of arriving at the balance of profits all that expenditure which is necessary for the purpose of earning the receipts must be deducted, otherwise you do not arrive at the balance of profits,—indeed, you do not ascertain, and cannot ascertain, whether there is such a thing as profit or not. The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts. That seems to me to be the meaning of the word "profits" in relation to any trade or business. Unless and until you have ascertained that there is such a balance, nothing exists to which the name "profits" can properly be applied.

It is quite true that the section provides that "the duty shall be assessed, charged and paid without other deduction than is hereinafter allowed"; and I will assume, for the purposes of this case, that that does prohibit (although the words certainly appear to be applicable to the duty) the making of any deductions from the balance except those allowed by the subsequent provisions of the Act. It is to be observed that, properly speaking, there is nothing to which those words are applicable. The provisions of the Act do not expressly allow any deductions. What they do is to prohibit certain deductions with certain exceptions, and therefore it may perhaps, in a sense, be said that having prohibited certain deductions with certain exceptions, the excepted things are allowed.

Now it is not disputed that the annual value of premises exclusively used for business purposes is properly to be deducted in arriving at the balance of profits and gains. I am of course speaking for the moment of premises which are not used in any way as a place of dwelling, but are exclusively business premises. But there may be a question where the right to make that deduction is to be found. I am myself disposed to think that it is allowed, because it is an essential element to be taken into account in ascertaining the amount of the balance of profits. If not, it can only be included by a very broad extension of the terms actually used, as being a disbursement or expense which is money wholly and exclusively laid out or expended for the purposes of the trade. It is quite true that, strictly speaking, the annual value, where the premises are owned and not rented, is not money laid out or expended for the purposes of the trade, but it is admitted, and must, I think, have been admitted, that in either the one way or the other that deduction is to be made, because inasmuch as it is clear that even in the case of a dwelling-house, a part of which is used for purposes wholly unconnected with the trade, the annual value of the portion which is used for the purposes of the trade is to be deducted, it is evident that it can never be contended that in the case of premises used not for the purpose of a dwelling at all but exclusively for trade purposes, the annual value is not to be deducted. The annual value is therefore to be deducted somehow. It is to be deducted either by taking it as an element before arriving at the balance of profits and gains, or as included in a very broad construction of the provision relating to disbursements and expenses.

If therefore the whole of these bank premises had been used for the business purposes of the bank without anyone dwelling in them, it is quite clear that the entire annual value would have fallen to be deducted. But it is said that inasmuch as the manager of the bank dwells in a part of those premises that deduction is not to be made. Now, apart from the provision with regard to a dwelling-house, to which I will advert in a moment, I cannot see any foundation for such a contention. The portion of the bank in which the manager resides is as much used for the purposes of the business of the bank, so far as appears upon the facts stated in this case, as if it were used in any other way. He resides there for the purposes of the bank—the bank receive nothing for his residing there. The bank are in precisely the same position as if that portion of their premises were used in any other way, in the strictest sense, for the purposes of the bank and the business of the bank. Therefore I do not see any reason why, if the annual value of the premises belonging to them used for the purposes of their business has to be deducted, any deduction should be made from that amount on account of the fact that the manager of the bank, for the purposes of the business or as part of his emolument (it seems to me not to matter which), occupies a portion of the bank premises.

But then it is said that the case of dwelling-houses is specially dealt with, and that no deduction is to be made in the case of dwelling-houses except in the manner specified. Now, my Lords, it is to be observed that that provision follows the general provision to which I have already alluded, and I think it would

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be extremely difficult to contend (though the learned counsel who appeared for the appellant hesitated to admit this) that if the bank paid as part of his emoluments the rent of a house in which their manager lived that would not be strictly speaking a disbursement or expense wholly and exclusively laid out or expended for the purpose of their business. Well, but if so, it is impossible to contend, or very difficult at least to contend, that an expense of that sort which comes within those terms, and which under those terms might be deducted, is rendered illegitimate as a matter of deduction by the words which follow. Now the words immediately following are—"nor for any disbursements or expenses of maintenance of the parties, their families, or establishments," which, of course, are not proper deductions in ascertaining the balance of profits of a trade or calling. Then follow the words, "nor for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern." I think that that manifestly is intended to apply to the case where a dwelling-house is occupied or rented by the person assessed in part for business purposes, and in part for purposes which are other than business purposes. In that case the Legislature has provided that a portion of the rent to be determined by the commissioners, and that portion alone, is to be deducted from the profits of the business. That this is what is being dealt with seems to me to be clear from the clause which follows: "nor for any sum expended in any other domestic or private purposes distinct from the purposes of such trade manufacture," &c. That shews that what the Legislature were dealing with at that time and intended to refer to were disbursements for the expense of maintenance, or the expense of residence, or of any other domestic or private purpose; and if that be the true view it would be wholly inapplicable to expenditure by a trader upon house rent for the purpose of housing his servants where such accommodation was necessary or incidental to the carrying on of his business.

It is contended on behalf of the appellant that the whole of this building is a dwelling-house. My Lords, I cannot agree in that conclusion. I do not think that the word "dwelling-house" is here used in any such sense, and that a bank or a manufactory or a warehouse becomes a dwelling-house because some servant of the trader resides in that building for the purposes of the trade.

It is not necessary to decide whether the bank manager would be liable to income-tax in respect of the value of his residence as part of the emoluments of his employment. I may say, however, that it occurs to me that the liability, if it exists, is not under schedule E, but under schedule D, case 2, which appears to be the one applicable to such an employment as that of a bank manager; and under that schedule the duty is to be computed upon "the full amount of the balance of the profits, gains, and emoluments of such profession."

A great part of the argument for the Crown has turned upon the suggestion that if the bank are allowed to make this deduction no claim can be made in respect of the enjoyment of this property by the bank manager. It does not follow necessarily that the Crown must be entitled to make any such charge. If it is not to be regarded as an emolument of the bank manager, but as a burden laid upon him by the necessities of his employment, no doubt it may be that he is not liable. If, on the other hand, it is to be regarded as an emolument the statute seems in express terms to make him liable. Of course it is not necessary in the present case nor would it be proper in his absence to express any definite opinion as to whether he would be so liable or not, but it is sufficient, I think, to say that the deduction which is proposed to be made appears to be one which is essential to arriving justly and truly at the balance of profits and gains of this business, and that therefore the judgment of the Court below ought to be affirmed.

Lord Fitzgerald.—I entirely concur with what has fallen from my noble and learned friend, and I think that the judgment should be affirmed. There is always considerable difficulty in putting a clear construction on the provisions either of the Act of 1842 or of the Act of 1853. But I think we have a clear state of facts here (save in one particular, to which I shall advert presently) which enables us to come to a just conclusion.

We find that a certain portion of the bank premises is "occupied as a dwelling-house by the manager or resident agent of the bank, as the case may be. The said manager and agent receive said accommodation as part of their emolument in the service of the bank, but the annual value of this accommodation is not assessed to income-tax otherwise than under schedule A." Then it is stated by the bank "that these dwelling-houses form the official residences of the agents, and are necessary for the proper carrying on of the business of the bank; that owing to the nature of the bank's business it is essential that a responsible official should reside on the bank premises, and that thus the whole premises belonging to and occupied by the bank or its officials or agents are used for the purposes of the bank's business. There is no necessity and no possibility for the bank as such having a dwelling-house merely for occupation. The whole premises are, for the purposes of the bank, business premises."

Now, although that is only a contention put forward, yet it is a contention put forward without any controversy as to the facts, but I venture to say that I am not satisfied as to one of the propositions. All through the statement these are called "dwelling-houses." They are in fact a portion of the bank premises occupied, for the purposes of the bank's business, by a bank manager or a bank agent. With all respect I should say that it does not follow that they are dwelling-houses at all, or that the occupation of certain rooms in the bank by the bank manager for bank purposes, which occupation is necessary for the protection of the institution and the carrying on of its business, converts that part of the bank premises into a dwelling-house, though it may make them for certain purposes the dwelling of the manager or agent.

However, passing from that, the first thing which we have to ascertain under this schedule is to estimate the balance of the profits. Now, what is the balance of the profits? "Profits" I read on authority to be the whole of the incomings of a concern after deducting the whole of the expenses of earning them—that is, what is gained by the trade. The whole expenses of earning them must mean, according to the schedule, the whole expenses incurred for the purposes of the business, and nothing else. But I come, upon the statement of facts, to the conclusion that if these premises were either actually used as the counting-house, as other parts of the bank were used, or if the residence of the bank manager or agent upon the premises was necessary for protection purposes and for the purposes of carrying on the business of the bank, the whole premises were used for the purposes of the business of the bank, and the annual value of them forms a proper deduction in estimating the balance of profits, which is the first thing to be done. That balance of profits is to be ascertained after

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deducting the whole of the necessary expenses, save those which by negativ provisions are excepted in the statute.

Without going further, it appears to me to be perfectly immaterial whethe this accommodation is to be regarded as a part of the emolument of the mar ager of the bank for the performance of the duties imposed upon him or as part of the premises used solely and wholly for bank purposes. Upon th ground which I have stated it seems to me clear that this deduction is a deduc tion which the bank are entitled to make, and that, therefore, they have alread paid the whole amount of income-tax for which they are liable.

Lord Macnaghten.—I quite agree; I think that the deduction was properl and necessarily made in estimating the profits and gains of the bank which were chargeable with duty, and that there is nothing in the first rule applicable to the first and second cases under Schedule D prohibiting the deduction. I do not think that a house in which a bank or limited company carries on business is a dwelling-house within the meaning of that rule. It is not, and could not be, used by the bank for any purpose distinct from their business. I think the expression "dwelling-house" in that rule means a house in which the person liable to pay income-tax dwells in the ordinary course of the word.

Judgment appealed from affirmed, and appeal dismissed, with costs.

W. H. Melvill, Solicitor for England of Board of Inland Revenue—
David Crole, Solicitor for Scotland of Board of Inland Revenue—
Grahames, Currey, & Spens—J. & F. Anderson, W.S.

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May 11, 1888.
Lord Blantyre v. Water-Works Commissioners of Dumbarton.

The Right Honourable Charles Lord Blantyre, (Pursuer) Appellant.
—*Littler, Q.C.—Dundas.*
Water-Works Commissioners of Dumbarton (Defenders) Respondents.
—*Sol.-Gen. Robertson—W. C. Smith.*

Property—River—Servitude—Water rights—Arbiter—Award.—B., who was proprietor of lands surrounding Loch H., and on both sides of Loch H. Burn for some distance after it left the loch, in 1854 disponed to D., an inferior heritor, along with two mills on Loch H. Burn, his "whole rights of water and water-power, and other rights connected with the mills hereby disponed, including all right" he had "to dam up and draw water from Loch H., or to form embankments or breastworks at said loch," but so that the water of the loch should not be raised more than three feet above its then existing level. At the same time he expressly reserved his rights in the foresaid loch and burn, excepting his rights therein connected with the mills and "other rights above conveyed or granted," and particularly his right to use the water-power for driving agricultural machinery.

In 1883 the Water-works Commissioners of the burgh of Dumbarton obtained compulsory powers to take the water of Loch H. for the supply of the inhabitants, but their special Act (sec. 9) provided that they must discharge into Loch H. Burn a regular supply of 320,000 gallons a-day, which should "be deemed to be compensation to mill-owners and other persons interested in the waters flowing down the stream called Loch H. Burn for the water intercepted and appropriated for the purposes of this Act"; and also (sec. 10) that "nothing in this Act contained shall be held to prejudice or affect the rights (if any) of B. in the loch known as Loch H., or to prevent him from claiming" from the Commissioners compensation for any such rights which should be injuriously affected by their operations. The Commissioners acquired by private agreement all the rights of D. in Loch H. and Loch H. Burn, and proceeded to take water from the burn at a point close to the loch to supply the town of Dumbarton.

B. claimed compensation, not only for land taken and wayleave, but for rights and interests in the water of the loch and burn injuriously affected. The Commissioners maintained that as the water had been taken from the burn, B.'s claim was excluded by the statutory compensation given under sec. 9.

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Held that the grant of servitude to D. was limited to the use of water for the mills, and that the Water-works Commissioners were bound to compensate B. for the water taken from the loch for the supply of the town of Dumbarton.

(In the Court of Session, March 3, 1886, 13 R. 636.)
Lord Blantyre appealed.

Ld. Chancellor (Halsbury).
Ld. Selborne.
Lord Watson.
Ld. Fitzgerald.

LORD CHANCELLOR.—In this case several difficulties have occurred in the construction of the award on which this action is brought, and it becomes necessary to examine, I think, with some minuteness, not only the rights to which in fact Lord Blantyre is entitled, but, to some extent, the arguments by which some of those rights have been sought to be satisfied. The plain meaning of the award has been perhaps somewhat obscured by the effort on the part of the arbitrator to exclude such constructions of the instrument as might lead to further litigation and leave in doubt that in respect of which he had intended to award compensation.

The position of the parties was this: Lord Blantyre had parted with certain rights in respect of the water in his loch, which, with respect to certain tenements on the burn, he had impressed with a servitude which could not but be of importance to those tenements as long as they were continued and in operation for the purpose for which that servitude was granted, and this servitude (to use the technical language) was a sufficient supply of water to keep certain mills on the stream in operation as mills. The Dumbarton Water-works Company had obtained an Act of Parliament which would have enabled them, had they thought proper, to appropriate both the banks of the loch and all necessary approaches to and interest in the loch for the purpose of supplying the town of Dumbarton with water. They appear to have obtained from those who had been the grantees of the servitude to which I have referred an assignment of all the rights of those grantees, and in some way or another it appears to have been imagined that if an adit could be màde to that portion of the burn or that end of the loch by buying a small piece of land, and then putting certain pipes in that small piece of land so as to adjoin the burn where it issues from the loch, they might by that expedient, and in right of the terms of the grant to the Dunns, who were the original grantees of the servitudes, conduct the water to Dumbarton, and so supply the inhabitants of Dumbarton without any further payment to the proprietor of the loch than that which was involved in the purchase of this small piece of land, and whatever adits or pipes, and so forth, were necessary to connect the burn with the system of pipes which was to conduct the water to Dumbarton.

That appears to me to have been founded on a complete error. The servitude granted to the Dunns was one which could only be available for the purpose for which it was granted. The assignees of that servitude were not entitled to divert a single ounce of water from the loch except for the purpose of the servitude itself, and they have taken the rights, whatever they were, from Dunn by assignment without taking the mills. They appear to me to have severed the servient tenement altogether from that which was the dominant tenement in respect of this servitude.

But another expedient appears to have occurred to the minds of those who were endeavouring to obtain the advantage of Lord Blantyre's loch without paying for it, and that was, that inasmuch as by the Act of Parliament the

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riparian rights of all the proprietors along the burn were to be satisfied by wha the Legislature considered to be, and what probably was, an equivalent amoun of water discharged down the burn so as to satisfy all the riparian rights dow below it, if the water was abstracted from the loch not at any new entrance int the loch but at some point of departure which should be within that portion o the burn which was already, as it were, equivalently supplied with water by this statutable quantity in lieu of any money compensation, then the process—the circuitous path by which it was sought to arrive at the conclusion—was, inasmuch as we do not take it from the loch, and inasmuch as the burn now is sufficiently supplied with water by the statutable amount of equivalent *going* down it, the moment we do that you become simply a riparian proprietor, you have no right to money compensation at all, and the consequence is that we can supply the whole town of Dumbarton without any money compensation to you because you are simply a riparian proprietor, and the rights of the riparian *proprietors* are extinguished by the quantity of water that is sent down the burn.

My Lords, it appears to me that that was an entire error, and I do not *think* there will be any difficulty at all, or doubt in the mind of any one of your Lordships, in coming to the conclusion that neither of the arguments to which I *have* referred could in the slightest degree impair Lord Blantyre's rights in the loch as proprietor of the loch and of the water therein contained. I can well *understand* that these arguments were pressed upon the arbitrator, and that the arbitrator was sought to be influenced by the considerations to which I have referred.

I have thought it right to mention these arguments, unfounded as they appear to me to be, because I think that in these arguments will be found the source of the only difficulty which I have had in the course of this case, and that is as to the language of the award itself, whereby it would appear that the arbitrator has placed something in the nature of a money-counted value upon the construction of the banks and the interest in the banks which Lord Blantyre possesses. My Lords, I cannot help saying that if that were the true construction of the award, and if I could come to the conclusion that the arbitrator had intended to value this in the sum awarded, and had given money-counted value to it as a part of the award, I should have very great difficulty in saying that his award could be sustained. But I think that upon the true construction of his award, and looking at the language in which it is couched, what the arbitrator meant was this—I value the right which Lord Blantyre has in this water as the proprietor of this loch. I value that to the Dumbarton Company, who are taking this water, at the sum of £3000, and that is the sum which I mean to award. And if he had left his award there without any further exposition I believe that your Lordships need not have been troubled with the argument to which we have listened, because it would have been too plain, I think, that that was a perfectly good award, and that Lord Blantyre's rights upon the question which is now before your Lordships would be clearly established upon the facts which are proved before us. But I have no doubt that for the purpose of avoiding future litigation, and for the purpose of explaining what considerations and what sources of calculation had entered into his mind, the arbitrator has used the difficult phrase which has given rise to all this litigation, namely, that in which he seems to value the banks as money-counted. Now, I think that upon a fair and reasonable construction of this award the award is reconcileable with the view which I have suggested, and that all the arbitrator by the use of that language intended to convey was this—It must not be supposed that after I have valued this right of taking water at the sum of £3000 it will be competent to Lord Blantyre hereafter to come and say to the company, "Oh, yes, you have got the water, but you must also pay me for the use of my banks." The arbitrator, I think, intended to say—What I mean to award is the gross sum to which Lord Blantyre shall be entitled in respect of his rights for the water which you, the company, are taking away, and in doing this I have come to the conclusion that there is a usefulness in this partly natural and partly artificial bank, which has been raised to keep in the water which I am thus valuing, as between vendor and vendee,—as between Lord Blantyre and the Dumbarton Company,—and therefore let it not be supposed that I have not disposed of that question by the award at which I have arrived.

My Lords, if that is the true construction of the award I must say for myself that I think it is right. The grant is what it would be if the water were not taken under the powers of the Act; it is a grant of water out of his loch which Lord Blantyre makes, and he certainly must not thereafter do anything wilfully which will defeat the grant which he has made, and therefore the banks ought not to be made themselves the subject of a separate arrangement. The arbitrator says to him—I have taken into consideration in my award the fact that this is partly an artificial loch which belongs to you, and this is one of the modes by which I have arrived at my gross sum of £3000, and therefore let it not be supposed that after that I have left uncovered any demand which you, Lord Blantyre, may possess, or may think that you possess, in respect of the banks which keep in this water as in a natural basin.

Under these circumstances it appears to me that the award can be supported upon that construction, and as it is manifestly just that Lord Blantyre should be properly compensated in respect of the water which this water company has taken, not strictly under the powers of its Act at all, but by the expedient to which I have referred, I move your Lordships that the interlocutors appealed from be reversed, that the cause be remitted to the Court of Session, and that the respondents do pay to the appellant his costs both here and below.

Earl of Selborne.—Looking broadly at the justice of this case, I cannot but feel satisfaction with the result at which the noble and learned Lord upon the woolsack has arrived, and which I have reason to believe will be embodied in your Lordships' judgment. That Lord Blantyre ought to be compensated for that which is taken from him I think nobody who has the least regard to law or justice can for a moment doubt, nor do I think that any reasonable person would quarrel with the sum of £3000 as at all an excessive estimate of the compensation which should be made to him for the water of this loch.

When I get out of that broad view of the case I must own that there are some difficulties which still remain upon my mind, though I am not prepared to give my voice against the judgment which has been proposed by your Lordships. One difficulty is the very imperfect way in which the various points of this case have been presented in the judgments under appeal. The majority of the Court evidently proceeded upon the second plea in law for the defenders, which was to this effect, that "the defenders should be assoilzied from the first conclusion of the summons, in respect (*a*) the pursuer sold to Dunn his mills and whole rights in the loch and burn now claimed upon, with the exception of the right of using the water in the burn as defined in the feu-disposition of 1854; (*b*) the said reserved right was compensated and discharged by the 9th section of

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the statute." If that was a correct view of the titles under the sale, as it i called, to Mr Dunn, there can be no doubt that the decision of the Court belo was correct, and as I understand it, the majority of the Court did proceed upo that view of the case, and with regard to those who did not so clearly procee upon that view of the case I think they were embarrassed in some measure b the language and form of the award, which undoubtedly present difficulties The consequence is, that upon the points which appear to your Lordships to b the real points calling for decision after the present argument, we do not get that amount of assistance which doubtless we otherwise should have had from the opinions of those learned Judges who did not proceed upon the transaction with Dunn.

With regard to this point raised by the second plea in law, which the majority of the learned Judges of the Court below thought good, I believe there is not the slightest shade of difference of opinion among your Lordships. To me, without going into any question as to what it may be which the Dumbarton Water Company have obtained from Dunn, it is perfectly clear that Dunn never had any rights whatever which can interfere with the claim of Lord Blantyre to compensation in this case. The dealing with Dunn was simply this—He had, for the purposes of certain mills, large rights given to him over the water in the loch which supplied the burn, and over the water in the burn, but for those purposes, and those purposes only; and that being the construction which I should put upon the words in the grant to Dunn taken by themselves, they being qualified by these words, "connected with the mills hereby disponed," it is to my mind made absolutely clear and unequivocal by the terms of the exception in Lord Blantyre's favour contained in the grant to Dunn, which are—"Reserving always to me and my foresaids all our rights in the foresaid lochs and burn except our rights therein connected with the mills." The question is, whether the right with which we are dealing now is a right "connected with the mills"? If it is, then it is affected by the sale, or whatever it ought to be called, to Dunn; but if it is not, it is not in the least degree whatever affected by it, and therefore it may be put aside as the most irrelevant thing in the world. Is it so? What is the subject of the compensation sought? I turn to Lord Blantyre's claim in the arbitration. Lord Blantyre stated "that these lands included the greater part of the Loch Humphrey and a portion of Loch Fyn, the waters of which flowed partly through his property into Loch Humphrey, and that the Loch Humphrey Burn, or Duntocher Burn, which was the natural outlet of the waters of Loch Humphrey, flowed through his property for a distance of nearly two miles; that the water of the loch and burn was used for agricultural purposes, and was capable of being used for other more important purposes in its course through his property, and otherwise; that by the acquisition of the lands and way-leaves the Dumbarton Water-works Commissioners would be in a position to abstract water from Loch Humphrey and from the burn flowing therefrom, with the result that his rights and interests would be most injuriously affected." "To abstract water" for what purpose? For the purpose of the mill, for which purpose it was given to Dunn? No; for the purpose of carrying it to supply water to the town of Dumbarton. Therefore he alleges rights which are manifestly rights excepted from the grant to Dunn, and he alleges that they would be injuriously affected by an operation of the Water-works Commissioners which Dunn could not possibly have performed under the grant to him. It appears to me that we must and ought to approach this case on the principle that the dealing with Dunn, and the subsequent acquisition of Dunn's title by the Commissioners, is purely and absolutely irrelevant.

That being so, the next point, which certainly appears to have been a matter of some difficulty to the learned Lord Justice-Clerk, if I may judge from the terms in which he expresses himself in his judgment, was also in the first instance, and until the argument had proceeded to a certain point, a considerable difficulty to myself, namely, the peculiar phraseology and language of this award, which appeared at first sight to give the £3000 if Lord Blantyre had any interest in any part of the waters of the lochs or the burns, and inasmuch as some interest which he undoubtedly might have had in the waters of the burns was expressly compensated under the Act of Parliament so as not to be the subject of any tenable claim for further compensation, it did at first sight appear to me that the terms of the award would give him compensation in a case which might fall under the 9th section of the Act. But further argument, especially the argument for the respondents, convinced me that that was not a correct interpretation of the terms of the award in that part of it. The arbitrator did not take upon himself to decide the questions of law in the case which depended upon the Act of Parliament, and upon the facts, which facts were undoubtedly before him and are also before your Lordships. He reserved those questions of law, but upon a double hypothesis he found £3000 to be due as compensation. The hypothesis consisted, as was pointed out in the argument, of these two branches; first, that Lord Blantyre was entitled to some interest in the lochs and burns, or one or more of them, which, if it had stood alone, would have raised the difficulty to which I have referred, but secondly, that he was also "entitled notwithstanding" (I may paraphrase that as "having regard to") "the provisions contained in sections 9 and 10 of the Water-works Act, to compensation in respect of such right or interest." Turning the rather long and involved language of the hypothesis as stated in the award into a shorter and simpler form, it comes to this—If he is entitled to any right or interest in either the lochs or the burns, or any of them, uncompensated by section 9 of the Act of Parliament, then I find the value of that interest, or the compensation which he is to receive in respect of the interference with it, to be £3000. Well now, having regard to the facts, that seems to me to be a hypothesis which really in the end involves no difficulty at all. The 9th section expressly compensates him for all his interest in what I may call the preservation of the water-course of the burns. If he had had any other interest in the burns not so compensated, it was quite right that the arbitrator should take that into account in the compensation which he awarded; and looking to the manner in which the respondents had thought fit to execute their work by taking the water, not directly out of the loch before it entered the burn, but just below the point of discharge of the water of the lochs into the burn, it is manifest to me that both in Lord Blantyre's claim and in this award the "burn" is properly put in to exclude any quibble arising out of the way in which the Water-works Company were actually taking the water, because the compensation given by section 9 of the Act of Parliament for the injury which otherwise might have arisen to those entitled to have the benefit of the burns in their regular and ordinary and natural course plainly does not apply to any abstraction of water from the burns any more than from the lochs for other purposes, as to which, so long as it had nothing to do with the mills, Lord Blantyre's right remained. That being so, the fact is that the water is taken from the lochs, and that Lord Blantyre's interest in the loch is unquestionable. At one time there seemed to be a doubt whether that wa admitted upon the record, but that doubt ultimately disappeared, and it was no really disputed that it was to be taken as his established right and title. Tha interest being unquestionable, it is equally certain that the Water-works Com missioners are taking the waters of the lochs, although they take them at a poin just below the discharge of those waters into the burn, and they take them no for purposes in any way connected with the water-course of the burn, but for wholly different purposes, the result being in my judgment exactly the same as if they had taken the water from any other point of the loch. Therefore I do not find any difficulty in construing the hypothesis. I think it is quite clear that Lord Blantyre has established his interest, and that it is not compensated under section 9 or section 10 of the Act of Parliament.

Then there remains the point about the £3000 and the way in which it seems to be divided upon the face of the award. Now there, I must confess, I have felt more difficulty than upon any other part of the case, and I do not pretend to say that that difficulty is entirely removed. It does seem to me that according to the natural construction of the award the arbitrator has in the first instance found the sum of £3000 as the compensation to be paid in respect of these several matters, first, "in respect of the right or interest to be acquired from Lord Blantyre in the foresaid waters," about which, if he had stopped there, I should have felt no doubt or difficulty whatever; but he goes on to say "and the embankments at said Lochs Humphrey and Fyn," so that he mentions the embankments as a distinct subject in which some right or interest *is to* be acquired by the Commissioners, "and the right to intercept and to appropriate the said waters," which of course would follow the waters themselves—no question arises upon that, "and for the damage to be sustained by him by or in consequence of the work of the Commissioners."

Now, in order to see whether I am justified in waiving my difficulty, or rather in acquiescing in the construction proposed by the noble and learned Lord of the whole passage, the first question which I ask myself is this—Would the award have been bad if the arbitrator had stopped there without saying anything about the £1650 apart from the rest; would it have been bad because he had mentioned some right or interest to be acquired from Lord Blantyre *in* the embankments at Lochs Humphrey and Fyn? I confess that it would have been an assistance to me to have heard more argument upon that point than was offered on either side of the bar, but the best judgment which I have been able to form in the absence of that argument is that it would be difficult to say that the Commissioners acquired no right or interest in respect of the embankments. Under the Act of Parliament they had a right to take the waters. Under this award they would have paid for what they did in the exercise of that right. The waters are maintained in their place, and made capable of passing into the conduits of the Water-works Company by reason of their being impounded by certain embankments, and if those embankments were taken away I suppose that the means of carrying the water to Dumbarton might be either entirely lost or seriously impaired. Therefore it seems to be necessarily incident to the right acquired as against Lord Blantyre of taking the waters by paying for them, first of all that whatever Lord Blantyre might before have been able actively to do in the alteration or destruction of these embankments, he can no longer do if it be in derogation of

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the rights to the water which have been acquired and paid for; and secondly, that even if Lord Blantyre is under no obligation at his own expense to maintain and keep in repair the embankments (as to which we have heard no argument one way or the other), yet at least the Water-works Commissioners, if it were necessary, would, as incidental to their right to have the waters, have a right to do what was needful to keep them in their place by maintaining these artificial embankments on which that depends. So that I could not possibly have held that the mere fact of the embankments being mentioned in that way, if nothing had been said about the £1650, vitiated the award.

My difficulty arises out of the words in which the arbitrator has separated the £1650 from the rest of the £3000, "including in the said sum of £3000 the sum of £1650 as the estimated price or value of the embankments made at Loch Humphrey and Loch Fyn." Now, at first sight I confess that looks very much like a statement by the arbitrator that he would not have given as much as £3000, but that his award would have been less by £1650, if he had not thought it right to give to Lord Blantyre the price or value of the embankments in the same way as if the embankments had been actually and bodily taken under the Act of Parliament. Of course he means the price or value to the Water-works Company. That is evidently the proper interpretation—not the price at which they were originally constructed. Whether it was so or not is not the question; it is not so upon the face of the award. Now, I do not think that if that were the construction I could support the award in that respect. It appears to me that, taking the incidental right to have the embankments in some way or other upheld, or at least not interfered with by Lord Blantyre, taking that as a separate item, it would not have been right for the arbitrator to value that even if he had given a sum less important than £1650. But your Lordships think, as I understand, that the arbitrator has merely intended by those words to signify that in his giving the £3000 for that which was previously mentioned he had taken this into account, so that no separate question is at any time to be raised as to those incidental rights in respect of the embankments which the Water-works Commissioners might acquire, and that he has treated the water as enhanced in its value by reason of the manner in which it is retained by the embankments, and by reason of the rights in respect of the embankments which the Water-works Commissioners would acquire. Your Lordships, I believe, think that that is on the whole the right construction to be placed upon the award; and although I feel, I confess, some difficulty upon the words "estimated price or value," yet I am not inclined to press that difficulty against your Lordships' opinion, and I am the less inclined to do so for this reason, which I think in this particular point of view is of importance. Lord Blantyre has made no separate claim in respect of the embankments; his claim manifestly relates to the interference with his water rights. If, as an element in computing the value of the water rights so interfered with, the arbitrator took into account the fact that the water must still be maintained by means of these embankments, and that that was a thing to be considered as between Lord Blantyre and the Commissioners, it would surely be a very hard thing to say that it is to be imputed to the award that it has introduced a new subject of claim which Lord Blantyre himself never made, and that for the purpose of vitiating a finding which is very reasonable in its amount, and which I think substantially just.

Under these circumstances, though I do not pretend to have my mind free

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from all difficulty as to the construction of these words in the award, I am not prepared to give my voice against the judgment which has been proposed by my noble and learned friend on the woolsack.

LORD WATSON.—The appellant is proprietor of the lands and barony of Kilpatrick in the county of Dumbarton, which include the greater part of a natural basin of water known as Loch Humphrey, and also an inconsiderable part of Loch Fyn, a small sheet of water which is one of the feeders of the larger loch. The outlet of Loch Humphrey is a burn which runs in a southerly direction for nearly a mile through the appellant's lands, and thence along the eastern boundary of these lands until it joins the Cochno Burn, which is in its turn absorbed by another stream called the Duntocher Burn. Many years ago the storage capacity of Loch Humphrey was greatly increased by means of an artificial embankment erected across its outlet by the predecessors in title of the appellant.

On the 20th February 1854 the appellant, in implement of a previous agreement, disponed in feu to the late Alexander Dunn of Duntocher several parcels of land either adjacent or near to the Duntocher Burn with the mills thereon, and also the whole "rights of water power, and other rights connected with the mills hereby disponed, including all right I have to dam up and draw water from Loch Humphrey and Loch Fyn, or to form embankments or breastworks at said lochs." The appellant especially reserved to himself and his successors "all our rights in the foresaid lochs and burn, except our rights therein connected with the mills, and with the pieces of ground and other rights above conveyed and granted." The effect of the disposition was to leave the property of the lochs and burn in the appellant burdened with a praedial servitude of water power attached to the heritable subjects feued. So far as the water of the loch was not required for the purposes of his dominant tenement, or could be utilised by him consistently with these purposes, it remained subject to the disposal of the appellant, and on the other hand Mr Dunn and his successors could not use their water rights except for the special objects for which they were given.

The servitude could not be communicated by them to any person who was not in right of the subjects to which it was attached.

The respondents are Water Commissioners for the burgh of Dumbarton under an Act passed in 1883, the 6th section of which defines the works which they are authorised to make and maintain. One of these is a reservoir, "being an enlargement of the reservoir or loch known as Loch Humphrey, in the parish of Old or West Kilpatrick and county of Dumbarton, to be formed by an embankment to commence at a point about 23 yards north-eastward from the point where the existing bye-wash issues from Loch Humphrey as aforesaid, and to terminate at a point about 210 yards westward from the said point of commencement." The other is a line of pipes "commencing in the reservoir hereinbefore described," and terminating in the respondents' Garshake reservoir, which lies to the north-east of Loch Humphrey. The Lands Clauses (Scotland) Act, 1845, and the Water-works Clauses Act, 1847, were incorporated in the Act of 1883, so that the respondents are admittedly bound to make due compensation for all interests in land taken by them or injuriously affected by their statutory operations.

The effect of the authorised works being to divert the water of the loch to

Dumbarton, it is obvious that their execution must affect the interests of the appellant both as riparian proprietor along the course of the natural outlet and as owner of the loch. For the first of these interests the appellant cannot claim to be compensated, because the 9th section of the Act provides that the respondents shall cause to be discharged down the burn a regular and continuous flow of not less than 320,000 gallons of water *per diem*, which is to be deemed to be sufficient compensation to mill-owners and all others interested in the waters of the burn. But section 10 expressly saves the rights of the appellant in Loch Humphrey, and his claims of compensation for any such rights as may be injuriously affected by anything done under or for the purposes of the Act.

If the respondents had chosen to execute the whole works authorised by section 6, it would have been necessary for them to take land for the site of the new embankment and enlargement of the loch, and the supply of water obtained by that means would have been taken from the loch. In that case the difficulties which they have hitherto thrown in the way of ascertaining the appellant's just claims to compensation would never have existed. But instead of strictly following their statutory powers the respondents resorted to the following ingenious device. In June 1884 they proceeded to take from the appellant by notice (1) one-sixteenth of an acre of land, just outside the old embankment and its outlet, upon which they have constructed a couple of guage-wells; and (2) a way-leave for their pipe, which they did not insert in the loch, but connected with the old outlet. In the statutory arbitration which followed on the notice the appellant claimed compensation for his water rights in the loch; but the respondents have all along disputed his claim upon the ground that they do not take water from the loch, but from the stream which issues from it, and that the appellant is therefore fully compensated by the daily supply sent down the burn in terms of section 9. The argument is simply preposterous. Their Act (sec. 8) authorises the respondents to divert, appropriate, and use the waters of Loch Humphrey, and that is just what they are now doing. The oversman valued the subjects included in the respondents' notice at £50, and with respect to the appellant's claim he found as follows,—"In the event of its being admitted or judicially determined that the said Lord Blantyre had at the date of the foresaid statutory notice retained any right or interest in the waters of Loch Fyn or Loch Humphrey, and the streams called Loch Humphrey Burn and Duntocher Burn, or any of them, and that he is now entitled to compensation in respect of such right or interest, notwithstanding the provisions contained in sections 9 and 10 of the Dumbarton Water-works, Streets, and Buildings Act, 1883, or either of them, I hereby find and determine the sum of £3000 to be the amount to be paid by the said Dumbarton Water-works Commissioners to the said Right Honourable Charles Lord Blantyre for or in respect of the interest to be acquired from the said Lord Blantyre by the said Dumbarton Water-works Commissioners in the foresaid waters, and the embankments at said Lochs Humphrey and Fyn, and the right to intercept and to appropriate the said water, and for the damage to be sustained by him by or in consequence of the work of the said Dumbarton Water-works Commissioners, and that over and above the said sum of £50, including in the said sum of £3000 the sum of £1650, as the estimated price or value of the embankments made at Loch Humphrey and Loch Fyn."

The present action has been brought by the appellant for recovery of that sum of £3000. The Lord Ordinary (Fraser), as soon as the record was closed, assoilzied the respondents with expenses, being of opinion that under the feu-conveyance of 1854 Alexander Dunn had "obtained a title to all Lord Blantyre's rights to the water in the two lochs"—a proposition so plainly untenable that it was practically given up by the respondents' counsel. The Second Division of the Court adhered to the Lord Ordinary's interlocutor. Lord Craighill was of the same opinion as Lord Fraser as to the effect of the feu-rights of 1854; but the majority of the Court, consisting of the Lord Justice-Clerk (Moncreiff) and Lord Rutherfurd Clark, did not take that view. They were of opinion that the appellant retained important rights in the lochs notwithstanding his disposition to Dunn; but, so far as I can understand their judgments, they seem to have thought either that the appellant had made no relevant statement of his interests said to be affected, or that these interests were not in reality prejudicially affected by the respondents' operations. The learned Judges appear to me to have overlooked the fact that apart from statutory authority no person could, even with the full consent of Dunn or his representatives, have diverted a drop of the loch water to Dumbarton without first obtaining the permission or acquiring the interest of the appellant, and that the value of that interest to persons taking it compulsorily is a matter for the determination not of the Court, but of the tribunals to whom it is committed by the Lands Clauses Acts.

Besides their defences founded on the feu to Alexander Dunn, and on the assumption that they are not taking water out of the loch but out of the stream, the respondents have at your Lordships' bar relied upon two pleas—the one being that the appellant has made no relevant allegation of his rights in the loch, and the other that the terms of the oversman's award of £3000 are so ambiguous that effect cannot be given to it.

No plea against relevancy is to be found in the record, and if sustained, it would not entitle the respondents to the decree of absolvitor which both Courts below have given them. Moreover, the plea now urged is founded on defect of specification, and if stated in the Court of Session would probably have been met at once by an amendment of the record. It appears to me that in the admitted circumstances of this case the claim made by the appellant in his condescendence, which is practically identical with the claim narrated by the oversman in his award, is perfectly intelligible. The claim in both is for compensation in respect of those interests of his in the loch which the respondents have possessed themselves of, and are now enjoying under statutory authority. It is not disputed that the respondents are using the old loch as a reservoir, the water of which they take to Dumbarton as matter of right—a right which they could not enjoy except by appropriating and using the appellant's proprietary interests. It is quite true that the respondents do not propose to acquire in property the *alveus* of the reservoir or the old artificial embankment, but they cannot acquire an interest in the water of the reservoir without also acquiring an interest in the basin which contains it, to the use of which they are by necessary implication entitled for the purpose of preserving its contents. These are interests taken by the respondents, with the result of imposing a new and perpetual burden upon the appellant's heritable estate.

To that part of the oversman's award which relates to the £3000 sued for the respondents take two objections. In the first place, it is said that the award fixes the same amount of compensation in respect of the whole as in respect of any one or more of several rights to which the appellant might ultimately be found entitled by a Court of law; and in the second place, that it values the embankments on the footing that they were to be acquired in fee by the respondents. Both objections appear to me to be unfounded. The supposed ambiguity in the award, just as in the appellant's claim, is, in my opinion, mainly due to the strange device by which the respondents sought to escape from their statutory liabilities. The alternative words upon which they found were obviously introduced in order to make the award cover the appellant's interest in the loch water, whether the respondents took it from the loch itself or abstracted it from the burn after it issued from the loch.

As to the second objection, the oversman in the earlier part of his award gives £3000, not in respect of the embankments on the footing that they are to be acquired by the respondents, but in respect of the interest in these embankments which they must necessarily acquire if they are to use the loch as a reservoir. I have had considerable difficulty with regard to the last clauses of the oversman's finding, but I have come to be of opinion with the Lord Chancellor that he did not intend to value the embankment as a separate subject at £1650. He merely refers to that sum as one of the factors which entered into his *cumulo* estimate of £3000. In valuing water alone the cost of works for storing it must be taken into account. The price of water in an artificial reservoir cannot be estimated on the same principles as that of water in a wholly natural basin. I see no reason to suppose that the arbiter erred in his mode of estimating those proprietary rights of the appellant which the respondents have beyond doubt either taken or affected, and in my opinion he has valued no other rights. I am accordingly of opinion that the interlocutors appealed from ought to be reversed, and a remit made to the Court of Session to decern in terms of the summons. I also think that the appellant ought to have his expenses in the Court of Session as well as the costs of his appeal.

LORD FITZGERALD.—From an early period of this hearing I had no doubt as to the decision at which in furtherance of justice your Lordships ought to arrive if it was practicable to do so, namely, that Lord Blantyre should receive compensation from the Council for the benefits of the reservoir, and the supply of water for the burgh of Dumbarton which they took from the reservoir by a circuitous course, and under a claim of right now decided to be unfounded.

I concur willingly in a decision which defeats the device by which the Council of Dumbarton sought to acquire this supply of water without paying just compensation for it. It is plain that a majority of the Judges in the Court below proceeded upon, or were at least very much influenced and misled by, an erroneous construction of the grant to Dunn.

There has been considerable difficulty in the interpretation of the award, but on the whole I concur in the construction of that instrument adopted by your Lordships, and so fully expressed by my noble and learned friend opposite (Lord Watson).

My Lords, I now desire for myself to acknowledge the assistance I have derived from the clear argument of Mr Dundas.

INTERLOCUTORS appealed from reversed; cause remitted to the Court of Session to decern for £3050, in terms of the summons; the respondents to pay to the appellant his costs both in this House and in the Court of Session.

SIMSON, WAKEFORD, & COMPANY—DUNDAS & WILSON, C.S.—
GRAHAMES, CURREY, & SPENS—MURRAY, BEITH, & MURRAY, W.S.

No. 10.

May 14, 1888.
Macpherson v. Scottish Rights of Way and Recreation Society, Limited.

DUNCAN MACPHERSON, (Defender) Appellant.—*Sol.-Gen. Robertson—Asher, Q.C.—Cosens.*

SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY, LIMITED, AND OTHERS, (Pursuers) Respondents.—*Balfour, Q.C.—Murray—W. C. Smith.*

Road—Right of way—Evidence of public use.—In an action of declarator that there existed a public right of way for passengers on foot and on horseback, and for driving cattle and sheep through the Glen of the Doll in Forfarshire, it was proved that the pass formed the direct and natural access from Clova to Braemar, and that from time immemorial there had existed a well-known and well-defined track through the glen; that there had been a practice of drovers taking sheep by this track from the public market at Braemar in spring and autumn to a public market near Kirriemuir; that the track had been used by farmers in the district going to Clova or to Braemar, and occasionally by tourists going between these places; that there had been a repute in the district, both among the public and among the proprietors of the ground over which the track passed, that there was a public right of way. *Held* (*aff.* judgment of the Second Division), on a consideration of the evidence, that having regard to the nature of the district, the use proved was sufficient in amount, and that it was to be attributed not to tolerance, but to the assertion of a public right.

Ld. Chancellor (Halsbury).
Earl of Selborne.
Lord Watson.
Ld. Fitzgerald.
Lord Macnaghten.

(IN the Court of Session, July 6, 1887, 14 R. p. 875.)

The defender appealed.

The respondents were not called on.

At delivering judgment,—

LORD CHANCELLOR.—Looking at what has been said by Lord Young in this case, and at what has been the course of the evidence, if I had been unable to find an answer to the question which his Lordship has propounded, I certainly should have desired to hear the respondents in this appeal, but in considering the evidence which has been brought before us I should very much regret that upon what is after all a pure question of fact I should differ from such a large majority of the learned Judges—the Lord Ordinary and the majority of the Judges of the Second Division—who had the facts before them, and who must be very much better acquainted than I can be with the habits and practices of the country.

The question in the mind of an English lawyer is not only whether he can, on proper judicial evidence, determine that there has been an exercise of such a right of way as is here in question, but whether he can reasonably infer from that that the owner had a real intention of dedicating that way to the use of the public. That, however, is not the law of Scotland, and if it can be established that for the necessary period there has in fact been such a use of the way as negatives a mere licence or permission, then, as I understand the law of Scotland, that establishes absolutely the right of way in question.

Now, I have said that a question is put by Lord Young to which if I were not able to give an answer I should feel that the respondents ought to be able to furnish it to me. Lord Young, quoting the Lord Ordinary, says,—"The question is, whether such use as has been proved is to be ascribed to tolerance or right. Why, I ventured to ask," says Lord Young, "is it not to be ascribed to tolerance? Does anybody think that an ordinary proprietor would have objected to it, or interfered with it by appealing to a Court of law to prevent such use of it upon any of the occasions which have been referred to? Why, he would have been thought very ill of by his neighbours, and I think deservedly." Now, I say that if no answer could be given to that question I should take a different view from that which I have been at last compelled to take. But when I look at the evidence I find that besides the occasional and rare use of the way by persons who would properly come within the ambit of Lord Young's observations, there are a set of facts which I think are not reconcilable with what his Lordship refers to as kindliness and good neighbourliness. If there is one fact more than another which stands out, as I think, clearly established by the evidence, and not qualified by any cross-examination, it is this, that upon this road from Braemar to Glen Clova there were at least two occasions in every year, and for a very considerable period, when those persons who had not been able to dispose of their sheep at Braemar made a regular, well-known, and ascertained practice of bringing those surplus sheep which they had not been able to dispose of at the Braemar market to the other market.

Now, I ask myself this question, whether, in the first place, I can infer from that state of facts that the proprietor was aware of what took place? I cannot doubt that, dealing with such public rights and such public matters as the markets which persons in the neighbourhood were in the habit of going to and coming from, it would be almost impossible but that the proprietor would become acquainted with that practice. And the second question immediately follows, whether, if he was aware of the long-continued and well-settled practice which was going on from year to year (not through the whole year of course, because the occasions did not arise, but on two ordinary and settled occasions in every year) the proprietor would, on the footing of its being a mere licence or permission, be likely to stand by and allow the right, which he must know would very probably be established by such constant user, to be established without interference or remonstrance on his part? My Lords, I have come to the conclusion that it would be impossible to sustain that contention. However good-natured the proprietor might be, and however desirous of assisting his neighbours, I think he would desire to protect his rights by insisting upon some record of his rights, or some way of shewing that what was being done was by his licence and permission, and not as of right; but I look in vain throughout the whole of this evidence for the least intimation of any effort on the part of the proprietor to impose upon those persons who were using this road —which was a wild mountain road, and one unfrequented no doubt on ordinary occasions—any kind of hindrance which could be removed by his permission.

Under these circumstances, my Lords, I cannot but feel that the observations made by the Lord Justice-Clerk and Lord Craighill are well founded; and apart altogether from what I should certainly regard as absolutely insufficient to establish any such right, namely, the evidence of the occasional and rare use of this road by travellers passing through, or by botanising excursionists, or by friends and neighbours, who are clearly proved to have used part of the road, and might very well be supposed to use a part of it without any assumed right to traverse it from end to end,—apart from all that class of evidence, to which I think Lord Young's observations apply with great force,—I cannot reconcile this market user, which was of necessity from one end to the other, because it was from one market to the other, and which was continuous from year to year on the particular occasions whenever a market was held, with anything but the existence of a public right, and under those circumstances I move your Lordships that the judgment of the Court below be affirmed, and that the appeal be dismissed, with costs.

LORD SELBORNE.—I entirely agree, and I am so well satisfied with the reasons

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given by the majority of the Judges in the Court below and by the Lord Ordinary that I do not think it necessary to say more than a very few words.

It appears to me, in the first place, that the evidence is as great in quantity and as cogent in its effect as could be expected under the circumstances of the place and of the country if the right did exist and had existed from a very remote period, and that being so, I think it would be rather alarming if without evidence of some kind to counterbalance the impression so made the evidence given were held insufficient, because it would follow from that that practically under such circumstances no amount of evidence at all would establish such a right. Well, is there evidence to counterbalance it? I own that I think there is none.

Now, when you have the fact of user of a road of this description in the manner and to the extent which would be the natural consequence of its being a matter of public right, and that fact proved by a sufficient amount of evidence, how is that to be met? According to the well-known text of the civil law a claim of right of this kind will be repelled if it is shewn to have been enjoyed either *vi* (which is out of the question here, for certainly there has been no force) or *clam* (which I think is equally out of the question, for whatever use there was was so public that it must have been known) or *precario;* and that is the real question here. What is suggested by Lord Young is that it is consistent with the evidence in this case that what was done should have been done *precario*—that is, by sufferance, by virtue of leave and licence, from time to time on each particular occasion, to those who would otherwise have been trespassers. Now, I confess that upon such evidence as we have here I think that is a strong proposition unless there are some definite facts brought forward in support of it. When I speak of "such evidence as we have here," I refer more particularly to those things which are most unequivocal—to the fact that this passage has taken place along a definite track (I think the evidence shews that even at the point where it is least definite, namely, towards the summit at Jock's Road, the boulders have been cleared away, and there is a sort of ladder or staircase in the rock, such as most people are familiar with in very mountainous districts and countries) from one public terminus to the other public terminus, and that there is a known line of passage and a definite track. It is not as if people made their own way, one in one direction and one in another; but the evidence appears to me to shew, without controversy or contradiction, that this is a definite passage between one public terminus and another, which, according to the law of Scotland, is necessary to make a public way. Then, in the next place, although except at certain periods and for certain purposes the use of it may be so casual that if that had stood alone it might have been insufficient to make out the right, yet the very periodicity and the nature of the purposes which at those periods caused the use of it to take place, give emphasis to all the other circumstances as calculated to call the attention of the proprietors and occupiers to the matter, and to lead either to interference or to definite permission if the thing were not of right. And I may mention (not supposing that so remarkable and conspicuous an instance frequently took place) the evidence which is not controverted about the several droves of sheep which several different persons took over the pass in 1875. It seems to me that that alone must have brought the parties into a sort of conflict with each other, and have led to an understanding whether the thing was to go on upon the footing of a right or otherwise if it had been really challenged.

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I then ask the question, whether there has been any leave or licence or tolerance or sufferance, regarded as a question of fact. Is there any evidence whatever given in support of an affirmative opinion? Absolutely none. I find from the beginning to the end not a trace of such a thing, not only not proof of there having been any act which would fairly have had that meaning, but I do not find the least trace of its having been suggested or thought of by anybody. On the contrary, it is to my mind fully proved both that the parties who used this road understood themselves to be doing so as of right without its necessitating anybody's permission, and that the occupiers and owners, at least for a very considerable time from the present (though perhaps not enough by itself to have established a right), understood that to be so, acquiesced in it, and themselves acted upon that supposition. There were several instances. I will not insist upon them as enough to establish the right, because the dates of them may be too recent. There was the soliciting of public subscriptions, and the obtaining of them, for a bridge in which the public would have had no interest whatever except upon the supposition that this was a public right. Then when one of the owners planted a certain place a space was left on purpose for this road, clearly because it was a public road; and there were some other things which I need not mention, but it is enough to say that it appears to me to be the true result of the evidence that everybody, both those who used the road and those over whose ground it was used, thought and acted upon the opinion that it was a matter of public right and not to be resisted. As far as there is evidence at all it is all that way.

Under these circumstances I confess that I do not think it possible to differ from the conclusion arrived at in the Court below.

Lord Watson.—Having regard to the character of the track in dispute, and to the thin population of the district in which it is situated, I think the amount of actual user for upwards of forty years past has been just such as might have been expected if it had been admittedly a public way.

That being so, the case is narrowed to this issue—Was such use had in the exercise and assertion of a public right, or must it be ascribed to the tolerance of successive proprietors? Notwithstanding the able arguments addressed to us by the Solicitor-General for Scotland and Mr Asher, I have been unable to come to the conclusion that the use was by sufferance merely. It appears to me to have been generally understood, as well by those who used the road as by those who stood by and saw it used, that foot-passengers and drovers were free to pass along it as a matter of right, and that no permission was required.

After the observations which have been made by the Lord Chancellor and by the noble and learned Earl opposite, it is unnecessary for me to refer to the evidence in detail. I concur in the judgment which has been proposed.

Lord Fitzgerald.—I also concur, and especially in the observations which have been made by my noble and learned friend opposite (Lord Watson). If this case had gone before a jury the question to be submitted to the jury would have been whether there had been an exercise as of right of the user of this way; and I should say that the proper inference to be deduced by the jury from the evidence would have been that there had been that continuous exercise—an exercise not by sufferance but as of right. The case comes, as far as I am concerned, in a still stronger light before me, for the Lord Ordinary who heard

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the witnesses and examined into the case in detail comes to that conclusion, and his decision is adopted by the majority of the Judges of the Court of Session. Upon the question of fact, or of the fair inference to be deduced from the facts in proof, I should have been slow indeed to take an adverse view if the question had been decided upon its being submitted to a jury, but still more so when the determination is that of so many able and learned Judges conversant with the law of Scotland, and with the mode of dealing with rights of this kind in Scotland. When we find, then, that there is evidence of the user of this way as of right, extending over a period of at least forty years, or more than forty years, even if we had some evidence of interruption it would be valueless.

The law on this subject was stated fifty or sixty years ago by the then Lord Chief Commissioner in very clear terms. I allude to the case from Scotland of *Harvie* v. *Rodgers*, July 8, 1828 (3 Wilson and Shaw's Reps. 251), in which the Lord Chief Commissioner's direction in point of law to the jury was adopted by Lord Eldon. Lord Eldon puts it thus (3 Wilson and Shaw, 260),—"The learned Judge in substance told the jury, There is evidence from which you may assume that for a particular period, namely, for forty years, this way had been exercised without interruption. If you are of that opinion, then that is, according to the law of Scotland, sufficient to establish a prescriptive right of way; and if that right of way be once established in the manner I have stated, then I tell you in point of law that subsequent interruptions not acquiesced in cannot defeat the right so acquired."

We had a great deal of consideration of the law of Scotland on this subject in the case of *Mann* v. *Brodie*, May 4, 1885, 10 App. Ca. 378, 12 R. (H. L.), 52, and *Harvie's* case is a distinct confirmation of the doctrine which I have mentioned.

I am therefore of opinion that the interlocutor of the Court below ought to be affirmed.

LORD MACNAGHTEN.—My Lords, I am also of the same opinion.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

ILIFFES, HENLEY, & SWEET—TAIT & CRICHTON, W.S.—KEEPING & GLOAG—ANDREW NEWLANDS, S.S.C.

No. 11.
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July 30, 1888.
Hunter v. Northern Marine Insurance Co., Limited.

DAVID HUNTER AND OTHERS (Owners of the "Afton"), (Pursuers) Appellants.—*Finlay, Q.C.*—*J. Gorel Barnes, Q.C.*

NORTHERN MARINE INSURANCE COMPANY, LIMITED, AND OTHERS, (Defenders) Respondents.—*Att.-Gen. Webster*—*R. T. Reid, Q.C.*

Harbour—Construction of the word "port" in policy of marine insurance.—Held (*aff.* judgment of First Division) that in a policy of insurance on a ship for the voyage, and "while in port thirty days after arrival," the meaning of the term "port" as applicable to the port of Greenock did not include the fairway of the navigable channel of the river Clyde *ex adverso* of the harbour works.

Ld. Chancellor (Halsbury).
Lord Watson.
Ld. Herschell.
Lord Macnaghten.

(IN the Court of Session, March 4, 1887, 14 R. 544.)

The following narrative is taken from the opinion of Lord Watson:—

"The barque 'Afton,' of Ayr, arrived at Greenock from Java, on 22d January 1885, and discharged her cargo in the Victoria Harbour. On 6th February the vessel was taken for repairs into a shipbuilder's private dock within the ambit of the harbour works, and on the 12th of the month she left that dock in ballast for the port of Glasgow in tow of a tug-steamer, when she was capsized by a sudden gust of wind, and sustained serious damage. At the time when the accident occurred the stern of the 'Afton' had reached a point in the waterway of the Clyde 500 yards or thereby outside the harbour works of Greenock. The 'Afton' was covered by three policies of insurance for a voyage from Java to any port of discharge in the United Kingdom, 'and while in port during thirty days after arrival.'

"The present action was brought by her owners, the appellants, against the underwriters, who are respondents, for the cost of raising and repairing the vessel.

"The Lord Ordinary (Trayner) assoilzied the respondents, being of opinion that the *locus* of the accident was not within the port of Greenock, and that the vessel had left the port on 6th February, within the meaning of the policies, when she went into a private dock for repairs.

"The First Division of the Court (Lord Shand dissenting) affirmed the interlocutor of the Lord Ordinary upon the first of these grounds, without disposing of the second. Lord Shand was of opinion that the Lord Ordinary was wrong upon both points, and that the appellants were entitled to decree."

Hunter and others, owners of the "Afton," appealed.

At delivering judgment,—

LORD CHANCELLOR.—The question whether the barque "Afton," insured under a policy while she was in port, suffered a misfortune which entitles her owners to recover against the underwriters, depends, first, upon the construction to be given to the word "port," and secondly, when the meaning of that word has been ascertained, upon whether the accident is proved to have happened within the limits contemplated by the contract.

The word "port" is undoubtedly ambiguous. If we were not dealing with a policy of insurance, then, no doubt, what is meant by the word "port" is what Lord Esher, in the *Garston Ship Company* v. *Hickie*, 1885, 15 Q. B. D. 580, describes as what shippers of goods, charterers of vessels, and shipowners, would mean by a port—that is to say, a legal port might be, according to the general understanding of the classes of persons described by Lord Esher, either restricted or enlarged by mercantile usage. There are, however, some well-received elements which, I think, according to any usage one would expect to find. I do not know that these ordinary elements are anywhere more concisely set forth than in the treatise ascribed to Sir Matthew Hale—(Pars Secunda de Portibus Maris, contained in Hargrave's Tracts relative to the law of England, 46). "A port is an haven, and something more—(1) It is a place for arriving and unlading of ships or vessels. (2) It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege, as shall be shewn. (3) It hath a ville or city or borough, that is the *caput portus*, for the receipt of mariners and merchants, and the securing and vending of their goods and victualling their ships. So that a port is *quid aggregatum*, consisting of somewhat that is natural, viz., an access of the sea, whereby ships may conveniently come, safe situation against winds, where they may safely lie, and a good shore, where they may well unlade; something that is artificial, as quays and wharfs and cranes and warehouses and houses of common receipt; and something that is civil, viz., privileges and franchises, viz., *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority."

Commonly when a port so described is in question no such difficulty as arises here interferes with the determination of the question of fact. The arrival of a vessel at a particular place, and the mercantile usage applicable to such a place, solves the problem without much real difficulty, or any appeal to the mercantile usage referred to by the Master of the Rolls in the case already quoted. What are the proper tests to apply when the question arises whether the vessel has or has not arrived at the port at which she is to deliver her cargo, to quote the language of the noble Lord (15 Q. B. D. 588)—"Now, what will such a port be? What do you go to a port for? Because you want either to load or unload goods. Everyone who understands ships knows that you cannot conveniently load or unload goods in a place where the ship itself would be in danger. Therefore all people possessed of common sense, instead of taking their boats on to a beach on an open sea, where they might be knocked to pieces in a storm, go to what they call a port, which is always a sheltered place. It is a place of safety for the ship and the goods whilst the goods are being loaded or unloaded. There will never be a port, in the ordinary business sense of the word, unless there is some element of safety in it for the ship and goods. Now, what will constitute a port as regards the loading and unloading of goods and the safety of the ship during the process? What will more certainly be a port in the sense of all persons concerned in the use of it than a natural port? That is, a place in which the conformation of the land with regard to the sea is such that if you get your ship within certain limits she is in a place of safety for loading and unloading."

But the difficulty in this case arises from the fact that there are, so to speak, rival ports along the course of the Clyde, and it is essential for the pursuers to establish that the "Afton" was capsized and stranded within the limits of the port of Greenock. I entirely agree with Lord Shand that the port as fixed by statute for fiscal purposes has no relation to the question now in debate. The port of Cardiff, for instance, extends for sixty miles for Customs purposes, and within that sixty miles are comprehended several other ports perfectly well known and recognised as different and independent ports in the commercial sense, although comprehended within the ambit enacted for Customs purposes. I also agree with Lord Shand that the test applied by one of the witnesses, namely, that the port must be where a ship can legally call upon a consignee of cargo to take delivery, is obviously unsound. I also agree that the argument derived from the Act of Parliament of 1866 is inconclusive, and I should follow the learned Judge's reasoning, for it is impossible to suppose that that statute has changed the meaning of the "Port of Greenock" as that term was previously understood in its natural and ordinary commercial sense by business men in making their contracts of charter or insurance.

Now, the place where the "Afton" stranded is about a quarter of a mile from the shore of Greenock, and the question whether or not it is within or without the limits of the port of Greenock is a pure question of fact. I think there was some evidence which, unexplained, might have induced me to come to the conclusion that it was. The reception of port dues, the loading or unloading of vessels bound to the port, are the natural and appropriate sources of proof. But the element of doubt which exists in this case arises from the fact that the accident happened in a land-locked waterway, as to which it may be said that the evidence is as applicable in some respects to Glasgow as to Greenock. The place called the Tail of the Bank has been used by vessels consigned to other ports, and it is common for vessels to anchor there when it is intended to lighten them of part of their burden, and the goods so lightered, and the vessels so lightened, have proceeded to ports other than Greenock. The only class of evidence which has made me hesitate has been the exaction by the Greenock authorities of dues from vessels anchoring at places which, if those dues had been lawfully exacted, would be almost conclusive to shew that the *locus in quo* was within the limits of the port of Greenock. But the weight of that evidence has, in my judgment, been so reduced by proof of successful resistance to the dues that I am unable to differ from the Lord Ordinary and the majority of the learned Judges who concurred with him in the conclusion at which they arrived, that the *locus in quo* is not proved to have been within the limits of the port of Greenock. I doubt whether the history of the port throws any light upon the questions under debate. Both in Scotland and in England the right to erect a port is part of the royal prerogative. No port can exist except under the authority of the Sovereign, and if the question were the legal existence of such a port as Greenock, the historical evidence would be conclusive, but it does not appear to me to touch the question of the limits of the port thus proved to exist. For these reasons I am of opinion that it is not established that the *locus in quo* was within the limits of the port of Greenock.

The Lord Ordinary decided the case in favour of the defenders, and expressed an opinion that the taking of the vessel into Caird's Dock, or the starting on her voyage, even if within the limits of the port of Greenock at the time of the happening of the accident, would have put an end to the risk. In the view I take of the case it is not necessary to decide these points, but I wish to guard myself against being supposed to concur in either of these views. I move your Lordships that the interlocutor appealed from be affirmed, and this appeal be dismissed, with costs.

LORD WATSON.—(After the narrative above quoted)—The harbour works of Greenock are constructed on the south shore of the river Clyde, and consist of a series of quays or breastworks abutting on the river, with inner docks or basins, the majority of which are tidal. The estuary of the Clyde *ex adverso* of these works is of considerable width, but the navigable channel is contracted by a sandbank on its north side, which extends all the way from the eastern to a point not far from the western extremity of the harbour works. The distance from the front of the works to the edge of the bank averages about 1000 feet, and at the place where the "Afton" capsized is about 800 feet, so that the vessel had crossed the *medium filum* of the water-way. At the west end of the sandbank, to the north of the waterway proper, there is a roadstead known as the Tail of the Bank, which is chiefly used as an anchorage by foreign-going vessels passing up and down the river on their way to and from Greenock or Glasgow and the intermediate ports, of which there are several. It is customary for inward-bound ships of large burthen, whilst anchored there, to lessen their draught of water by discharging part of their cargo, which is conveyed in lighters, sometimes to Greenock and sometimes to Glasgow. It is also customary for outward-bound ships to moor at the Tail of the Bank for the purpose of taking on board their stores and the complement of their crew.

According to the appellants' argument the port of Greenock comprehends what they represent as the bay of Greenock, being a large area of water *ex adverso* of the south shore, between Garvel Point on the east and White Farland Point on the west, extending so far northwards as to include the whole navigable channel used by vessels passing up and down the river, as well as the Tail of the Bank. The case submitted for the respondents is, that the port of Greenock

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is confined to the artificial harbour works, and to such part of the river as ma be necessary for and is actually used by vessels moored alongside the piers o quays. A great mass of evidence—oral and documentary—has been adduce in support of either view. It was not disputed that what is popularly or commercially understood to be the port of Greenock must be taken to be the por for the purposes of this case.

I doubt whether it would be expedient, and I do not think it is necessary, to attempt any definition of the various circumstances or indicia which will be sufficient to give to a particular piece of water the character of a port in a popular or commercial sense. In many instances its natural or artificial features of themselves go a long way to indicate what must be popularly taken to be the limits of a port; but the case of *The Sea Insurance Company* v. *Gavin*, decided by this House in 1830 (4 W. & S. 17), shews that an open and exposed roadstead may be a port within the meaning of a marine policy. I think it was rightly held in *Garston Ship Company* v. *Hickie*, 15 Q. B. D. 580, that in ascertaining its popular limits no aid can be derived from statutory definitions of a port for fiscal purposes. That is obviously true in the present case, because the port of Greenock, as defined by Treasury Warrant, in pursuance of the Customs Consolidation Act, 1853, includes the greater part of the Firth of Clyde, and all seaports on the mainland, or in the Hebrides, from Ardnamurchan Point to West Loch Tarbert. The boundaries of the burgh of Greenock, as fixed for police purposes by a series of municipal Acts, appear to me to be equally beside the present question.

In my opinion the most important consideration in all cases like the present must be whether the area in dispute has or has not been used and treated as an integral part of the port by vessels frequenting it as well as by the port authorities. I do not think the oral evidence—which chiefly consists of conflicting opinions derived from facts otherwise proved—throws much, if any, light upon the controversy between the parties. Upon the whole evidence, I have come to the conclusion that both Courts below were right in holding that the place where the "Afton" met with her mishap on the 12th February 1885 is not within the limits of the port and harbour of Greenock. The contour of the south shore between Garvel Point and White Farland Point does not indicate the existence of anything like a bay enclosed by two headlands, although the phrase "bay of Greenock" does occur in some of the documents produced. A straight line drawn between these points would include but a small portion of the area claimed as a bay by the appellants. Immediately, or at a very short distance, outside the face of the harbour works there is the navigable channel, of inconsiderable width, which is in constant use by shipping of all sorts and sizes, passing and repassing between Glasgow or other places on the Clyde and home or foreign ports. The Tail of the Bank is not used for these purposes, and affords a safe harbourage for vessels of large size, but there are no physical features to indicate that it is more intimately connected with Greenock than with other ports on the river.

According to the law of Scotland the right of erecting and holding public ports and harbours is vested in the Sovereign, and neither communities nor individuals can possess that right without a grant from the Crown or the authority of Parliament. In some instances the Crown has given a right of free port, with the privilege of levying dues, over a large area of water, as in the case of the royal burgh of Campbeltown, whose grant expressly includes the whole loch or bay—*Magis-*

trates of Campbeltown v. *Galbreath*, Dec. 14, 1844, 7 D. 220. The port of Greenock was the subject of a grant from the Crown in 1670 to Sir John Shaw, the owner of the lands and barony of Greenock, and superior of the burgh, which conferred upon him and his successors power "to repair and build free ports, harbouries, and havening places upon any pairt of the ground of the said lands," with all rights and privileges pertaining to other free ports, including such shore silver, anchorage, and other duties as these were in use to levy. The charter expressly confines the grant to the foreshore of the barony, and to artificial works upon it, and gives the grantee no right of port in the bay of Greenock or in the navigable waters of the Clyde. It appears from the municipal records of Glasgow in 1693 and 1696 that two ports had then been established on the foreshores of the barony, the one at the burgh of Greenock and the other at Cartsdyke, between the burgh and Garvel Point. These were in all probability mere landing places upon the open beach, ports which Sir Thomas Craig (De Feudis, 1, 16, 12) describes as places *in quibus naves appellunt;* but in the year 1705 Sir John Shaw raised a sum of money, by subscription from the inhabitants of the burgh, "for building the harbour there situated on a small beginning." The subscription proved to be insufficient for the completion of the works contemplated, and in 1751 a local Act was passed authorising a tax upon all ale or beer sold within the burgh, to be paid to the Magistrates and Council, who were appointed trustees for cleaning and excavating, building, and repairing the harbour and piers. In 1772 the then proprietor of the barony disponed in feu to the Magistrates and Council "All and Whole the harbour of Greenock, and piers and quays of the same, which have been all built and gained off the sea since 1700, consisting of and comprehending eight acres three roods and ten falls, conform to a plan, signed by him of this date, with the anchorages, shore, bay, and ring dues payable by all kinds of ships or vessels coming into the harbour of Greenock or into any other harbour or harbours that may be built betwixt the west side of the Kirk Burn and the east side of the Royal Closs in Greenock." It is clear that the feu-charter of 1772, which transferred the harbour to the burgh, conveyed nothing except the artificial works defined by plan and measurement, and confined the right of exacting dues to vessels entering or using these works, or any additions which might be made to them. Having regard to the terms of his own title, it is equally clear that the superior made over to his feuars all the dues which he himself had a legal right to exact. The fact may be noticed here that in the year 1816 the Magistrates and Town Council, upon an application to His Majesty's Barons of Exchequer in Scotland, obtained a charter of gift from the Crown of the sandbank already mentioned, with the professed object of building dykes upon it for the protection of the bay and harbour from the east and north winds, and for making it otherwise useful without destroying or injuring the navigation of the river. I cannot understand what assistance the appellants derive from the terms of that deed. In the petition to the Barons of Exchequer which the charter narrates the sandbank is not described as lying in or bounding the port of Greenock (which is now the appellants' contention), but as situated in the estuary of the Clyde, and in the dispositive clause of the charter it is described as "opposite to the harbour of Greenock." Thus far the evidence does not suggest that the port of Greenock extends beyond the limits of the artificial works, and so much contiguous water space as may be requisite for the accommodation of vessels which use them.

I do not say that in Scotland the limits of a trading port, as understood by persons engaged in commerce, must of necessity be coextensive with the original grant from the Crown. They may be extended by parliamentary recognition or by the usage of the port, but it appears to me that the terms of the legal grant are an element of some importance in considering the history of the port and its present commercial limits. Since their acquisition by the municipality in 1772 the harbour works have been greatly enlarged and improved in virtue of powers conferred by a succession of local Acts, commencing in 1773 and ending in 1882. Under these Acts the ports and harbours have for a very long period been vested in a body of statutory trustees, who constitute the port authority for Greenock. They levy statutory rates, which are exigible solely in respect of the use of the artificial harbour works, and are applicable to the maintenance, repair, and extension of these works. At the time when the harbour was transferred to trustees the Magistrates and Council retained all rights which they had to levy anchorage, shore, bay, and ring dues, and these, or at least anchorage dues, were until recently collected by the Harbour Trust along with their statutory rates, and paid into the common good of the burgh. The subjects vested in the port authority by these statutes are the port and harbours of Greenock, and their enactments do not appear to me, when closely examined, to contain any recognition by the Legislature of the waterway of the Clyde or of the Tail of the Bank as forming a part of the port. The more recent statutes are decidedly unfavourable to that view. They limit the powers and jurisdiction of the trustees to the artificial works and harbours and the entrances to the latter, and the Act of 1866, which is now the leading statute, expressly distinguishes the port and harbours from the stream of the river and the Tail of the Bank in terms which, taken by themselves, plainly indicate that neither of these places is within the ambit of the statutory port. It must of course be kept in view that the main object of the statutes was to provide for the maintenance and enlargement of the artificial works, and their provisions are therefore not necessarily conclusive as to the limits of the commercial port. It is sufficient for the purposes of the present case to say that their enactments lend no support to the appellants' case. The duty of erecting and maintaining lighthouses and beacons, removing wrecks and other obstructions, of licensing pilots, and of making and enforcing regulations for the navigation of the river and firth of Clyde, including that part of the river which is *ex adverso* of the Greenock harbours, belongs exclusively to a statutory board, known as the Lighthouse Board. The cost incurred by the board in the execution of their Acts is defrayed by special rates, which they are empowered to levy from all vessels which navigate the waters under their jurisdiction. They have also the duty of deepening and dredging the navigable channel at the expense of these rates, but, so far as concerns that part of the channel which is opposite to Greenock Harbour, it is provided that the dredging shall be performed by the Greenock Harbour Trustees, either at their own instigation, after due notice to the board, or upon the requisition of the board; and, in the case of difference of opinion as to the work necessary to be executed, the Sheriff-depute of the county is authorised to decide between them. In all cases the cost of the work is borne by the board and not by the harbour rates.

The appellants' counsel laid considerable stress upon sections 96 and 134 of the Greenock Harbour Act of 1842, which authorise the trustees to cause the harbour, "and the bed of the river opposite the same," to be cleansed and deepened in such manner and to such extent as they may think fit, and also to remove "any wreck and other obstructions to the said harbours and the approaches thereof." The cost of these operations is laid upon the harbour rates, and I think the operations sanctioned upon the bed of the river were to be confined to the immediate vicinity of the works, and were meant to secure a sufficient depth of water, free from obstructions, alongside the piers and at the harbour entrances.

The appellants maintain that for a long course of years anchorage dues were levied from vessels moored in the waterway or at the Tail of the Bank quite irrespective of their intended port of discharge. As already explained, these dues, although collected by the trustees, were in reality levied by the municipality, as feuars of the port, and not by the harbour authority. Still, I do not think that circumstance would impair the significance of the fact, if it could be shewn that they were regularly exacted as dues for the use of the port of Greenock from vessels which did not enter or use the harbour works for any purpose. But the evidence comes far short of that. The anchorage dues amounted to a considerable sum annually, but the trade of the harbour of Greenock has been very large, and no attempt has been made to prove the proportion of the total sums collected from vessels which merely anchored, but did not break bulk, within the limits claimed by the appellants. So far as regards vessels which did not unload at or into Greenock Harbour, the evidence is both scant and unsatisfactory, and merely proves that attempts were frequently made, often, if not generally, without success, to levy anchorage dues from them. Eventually these dues were acquired by the Harbour Trust, and have not been exacted since the year 1868. There is some evidence to shew that many years ago vessels occasionally dropped their anchor outside the harbour works, but it is conclusively established that the narrow waterway is not and cannot, without detriment to the navigation of the river, be used as a place for mooring and loading and unloading ships. There are no doubt several buoys with mooring rings along the edge of the sandbank on the north side of the channel, but these have not been used for loading and discharging, and were placed there for the convenience of vessels warping out of or into the inner harbour.

In these circumstances, the appellants appear to me to have failed to prove any facts which can reasonably be held to warrant the inference that the port of Greenock extends to the whole of the navigable channel or to the Tail of the Bank. The ambit of the commercial port must, in my opinion, be taken to include merely the artificial works vested in the Harbour Trustees, and such contiguous water space as may be necessary for the accommodation of vessels using these works. What the precise extent of that space may be I do not find it necessary to consider, because it cannot embrace that part of the channel where the "Afton" capsized. The roadstead at the Tail of the Bank may be in a certain sense a port, but it is a roadstead over which the Greenock Harbour Trustees have no authority or control, and is used as a common anchorage by ships navigating the firth and river, whatever be their starting place or destination. It is no more an adjunct of the harbour of Greenock than of the harbours of Broomielaw or Port-Glasgow.

I am accordingly of opinion that the interlocutor appealed from ought to be affirmed, on the ground that the "Afton" was not at the time of the accident within the limits of the port of Greenock. I am not at present prepared to concur in the second reason assigned by the Lord Ordinary for his judgment. The

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respondents argued alternatively, that assuming the place of the accident to b within the limits of the port of Greenock, the "Afton" was no longer "i port" within the meaning of the policies, after she had broken ground, and wa proceeding on a new voyage. In my opinion, that is a question requiring con sideration, and is not (as Lord Shand seems to hold) necessarily ruled either b *Garston Ship Company* v. *Hickie*, 15 Q. B. D. 580, or by *Roelandts* v. *Harri son*, Jan. 31, 1854, 9 Ex. 444, but in the view which I take of the facts of thi case it is unnecessary to decide the point.

LORD HERSCHELL.—The circumstances which have given rise to this appeal may be very shortly stated. The appellants' barque, "Afton," was insured by an ordinary marine policy, "at and from port or ports in Java to any ports of call or discharge in the United Kingdom, or France, or the United States, and while in port during thirty days after arrival." She arrived at Greenock, to which port she had been ordered, on the 22d of January 1885, and discharged her cargo in the Victoria Harbour. On the completion of her discharge on the 6th of February she went into Caird's Dry Dock for repairs. These were finished on 12th February, and on the same day she was taken in tow in order to proceed to Glasgow to load a cargo of coals for Brisbane. She had reached a point about 500 yards distant from the artificial works of the harbour when she was struck by a squall of wind, capsized, and drifted on to a sandbank opposite the Custom House Quay. The disaster happened within thirty days after the vessel's arrival at Greenock, and the question is whether it occurred while she was "in port."

I agree with the view, which has been more than once expressed by learned Judges, that in construing such a contract as that with which we are dealing, the word "port" must be taken to have been used in its popular or commercial sense—that is to say, as applying to what would be understood as the port by shippers, shipowners, and underwriters. Where there is a common understanding among such persons as to the limits of a port the matter is free from difficulty. Here the appellants attempted to prove such a common understanding. The learned Lord Ordinary came to the conclusion that they had not succeeded in doing so, and after carefully considering the evidence I see no reason to differ from him. In the absence of any such common understanding, how is the question to be determined? It appears to me that you must then consider what are commonly understood to be the characteristics of a port, and what are in general the tests for determining its limits, and apply the conclusions arrived at to the particular case.

A port is a place where a vessel can lie in a position of more or less shelter from the elements, with a view to the loading or discharge of cargo. The natural configuration of the land is therefore often a most important element in determining what are the limits of a port. All the waters within given boundaries which possess the common character of safety and protection would be generally admitted to be within its ambit. Where, however, a port is one of several situate on the same river, it is obvious that the natural configuration of the land is not of the same importance, and does not afford the same guidance. I have carefully examined the plans before your Lordships in the present case, but do not find myself led by them to the conclusion that the disaster to the "Afton" occurred within the port of Greenock, nor have I been assisted by them in fixing the boundaries of that port. Under these circumstances I think we must have recourse to the history of the port, and its user, and must ascertain what is the area which has served the purposes of a port.

The port of Greenock is of comparatively recent origin, and the charter which created it is in existence. But I think that the inquiry, what has *de facto* been used as the port, is of even greater importance than an investigation of the limits constituted by the original grant. By a charter bearing date 10th July 1670, Charles II. granted to John Schaw of Greenock, the lands and barony of Greenock, comprising the lands of Wester Greenock, and other lands, with the ground within the ebbing and flowing of the sea lying contiguous to the said lands. By the same charter he granted full power to the said John Schaw "to repair and build free ports, harbouries, and havening places upon any pairt of the ground of the said lands," and gave, granted, and disponed "the haill privileges and liberty of free ports, harbouries, and havening places pertaining to any other port, harbourie, or havening place in this kingdom, and haill petty customs, shore silver, anchorage, and other dewties whatsoever of the said port or havening places." I think there can be little doubt that this was the origin of the port of Greenock: the language used points to that, and no evidence has been adduced of its existence at an earlier date. It appears that in the year 1705 Sir John Schaw raised a fund of money by voluntary subscription from the inhabitants of Greenock "for building the harbour there situated on a small beginning," and that a voluntary tax was afterwards imposed by the inhabitants for the same purpose. In the 24th year of Geo. II. an Act was passed, which, after reciting that the superior of the town of Greenock, with the inhabitants thereof, began to raise money about 1705 by voluntary subscription for building a harbour there, gave authority to levy a tax for the repair of the harbour.

In or about 1772, by an instrument which recited that the family of Greenock, who were the only lawful proprietors of the harbour, had been in use to exact certain small taxes called anchorage dues from the ships and other vessels frequenting the said harbour, the administrators and Town-Council of Greenock acquired these rights from John Shaw Stewart, and a feu-contract was afterwards entered into between them by which he alienated to the Magistrates and Town-Council "all and whole the harbour of Greenock, and piers and quays of the same, which have been all built and gained off the sea since 1700, consisting of and comprehending eight acres," with the anchorage, shore, bay, and ring dues payable by all the ships or vessels entering the harbour of Greenock, or any other harbour or harbours within certain limits, with power to the Magistrates and Town-Council to move forward and enlarge the harbour and to erect other harbours. I pause here to observe that it appears to me impossible to infer from the terms of the charter or the instruments founded upon it that the port has the wide limits contended for by the appellants. In 1773 an Act became law, entituled an Act for deepening, cleaning, and making more commodious the harbour of the town of Greenock. Several other Acts were passed relating to the harbour or port of Greenock between that date and 1866, when the consolidating and amending Act now in force was enacted.

Both sides have placed reliance upon this legislation. The appellants contend that it recognises the existence of a port extending beyond the artificial works and across the fairway of the river. The respondents deny this, and assert, on the contrary, that the statutes define the limits of the port, and shew that it does not extend beyond the artificial works and the waters immediately adjacent to them. I do not propose to enter upon a critical examination of the language

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of these statutes, for I am not disposed to place the same reliance upon them in determining this case as some of the learned Judges did in the Courts below. Even if it were quite clear that the statutes defined the port in the limited sense contended for, it would not to my mind be conclusive of the question with which we are dealing. Such definitions are often inserted merely for the purposes of the Act in which they are found, determining the boundaries within which the regulations or obligations of the statute are to operate. I will only say this—that I can find nothing in this legislation to indicate that the port of Greenock was known or understood to have the extensive limits contended for.

I have already pointed out that, in my judgment, the more important inquiry is what has been used as the port. For if an area outside the charter or statutory limits has in fact served as part of the port, I think it must be held for the present purpose to have these more extended limits. Before proceeding to this inquiry I may observe that I cannot attach any weight to the argument derived from the charter of 1816, by which the sandbank opposite Greenock was granted to the Town-Council for the purpose of building dykes upon it for the protection of the bay and harbour. I think it is consistent with either view. It was no doubt at one time the practice for vessels to anchor near the bank opposite Greenock, principally at the west end, which is known as the Tail of the Bank, and there discharge a part of their cargoes, or occasionally the whole. This practice continued until a few years ago. The appellants lay great stress upon this circumstance, and maintain that these anchorage places were within the port of Greenock. If Greenock had in all cases been the destination of the vessels so anchoring, and of the cargoes discharged from them, I should have felt the weight of this contention, for it would have been cogent evidence that the whole of the fairway opposite Greenock across to the bank had been treated and used as part of the port. But in point of fact many, I believe most, of the vessels which came to anchor in the neighbourhood of the bank were bound to Glasgow and other places on the river, and the part of the cargo there discharged was taken to these destinations. It appears to me that there is no more reason derived from the practice of anchoring and discharging near the bank, for asserting that the water so used formed part of the port of Greenock, than there is for alleging that it was a part of any other of the ports to which the vessels were bound, or to which the goods discharged from them were lightered. The appellants also urged strongly that their contention was supported by the fact that anchorage dues were received by the Greenock authorities in respect of vessels which came to anchor in the neighbourhood of the bank. If these dues had been uniformly paid by vessels so anchoring, one would unquestionably have endeavoured to find a legal origin for payments thus exacted and submitted to. And it may be that the conclusion that the anchoring ground was within the port of Greenock would have been the best explanation that could be arrived at, whatever difficulty might be interposed by the terms of the charter which created the port. But it is clear from the evidence led by the appellants that though many, and even the majority, of the vessels yielded to the claim and made the payments, yet during the entire period over which the evidence extends, payment was at times refused not only in the case of vessels going to Glasgow, but also of vessels destined for Greenock. And when payment was so refused it was never insisted on by the local authorities, nor did they ever assert their right in a Court of law. It is common knowledge that where it is

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sought to establish a right by evidence of its exercise a few instances in which the claim of right has been resisted and not insisted upon outweigh a multitude of cases in which it has been yielded to. I think it is impossible to draw any conclusion favourable to the appellants from the evidence as to the exaction of anchorage dues. It produces upon my mind the impression of a usurpation and encroachment rather than of the existence of a right which could have been established if brought to the test of legal proceedings.

The conclusion, then, to which I am led is that there is nothing either in the nature of the locality or in the documentary history of the port, or in the evidence as to the way in which it has been used, to shew that its boundaries extended to the place where the "Afton" was capsized. The learned counsel for the appellants insisted that if the contention of the respondents were supported a vessel going from one dock to another could not be said to be "in port." I do not think this follows. A vessel using in this manner and for this purpose the waters adjacent to the artificial works might well be said to be within the port without compelling the conclusion that it extended to the *locus* in question. All that I decide is that the appellants have not discharged themselves of the burden of proving that the place where the disaster occurred was within the port of Greenock.

It becomes unnecessary, owing to the conclusion at which I have arrived, to express an opinion upon the other question argued at the bar. Inasmuch as the "Afton" had broken ground on a new voyage at the time of the disaster it was urged that even if within the ambit of the port when this occurred she was not "in port" within the meaning of the policy. It was admitted by the appellants that the words "while in port" must receive some limiting construction, and that if the vessel had proceeded—say to Ayr—and then returned to Greenock, and been lost whilst in that port, and within the thirty days, the loss would not have been covered by the policy. Inasmuch as the "Afton" at the time in question would have been covered by a policy "from" Greenock, even though within the limits of the port, it is certainly open to serious consideration whether she can properly be said to have been damaged "while in port" within the meaning of the instrument sued on. I am of opinion that the interlocutor appealed from ought to be affirmed.

LORD FITZGERALD concurred.

THE appeal was dismissed, with costs.

STIBBARD, GIBSON, & Co.—BOYD, JAMESON, & KELLY, W.S.—HOLLAMS, SON, & COWARD—J. & J. ROSS, W.S.

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Aug. 7, 1888.

Knox v. Mackinnon.

JOHN KNOX AND OTHERS (Millar's Trustees), (Defenders) Appellants.—
Rigby, Q.C.—C. S. Dickson.
WILLIAM MACKINNON (Millar's Judicial Factor), (Pursuer) Respondent.—
Davey, Q.C.—Asher, Q.C.

Trust—Liability of trustees for imprudent investment.—Circumstances in which family trustees, with the fullest powers of investment on such securities, heritable or personal, as they should think proper, were made liable for the loss of a sum lent to a member of the family on insufficient security.

The trustees of a draper in Glasgow, who died in 1863, held his estate, consisting, *inter alia*, of £4400 of capital in his business and his business premises, for the purpose of paying his widow an annuity of £400 per annum, and of

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dividing the residue among his children. They had the fullest powers to invest the estate "on such securities, heritable or personal, as they should think proper." The eldest son, who subsequently carried on the business, in 1874 bought the premises for £25,000, and applied to the trustees, after paying £13,000 of the price, for a loan of £12,000 to meet the balance, offering as security the premises themselves, on which he had already borrowed £17,000, and other subjects belonging to him. All these subjects were already burdened. The margin of value of the whole subjects, including the business premises,—taking as the gross value in each case the prices paid for them within a year of the loan,—was £12,150. He also offered the security of a policy on his life for £2160, the surrender value of which was less than £500, and his share, viz., one-seventh, of the sum (£10,000) held by the trustees for security of the widow's annuity. In addition he offered the personal security of his father-in-law, engaged in business in Glasgow as a "club draper," who was proprietor of certain subjects in which large quantities of shale were believed to exist. Both he and the offerer were then (1874) in good credit. The offer was accepted, but no communication was made to the other beneficiaries, several of whom were of age. One of them shortly afterwards, on hearing of the loan, protested for himself and the other beneficiaries, but no notice was taken of his letter. In 1884, the debtor and his father-in-law having both become bankrupt, and the prior bondholders having entered into possession, an action was raised by the beneficiaries against the trustees for repayment of the loss sustained by the estate through the transaction.

Held (*aff.* judgment of Second Division) that the trustees were personally liable as having invested on unsubstantial and insufficient security, contrary to the law and practice of trust administration.

Opinion (*per* Lord Watson) that there is no rule in the law of Scotland that the responsibility of a gratuitous trustee must (apart from any special dispensation by the truster) be tested by reference, not to an average standard, but to the degree of care and prudence which he uses in the management of his own private affairs.

Per Lord Watson—"The power to lend trust money on personal credit may prove very useful to trustees who are in search of a permanent investment, but trustees who make a permanent loan on that footing must, in my opinion, if any loss results from it, justify their action by shewing that no safer investment was open to them."

Ld. Chancellor (Halsbury).
Lord Watson.
Ld. Fitzgerald.
Lord Macnaghten.

(In the Court of Session, 2d November 1886, 14 R. 22.)

The defenders appealed.

After hearing counsel for the appellants,—

Lord Chancellor.—My Lords, in this case I have come to the conclusion that the judgment of the Lord Ordinary is one which, so far as it determines a question of fact, is very satisfactorily supported by the evidence, and if the facts are as his Lordship found them to be, it seems absolutely impossible to controvert the legal conclusion.

Certain family trustees appear to have lent a sum of £12,000 on what they ought to have known to be a very doubtful security. It is quite possible that the trustees were only actuated by an honest desire to do what was best for the whole family, and it may be that they were quite right in endeavouring to aid and assist William Millar to become the purchaser of the property of which they had the disposition; but there was upon them the overwhelming obligation to see that the property which they disposed of to William Millar was paid for.

Now, I am satisfied the trustees were or ought to have been conscious of the fact that William Millar was not in a position to pay for what he had bought; they nevertheless permitted it to be conveyed to him; they allowed him to raise £17,000 upon it, and then lent him £12,000 on the property so previously charged, not in truth as an investment at all, but as a method by which he should in form pay the purchase money of the property they had sold him.

I asked the same question as Lord M'Laren—"Why did not the trustees agree themselves to lend the £17,000 on a first bond, and allow Mr Millar to raise the £12,000 on what he offered as unexceptionable security?" They knew, or Mr Black, their agent, knew on their behalf, that Mr Millar could not have got the £12,000 from any source but the trust, and I have the less difficulty in arriving at the conclusion at which I have arrived when I remember that Mr Black was to the knowledge of the trustees the adviser of Mr William Millar as well as their own. If trustees will permit such a mixture of interests to take place, they have but themselves to thank when such a misfortune as has resulted in this case overtakes them.

I think there is some evidence to shew that the trustees (I daresay from very worthy motives) had placed themselves in the position of champions of the William Millar side of the family, but I am of opinion that the loan was originally a breach of trust. I think it was not made better by the personal security that they took, since I am of opinion that the whole transaction assumes the shape of an accommodation to William Millar to buy the property, and not a *bona fide* investment of the trust-funds.

Under these circumstances it becomes unnecessary to consider the indemnity clause, since to such a transaction the indemnity clause has no application.

It is to my mind unnecessary to consider under these circumstances the question as to the continuance of the loan in spite of warning and remonstrances. It certainly cannot make better the position of the trustees. I move your Lordships that the interlocutor appealed from be affirmed, and this appeal dismissed, with costs.

LORD WATSON.—My Lords, the testamentary trustees of the late John Millar, merchant in Glasgow, who are represented by the appellants, lent in November 1874 £12,000 of the trust-funds under their charge to William Millar, one of the seven beneficiaries entitled, in equal shares, to the residue of the trust-estate. That sum formed part of the price of a tenement purchased by William Millar from the trustees, which was payable in terms of the contract of sale in May 1874, but he was unable to pay the £12,000, and was allowed to retain it as a loan. In security of the loan he conveyed to the trustees three house properties in Glasgow, including his purchase from the trust, upon each of which there were prior incumbrances to an amount exceeding two-thirds of their estimated values as stated by the borrower. Besides these margins the trustees held the personal obligation of their debtor, whom they must have known to be impecunious, and of his father-in-law, Andrew Walker, who was engaged in trade, and of whose solvency they knew nothing beyond general repute.

Notwithstanding remonstrances by the other beneficiaries interested, the money was suffered to remain on these securities until 1884, when it was discovered that the margins were utterly worthless, and both the personal obligants became bankrupt, the estimated dividend in William Millar's sequestration being 2d. and in Andrew Walker's 5s. 9d. per pound.

It is not disputed that in ordinary circumstances the conduct of these trustees would have been unwarrantable, and that they would have been personally liable to make good to the trust-estate the deficit occasioned by the insufficiency

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of the securities, but the appellants plead that the combined effect of tw clauses in John Millar's deed of trust is to relieve them of all responsibility fo the loss.

By the first of these clauses his trustees are authorised and empowered, whe they shall consider it necessary or expedient, to realise the trust-estate, and "t lend out the proceeds and other funds of the trust, or such parts thereof as ma not be otherwise required, on such securities, heritable or personal, as they ma think proper." A power to lend on personal security has been held in Scotlan to include lending on personal credit, but it must be kept in view that in re quiring some kind of security to be taken it was the plain object of the truste to preserve intact the capital of the trust-estate for the benefit of the person ultimately entitled to it. It appears to me that the authority to invest, whic he gives for that obvious purpose and no other, cannot be construed as a licence to his trustees to take a worse instead of a better security—that is to say, to accept a bare personal obligation so long as it is possible for them to obtain a pledge of heritable or moveable property. The power to lend trust money on personal credit may prove very useful to trustees who are in search of a permanent investment, but trustees who make a permanent loan on that footing must, in my opinion, if any loss results from it, justify their action by shewing that no safer investment was open to them. It would require very exceptional circumstances to warrant a loan of trust funds, continued for a period of ten years, upon no better security than the personal guarantee of two individuals whose ability to repay was dependent upon the vicissitudes of trade.

By the second of these clauses it is declared that the trustees "shall not be liable for omissions, errors, or neglect of management, nor *singuli in solidum*, but each shall be liable for his own actual intromissions only." I see no reason to doubt that a clause conceived in these or similar terms will afford a considerable measure of protection to trustees who have *bona fide* abstained from closely superintending the administration of the trust, or who have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust and of the persons whom it concerns; but it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of *culpa lata*, or of gross negligence on his part, or of any conduct which is inconsistent with *bona fides*. I think it is equally clear that the clause will afford no protection to trustees who, from motives however laudable in themselves, act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer. I agree with the opinion expressed by Lords Ivory, Gillies, and Murray in *Seton* v. *Dawson*, 4 D. 318, to the effect "that clauses of this kind do not protect against positive breach of duty."

Upon the facts of this case I should be prepared to hold that there was *crassa negligentia* exhibited by these trustees. The sale to William Millar was effected on terms favourable to the trust, and having regard to the pecuniary circumstances of the purchaser they were not in my opinion to blame for not insisting upon immediate payment of the £12,000, which might have defeated the transaction. But these very circumstances, coupled with the unsatisfactory character of the securities which the purchaser was able to give them, ought to have warned men of ordinary prudence of the necessity of obtaining payment of the money within a limited time, and of placing it on a proper trust investment. I am content, however, to rest my judgment upon the same view of the facts which was adopted by the Lord Ordinary and by the Second Division of the

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Court. I do not think it necessary to enter into details of the evidence, which has satisfied me that throughout the unfortunate transaction these trustees lost sight of the primary duty which they owed to the beneficiaries interested, and were mainly actuated by a desire to accommodate William Millar, the borrower of the money.

There were two points raised in the argument for the appellants which appear to me to deserve notice. It was seriously argued that, according to the law of Scotland, the responsibility of a gratuitous trustee must (apart from any special dispensation by the truster) be tested by reference, not to an average standard, but to the degree of care and prudence which he uses in the management of his own private affairs. The rule, which is quite new to me, would be highly inconvenient in practice. In every case where neglect of duty is imputed to a body of trustees it would necessitate an exhaustive inquiry into the private transactions of each individual member, the interest of the trustee being to shew that he was a stupid fellow, careless in money matters, and that of his opponents to prove that he was a man of superior intelligence and exceptional shrewdness. The learned counsel were unable to cite any case in which such a rule has been applied, but it was said to rest upon the high authority of Lord Stair. We were referred to a passage in that title of the Institutes which treats of mandates (i. 12, 10), where the rule is so laid down. But the passage thus relied on appears to me to have reference to special and not to general mandates. The learned author carefully distinguishes between these two classes (i. 12, 15), mandates being defined by him as special or determinate "when both matter and manner are special," and as general or indeterminate "when the matter is special but the manner is not specified." A testamentary trust to invest on such heritable or personal securities as the trustees may think proper is of the nature of a general or indeterminate mandate, and the rule which Lord Stair twice lays down in reference to that case (i. 12, 9, and 15) is, that the mandator "must necessarily do what is best *secundum arbitrium boni viri*, and must do the like in all indeterminate mandates."

The other point involves matter of some delicacy. It was urged that the trustees acted *bona fide* in accordance with the advice of their law-agent, whose evidence was no longer available when this case went to trial. The late Mr Knox, one of the trustees, said in his evidence, "we were entirely guided by him," and another of them, Mr Gavin Miller, on his attention being called to the hazardous nature of the transaction, stated "we were acting on the advice of our law-agent, and we considered we were perfectly safe." The agent upon whom they thus relied was not only acting for the trust, but on behalf of William Millar, their borrower, and the fact of his double agency was well known to the trustees. I have always held that in the conduct of his own affairs a man may, if he chooses, trust to the advice of an agent in that position, and if anything goes wrong *sibi imputet*, but I am very clearly of opinion that no one clothed with a fiduciary character is justified in perilling the interest of the *cestuis que trust* upon such partial advice. I have not found it necessary to take the circumstance into account in deciding the present case; had it been necessary to do so, any inference which I could have derived from it would have been unfavourable to the appellants.

I concur in the judgment which has been moved by the Lord Chancellor.

Lord Fitzgerald.—My Lords, I concur in thinking that the interlocutor

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of the Lord Ordinary adopted by the Second Division of the Court o Session should now be affirmed, for the reasons given both by the Lorc Ordinary and in the Court of Session. In the very able and elaborate judgment of my noble and learned friend opposite (Lord Watson) there are som additional propositions on which I do not find it necessary to express an opinion.

LORD MACNAGHTEN.—My Lords, I quite agree. Notwithstanding the able argument of Mr Rigby and Mr Dickson I cannot say that I have felt any doubt as to the propriety of the interlocutors under appeal.

Any system of trusts which did not require trustees to act with perfect impartiality as between their *cestuis que trust*, and to bring to the management of trust affairs the same care and diligence which a man of ordinary prudence may be expected to use in his own concerns, would be illusory and mischievous. Tried by this standard the conduct of the defenders falls far short of what is required by law and common sense. The transaction which has led to the loss stands condemned, whether it be regarded as a sale of trust property, or as an investment of trust funds, or as a combination of both. No man of ordinary prudence would, I think, have sold his own property on the terms upon which the defenders disposed of the property committed to their charge. The property seems to have been readily saleable at the time, yet the trustees were satisfied to part with the legal dominion over it for about half its value in cash, taking for the balance a parcel of securities of the most shadowy and unsubstantial character. No man of ordinary prudence would have thought of investing £12,000 of his own on these so-called securities. No man of ordinary prudence would have entered into the arrangement regarding it as a whole unless his first object had been to assist Mr William Millar and help him to become owner of his business premises.

It was said that the price was a very high one, and that it was greatly to the advantage of the trust-estate that the transaction should be carried through even at some risk. There is no evidence that the sum which Mr William Millar offered was more than might have been got in the open market. But assuming that the price was high, and that it was most important to secure it, that did not justify the trustees in parting with the substance in a great measure for a mere shadow. If the trustees were really desirous of carrying the transaction through for the benefit of the trust-estate, one would certainly have expected to find that they would have required payment by instalments, or at least have insisted on Mr William Millar reducing his debt while his affairs still continued prosperous.

It is impossible, I think, not to see that the trustees did unduly favour Mr William Millar. They seem to have been led aside from the strict path of duty by two things. They appear to have thought, rightly or wrongly, that the second family were trying to put an unfair pressure on Mr William Millar, and so they paid no attention to remonstrances in themselves reasonable, and they allowed their judgment to be guided or warped by the opinion of a gentleman who was acting, or professing to act, as their law-agent, but who was also to their knowledge the law-agent of Mr William Millar, and whom therefore they ought not to have consulted on this question.

On the whole I have no hesitation in agreeing with the Lord Ordinary and the Second Division of the Court of Session that the £12,000 was lent to Mr

William Millar upon unsubstantial and insufficient security, contrary to the law and practice of trust administration.

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INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

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WESTMINSTER FIRE OFFICE, (Defenders) Appellants.—*Finlay, Q.C.—Wood Hill.*

GLASGOW PROVIDENT INVESTMENT SOCIETY, (Pursuers) Respondents.—*Rigby, Q.C.—J. G. Barnes, Q.C.*

Fire insurance—Insurable interest—Right of postponed bondholder to recover insurance when prior bondholder has recovered sum sufficient to reinstate.—The proprietor of mills (which with the site were at least of the value of £10,000) granted bonds over them for £9000, and subsequently a postponed bond to another creditor for £900. Policies of fire insurance for £7000 were taken in name of the prior bondholders for behoof of themselves and of the owner in reversion. The postponed bondholder, an investment society, took a policy of fire insurance from another company for £900 in name of the society and of the owner "in reversion." The policy insured against damage by fire "the property described on the margin hereof." On the margin were set forth various items forming parts of the mills and machinery, with the specific sum insured on each. The owner paid the premiums of insurance.

A fire occurred, which damaged the mills and stopped the works. The holders of the prior bonds obtained under their policies of insurance the sum of £5668, which was sufficient to reinstate the works, but they applied it in reduction of their debt.

Subsequently the investment society raised an action, with consent and concurrence of the owner, against their insurers for declarator that the pursuers were entitled to be indemnified by the defenders against the loss they had sustained by the fire, and for payment. The defenders denied liability, on the ground that the loss caused by the fire had already been made good to the prior bondholders and the owner. It was admitted that at the date of the fire the subjects were of sufficient value to cover all the bonds, and that after the fire the subjects were not of sufficient value to meet the prior bonds.

Held (*aff.* judgment of whole Court) that the defenders were bound under their contract to indemnify the investment society for the loss it had sustained by the fire.

Question, whether the Act 14 Geo. III. cap. 78, applies to Scotland.

Opinion (*per* Lord Watson) that it does not.

(IN the Court of Session, 12th July 1887, 14 R. 947.)

Ld. Chancellor (Halsbury).
Lord Watson.

The defenders appealed.

The parties agreed to accept the judgment of the Lord Chancellor and Lord Watson.

LORD CHANCELLOR.—My Lords, this action was founded on a contract contained in a policy of fire insurance, dated 10th October 1881. One of the terms of that contract was that if the property or any part thereof should be destroyed or damaged by fire the appellants agreed that they would make good the loss to an amount not exceeding £900. The owners of the property insured were Messrs Hay, grain millers of Glasgow. The respondents held heritable securities on the property to an extent not exceeding £900. Other contracts of insurance had been made by other creditors of Messrs Hay, the proprietors of the mills. These other creditors also held heritable securities prior to those of the present respondents.

By the joint minute of admission it was agreed between the parties that

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immediately before the date of the fire the value of the subjects insured was sufficient to cover both the prior bonds and that of the respondents. As a consequence of the fire the value of the buildings is now so reduced that the respondents' bond is entirely uncovered. It appears to me beyond doubt that by the contract of indemnity into which the appellants entered with the respondents the contingency has arisen against which the appellants contracted to indemnify the respondents.

It is difficult to state the argument on the other side, since it seems to me to be founded partly upon an error of law and partly upon a suggestion of fact which seeks to get behind the admission by which the parties are concluded. The error of law, I think, is in the suggestion that a creditor has not an insurable interest in the property of his debtor, upon which property the debtor has given him a heritable security. I should have thought it was too well settled a proposition in insurance law to be susceptible of argument that a creditor under these circumstances is entitled to insure. The error in fact appears to be founded upon the suggestion, more implied than expressed, that more was insured upon the subjects of insurance than their value justified, since, if the property before the fire was good security for the value of the bonds, and is now only good as represented by the insurance paid in respect of it to satisfy the bonds prior to that of the respondents', it is difficult to see that when all these contracts were made, the subject being sufficient to satisfy them, and the fire alone having made the difference, yet the respondents are not to be indemnified to the extent of their loss. I am wholly unable to understand how other contracts made with other people can affect the question, once it is conceded that the property as it originally stood was sufficiently valuable to meet the demands of all. But it is said that, apart from the sums of money received by the prior creditors, and by which they have extinguished the debt which gave them an insurable interest in the premises, they might—or some of them might—have insisted on the reinstatement of the premises. It seems to me that such a proposition would be as reasonable an answer to the respondents' demand as to suggest that if the premises had not been burned down there would have been no loss, and I agree that if the premises had been reinstated there would have been no loss, but as a fact they were not, and, apart from the argument derived from the Statute 14 Geo. III. cap. 78, section 83, that the respondents had no control over the question whether the premises should be reinstated or not, and no terms in the contract to which they were parties gave them an option whether the premises should or should not be reinstated. With respect to that statute I will only say that no such question is suggested upon the record, and inasmuch as there are some questions of fact which would have to be determined before one could affirm the application of that statute, I decline to consider it.

As to the rent, I am of opinion that there was no loss in respect of it. The £120 awarded by the Inner-House in respect of the rent seems to me not to be maintainable—Messrs Hay themselves occupied the premises. This was an occupation to which the respondents could not under the circumstances have been entitled, and the loss, if it can be called a loss, to the actual occupiers has been paid for to the persons entitled to it. It is not a loss to the respondents, who never had it, and could not be entitled to it. I am therefore of opinion that the judgment must be reduced by the sum of £120. It does not appear to me that that alteration of the amount substantially affects the question as to who has been successful in the litigation, and I therefore think that the appel-

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lants ought to pay the costs both here and below, and I move your Lordships accordingly.

My Lords, I am not entitled to read to the House as a judgment the opinion of the noble and learned Earl (the Earl of Selborne) who was present during the argument in this case, but as a part of my opinion I am entitled to read it to your Lordships, and I propose to do so. What follows is that which the learned and noble Earl would have said if he had been here.

EARL OF SELBORNE.

"The questions to be decided on this appeal are two—First, whether the respondents are entitled to recover at all against the appellants? and secondly, whether they are entitled to recover for loss of rent? If the respondents have suffered any loss by the destruction of the insured buildings which were destroyed by fire, it follows necessarily that they are entitled to recover to the extent of that loss in this action. If they have suffered no such loss they are of course not entitled to any indemnity. The case therefore of the appellants upon the first question depends upon the contention (difficult in the face of the admissions upon the record) that the respondents have suffered no such loss.

"The respondents were insured in the appellants' office for £900 by a policy dated in 1881, on which the premiums were duly paid. The subjects insured against fire consisted of the Greenhead grain mills and machinery (at Glasgow), belonging to Messrs Hay Brothers, who had given the respondents a heritable security by bond on those premises for the sum of £1000, of which £917, 11s. 6d. remained due when the fire occurred. The amount of that insurance was apportioned over different parts of the subjects insured, of which the barley mill and counting-house were damaged to the full amount at which they were insured, viz., £190, and damage, estimated at £40, was also done to parts of the machinery insured to a greater amount. Under the judgment of the Inner-House now appealed from the respondents have recovered these two sums (making together £230), and also £120 for one year's rent of the barley mill and counting-house—in all £350.

"There were prior securities also given by Messrs Hay Brothers to other creditors upon the same premises, and those other creditors had insured in other offices. All the securities, including that of the respondents', covered the ground or site on which the mills stood, which (being a subject indestructible by fire) was not insured either by the respondents or by the prior incumbrancers.

"It was admitted between the parties that 'immediately before the date of the fire the value of the site, buildings, and machinery of Greenhead grain mills was sufficient to cover not only the prior bonds, but also the pursuers' bond.' The interest therefore of the respondents at the time of the fire was more than equal to the amount which they have recovered in this action. It was also admitted that 'the value of the site of the mills, and the salvage thereon of buildings and machinery after the fire, was not sufficient to meet the bonds prior to that of the pursuers'.' The pursuers therefore have actually lost by the fire the whole amount of that interest in respect of which they were insured, and they have *prima facie* a clear right to the extent to which that loss is covered by their contract with the appellants so to be indemnified. I reject (as in my judgment fallacious) the argument that part of the loss ought to be ascribed to depreciation in value of the site or ground on which the barley mill and counting-house stood, or of other parts of the site of the mill premises. The site remains at whatever may have been its value apart from and independent of the

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buildings which stood upon it. Any greater value which it had when the buildings which have been destroyed stood upon it was entirely due to those buildings, and as they were insured and have been destroyed by fire the contract of indemnity covers in my opinion the whole of that difference, less salvage only.

"What, then, is the ground on which the respondents' claim to indemnity is now resisted? Simply this, that the prior incumbrancers have recovered from and have been paid by the other offices in which they were insured (under contracts to which neither the appellants nor the respondents were parties or privies) £5500, being (subject to certain reserved questions affecting a sum of £168, 16s. 8d., with which the respondents are in no way concerned) the amount which had been awarded by the witness Mr Kinniell (oversman in a reference between the prior bondholders and those offices) as sufficient for the reinstatement of the premises. But the premises were not in fact reinstated. The whole amount so awarded went into the pockets of the prior incumbrancers. If it had been applied in reinstating the premises the respondents would no doubt have had the benefit of the reinstatement, and the appellants might then have been entitled to say that they had suffered no loss. But it was not so applied, and the respondents derived no actual benefit from the payment to the prior incumbrancers, because although the debt due to those incumbrancers was (so far) reduced, the balance still remaining due to them was more than sufficient to exhaust the whole remaining value of the property included in their securities.

"It is, nevertheless, insisted that the payment so made, by strangers to the contract on which this action was brought, to other strangers with whom the respondents had nothing to do was, not as between those parties only, but also as against the present respondents, the full and absolute measure of the respondents' interest, and of the whole loss for which any number of insurance companies could possibly be answerable by way of indemnity to any number of persons, under any contracts whatever, in respect of this fire; and that, this having been paid to the prior incumbrancers, and having been insufficient (by more than the amount now in question) to discharge their debt, the whole interest of the respondents in the subject-matter of the action was thereby extinguished. Why should this be so? As between themselves and the prior incumbrancers it was the right of the other insurance companies to satisfy their contracts of indemnity by reinstating the premises which the fire had destroyed, or (which amounts to the same thing) to pay those prior incumbrancers the amount necessary and sufficient for that purpose. This they have done. The claims of the prior incumbrancers on their insurances were in that way satisfied, and it is in my judgment immaterial, as between the present parties, that they might have been entitled under their securities to receive and retain more, if more had been recoverable under their policies. But if the amount of the actual loss by the fire, with which alone the respondents are concerned (as the premises have not been reinstated, and the appellants have not offered to reinstate them), is greater than the amount which would have been sufficient to reinstate them, and which the prior incumbrancers have accepted, why should this latter amount be treated as the measure of the loss as between these parties? Nothing less than some statutory or other binding authority could establish in the appellants' favour a false and arbitrary measure of the actual loss. No such authority applicable in these circumstances, and as between these parties, was cited to your Lordships. The sum necessary to reinstate is one thing; the loss if there be no reinstatement (which is the present case) is another. On this point the

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evidence of the witnesses Livingstone and Thomson is demonstrative, and in my judgment conclusive.

"It was further contended that the respondents, under a certain statute (14 Geo. III. cap. 78, sec. 83), might have intervened before the settlement between the other insurance companies and the prior incumbrancers, and might have required the money, which was in fact paid to those prior incumbrancers, to be applied in reinstating the premises. I am by no means sure that they could, assuming (as for this purpose I do assume) that the section of the statute relied upon is operative beyond the Bills of Mortality (see *Ex parte Gorely*, 4 De G. J. & S. 477), and that the Scottish Courts, in which no similar question has yet been raised, would hold it to be applicable to Scotland. It has not, as far as I know, ever been decided that it applies as between mortgagor and mortgagee, or (which is the same thing in effect) as between prior and puisne incumbrancers. The concluding words of the section are sufficient at least to suggest grave doubts whether it ought to be so applied. But I do not think it necessary for your Lordships to decide that point, because no question upon that statute has been raised in the pleadings between these parties, as (in my judgment) it ought to have been, if anything was to be founded upon it. There is nothing to shew that the respondents knew that they had the right which the statute is supposed to have given them, much less that they were bound, as between themselves and the appellants, to put it in force. It is not even shewn that they knew what other insurances there were, or that they could practically have intervened before the settlement between the other insurance companies and the prior incumbrancers was completed. Certainly it does not appear that they were ever called upon by the appellants to exercise that supposed right; and if they were not, the appellants ought not, in my opinion, to be heard to complain that it was not done. So far therefore as my judgment is concerned, nothing turns in this case upon the Statute 14 Geo. III. cap. 78.

"The question of rent remains; and as to this I think the respondents fail, and that the sum awarded to them by the Inner-House ought to be reduced by £120. The mills were in fact occupied by the mortgagors Messrs Hay, and not by any tenant paying rent. Taking the £120 as representing one year's value of their occupation to Messrs Hay (who were joint insurers), the occupation rent could only be lost to the persons entitled to receive it; and when paid to or settled with them it could not be lost over again to any other person. The rent of the barley mill and counting-house was included in the securities of the prior incumbrancers; it was also insured by them; they, according to their priority, and not the respondents who stood behind them, were entitled, if they thought fit, to claim it, or the insurance money payable for its loss. In the settlement between them and the offices in which they were insured they actually did so, and it was allowed to them for eight months, the period which the oversman thought it would have taken to restore the property and to put the mill in full working order. This could only be on the principle of treating them as, through their mortgagors, virtually in possession or in receipt of rents and profits; the mortgagors, as joint insurers, were parties to that settlement. I am unable to see how, consistently with this, there could be another actual loss of the same rent for those four months of the year during which it was treated as not lost to those prior incumbrancers. I think, therefore, that the amount recovered in the action ought to be reduced to £230.

"I do not, however, think that the determination of this point in the appel-

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lants' favour ought to make any difference as to costs. Considering the position c the parties, and the nature of the larger question raised by the appeal, my opinio is that all the costs, here and below, ought to be paid by the appellants."

Lord Watson.—I have had the opportunity of considering a print of th opinion of the noble and learned Earl (the Earl of Selborne), and I concur in i The reasoning of the learned Judges who constituted the minority of the Cour of Session depends upon two propositions, which are in my opinion equall fallacious. One of these is that separate fire policies covering the same subjects effected without privity by independent incumbrancers, for the protection o their several interests, must all be treated as if they had been effected by th owner of the subjects, if he is made a party to each policy in respect of his righ of reversion only, and undertakes to pay the premiums of insurance. The othe is, that payment to a first incumbrancer of a sum which does not represent the difference between the insurable value of the subjects and their value after deterioration by fire, but is sufficient to reinstate them, must necessarily be regarded as full indemnity to a postponed incumbrancer in any question with his own insurers, although the sum so paid is pocketed by the insured and is not expended on reinstatement.

The Act 14 Geo. III., cap. 78, sec. 83, was not pleaded in the Court below, and it is not referred to in the appellants' case, although it was founded on in the argument addressed to your Lordships. Having regard to the preamble of the statute, and to the general scope of its provisions, it humbly appears to me that if a question were to arise as to its applicability within the realm of England, beyond the Bills of Mortality, the decision in *Ex parte Gorely*, Nov. 10, 1864, 4 De G. J. & S. 477, would require to be carefully considered. In my opinion the Act was not intended by the Legislature to have any application to Scotland. It was passed in order to amend previous legislation which had no reference to that country, and the whole tenor of its enactments, and the remedies which these provide, appear to me to indicate that they were not meant to be administered by Scottish Courts.

I am also of opinion that the respondents have failed to shew that they had an insurable interest in the rent of the subjects embraced in their security, but I agree with the Lord Chancellor that their failure upon that subordinate point ought not to prejudice their right to the costs of this appeal.

The House affirmed the judgment appealed against, with a variation deducting the amount given for the alleged loss of rent, the respondents not having an insurable interest in rent for which an allowance had already been made to prior bondholders: Appeal dismissed, with costs.

Dawes & Sons—H. B. & F. J. Dewar, W.S.—Lindo & Company—Smith & Mason, S.S.C.

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Magistrates of Glasgow v. Farie.

Magistrates of Glasgow, (Pursuers) Appellants.—
Att.-Gen. Sir R. E. Webster—Balfour Brown, Q.C.
Allan Farie, (Defender) Respondent.—*Sir H. Davey, Q.C.—E. W. Byrne.*

Minerals—Clay—Water-Works Clauses Act, 1847 (10 *and* 11 *Vict. c.* 17), *sec.* 18—*Railway Clauses Act*, 1845 (8 *and* 9 *Vict. c.* 33).—*Held* (*diss.* Lord Herschell, *rev.* judgment of First Division) that the provision of the Water-Works Clauses Act, 1847, sec. 18, excluding from conveyances of lands purchased under the Act (when not expressly included) "mines of coal, ironstone, slate, or other minerals under any land purchased" did not apply to a seam of clay forming the subsoil of the lands conveyed.

The Lord Chancellor holding that the word "minerals" fell to be construed in accordance with the ordinary use of the word in dealing with proprietary rights in Scotland, and did not include clay.

Lord Watson holding that the "land purchased" included the soil and subsoil, and that the exceptional depth of the subsoil (even if mineral) was no reason for bringing it within the category of excepted minerals.

Lord Macnaghten holding that the exception was limited to mines in the proper and usual sense of underground workings, and to minerals in such mines.

Lord Herschell was of opinion that the word "mines" was not limited to underground workings or to minerals that could be won only by such operations, and that the word "minerals," as used in the exception, must be taken to mean all such non-vegetable substances lying together in seams or strata as are commonly worked for profit, and to include clay.

(In the Court of Session, Jan. 21, 1887, 14 R. 346.)
The pursuers appealed.

Ld. Chancellor (Halsbury).
Lord Watson.
Ld. Herschell.
Lord Macnaghten.

LORD CHANCELLOR.—My Lords, I cannot conceal from myself the importance and the difficulty of the question involved in this case. The consequences flowing from a decision either way seem to me to be very grave, and I desire therefore to say at the outset that I wish to decide nothing but what is necessarily involved in the particular case now before your Lordships. That question may be very summarily stated to be whether clay is included in the reservation of mines and minerals under the Water-Works Clauses Act, 1847.

I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by Lord Justice James in the case of *Hext* v. *Gill* (July 22, 1872, L. R., 7 Ch. App. 699), which I shall have occasion hereafter to refer to, and although the Lord Justice held himself bound by authority, so that he yielded to the technical sense which had been attributed to those words, I still think (to use his language) "that a grant of mines and minerals is a question of fact—what these words meant in the vernacular of the mining world, the commercial world, and land-owners," at the time when they were used in the instrument it is necessary to consider.

I will not at present say how far I think we are bound by authority, because I desire to keep myself entirely free if the question should arise in this House with respect to any other statute or with respect to any grant not controlled by the statute in question in which the words "mines" and "minerals" occur.

It may be that I am influenced by the considerations to which Vice-Chancellor Wickens referred (L. R., 7 Ch. App. 705) when he said that "some inclination may be thought to have arisen on the part of Judges to give more weight than ought to have been attributed to some small circumstances of context in order to cut down the proper and ordinary meaning of the words 'mines and minerals.'" I think no one can doubt that if a man had purchased a site for his house with a reservation of mines and minerals neither he nor anybody else would imagine that the vendor had reserved the stratum of clay upon which his house was built under the reservation of mines and minerals.

There is no doubt that more accurate scientific investigation of the substances of the earth and different modes of extracting them have contributed to render the sense of the word "minerals" less certain than when it was originally used in relation to mining operations. I should think that there could be no doubt

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that the word "minerals" in old times meant the substances got by mining, and I think mining in old times meant subterranean excavation. I doubt whether in the present state of the authorities it is accurate to say that in every deed or in every statute the word "minerals" has acquired a meaning of its own independently of any question as to the manner in which the minerals themselves are gotten.

Lord Justice Mellish, in the case to which I have already referred, sums up the authorities by saying (L. R., 7 Ch. App. 712) that the word "mines" (to use his Lordship's language) combined with the more general word "minerals" "does not restrict the meaning of the word 'minerals,'" and he says that the result of the authorities appears to be "that a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit unless there is something in the context, or in the nature of the transaction to induce the Court to give it a more limited meaning." I cannot myself assent to such a definition. In the first place, it introduces as one element the circumstance that the substance can be got at a profit. It is obvious that if that is an essential part of the definition the question whether a particular substance is or is not a mineral may depend on the state of the market, and it may be that a mineral one year is not a mineral the next.

If, on the other hand, one is to have recourse to etymology or science, and to disregard the mode of working as reflecting any light on the nature of the substance, it is obvious to inquire whether coal is a mineral. Its vegetable origin would to some minds exclude its being regarded as a mineral, while the substance kaolin was held by Vice-Chancellor Wickens (L. R., 7 Ch. App. 705) to be a mineral. "According to the evidence kaolin or china clay is a metalliferous mineral, perfectly distinguishable from and much more valuable than ordinary agricultural earth, and which produces metal in a larger proportion to its bulk as compared with ordinary ores, but which it is not commercially profitable to work in England for the purpose of extracting the metal from it."

The difficulty of dealing with this case is not diminished but rather increased by the state of the authorities upon the question. In *Bennett* v. *The Great Western Railway Company*, March 18, 1867, L. R., 2 H. L. 27, all that was decided in this House was that the common law principle which would have prevented an owner who had sold his surface land to a railway company from defeating his grant by withdrawing support from the surface land so used, did not apply to a state of things created by the statute in which the statute itself creates the distinction between the surface-owner and the mine-owner, and gives power to the mine-owner to work his minerals unless the railway company purchases or gives compensation to the mine-owner for leaving his mines unworked. In that case it was admitted that the word "minerals" was properly applicable to the substances to be worked, and the only question was the application of the common law principle to which I have adverted. But the Legislature must have meant something when it recognises and acts upon the distinction which as matter of business and understanding in the mining and commercial world I think everyone must be familiar with.

It appears to me that the effect of some of the decisions, pushed to their logical consequences, would be altogether to efface the distinction which all the statutes recognise. One might summarise these decisions and say a mineral need not be metallic, it need not be subjacent, it need not be worked by a mine, it need not be in any one particular distinguished from any part of the

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substance of the earth, using the word "earth" as applicable to this habitable globe. Even the word "inorganic" must be rejected if applied to some of the substances which form part of the earth. The bones of extinct animals are limestone, and, as curiosities for research and scientific inquiry, would find a ready market and would therefore come within that part of the definition which requires that they should be capable of being profitably worked. Are they minerals?

I find myself called upon to construe these words with reference to the known usage of the language employed in distinguishing proprietary rights in Scotland, and having relation to Scotch land and Scotch mines or minerals. I am not insensible to the observation that this is only one of a group of statutes which may be supposed to have had the same object, and might be therefore assumed to use the same phraseology in the same sense. Still, I am construing the application of general words to a purchase made in Scotland under the statutes, and if there be any difference in the law of Scotland from that of England the Legislature must be supposed to have been familiar with it, and to have legislated accordingly.

Now, the case is stated by the Lord Ordinary thus,—"Here the thing which the defender claims to work is the common clay which constitutes the subsoil of the greater part of the land of this country, which never can in any locality be wrought by underground working, but under all circumstances is only to be won by tearing up and destroying the surface over the entire extent of the working. When such a right is claimed against the owner of the surface, I ask myself, Did anyone who wanted to purchase or acquire a clay-field, whether by disposition or reservation, ever bargain for it under the name of a right of working minerals? In the case of a voluntary sale of land, with reservation of minerals, I am satisfied that we should not permit the seller to work the clay to the destruction or injury of the purchaser's estate, because we should hold that the conversion of the estate into a clay-field was not within the fair meaning of the reservation. That being so, I see no reason for concluding that the statutory reservation of minerals means anything different from a reservation of minerals in a private deed. The consequences of the reservation are different, but the thing to be reserved is to my mind essentially the same, being neither more nor less than the right to work such substances and strata as are ordinarily known by the denomination of minerals in contracts between sellers and purchasers or superiors and feuars."

If that is the correct view, and I find myself unable to differ from it, I think the case of *Lord Breadalbane* v. *Menzies* (June 10, 1818, F. C., affd. 1822, 1 Sh. Apps. 225) is a binding authority in this House. There the words were, "haill mines and minerals of whatever nature and quality," and were held not to include a vein of stone suitable for building.

I feel it impossible to resist the reasoning of Lord Mure in this case, but I hold myself free if the question should arise in England to consider quite independently of this decision what may be the law as applicable to an English case. I only regret that the test which Lord Justice James suggested, and which I think would have been the true one, and would have satisfied all difficulties, was not adhered to in *Hext* v. *Gill*. In that case, as I have pointed out before, the substance which was called china clay was assumed to be metalliferous ore, and it was held that though the lord of the manor had reserved it, he could not work it, because he had not also reserved a right so to work it at the

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expense of the surface owner. I hesitate very much to adopt the reasoning of that case, notwithstanding the high authority by which it was decided.

I am satisfied with the view so clearly put forward by Lord Mure, and upon the reasoning of that learned Lord's judgment I move your Lordships that the interlocutor appealed from be reversed.

LORD WATSON.—The question raised for decision in this appeal, which is one of general importance, has led to differences of judicial opinion in this House, as well as in the Court of Session. For my own part, I have experienced considerable difficulty in forming an opinion upon it, owing to the very indefinite terms which the Legislature has used to describe the minerals reserved by statute to proprietors whose land is compulsorily purchased for the purposes of railway or water-works undertakings. The present controversy is between a statutory body of water commissioners and a landowner who is now asserting his right to work out a seam of clay within a parcel of ground about twenty-one acres in extent, which they acquired from him under compulsory powers in the year 1871; but the question which your Lordships have to consider would, in my opinion, have been precisely the same if the purchasers had been a railway company.

The Court below disposed of the case without inquiry into the facts, and these must consequently be gathered from the statements made by the parties on record, which are, unfortunately, in some respects conflicting. It appears, however, and it was assumed in the arguments addressed to us, that the seam in dispute is composed of ordinary subsoil clay, such as is generally found throughout the district; that it lies at a depth of not more than two or three feet below the surface of the soil; that it is of considerable but variable thickness, and that it has been wrought open-cast by the respondent in close proximity to the appellants' land, where its extreme thickness has proved to be from twenty to thirty feet. Since their acquisition of the ground the appellants have constructed upon it two reservoirs, each capable of storing nearly four million gallons of water, which have been sunk into and now rest upon the clay.

The 18th section of the Water-Works Clauses Act, 1847, is identical, *mutatis mutandis*, with section 77 of the English, and section 70 of the Scotch, Railways Clauses Act of 1845. It enacts that "the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the water-works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby." The Act of 1847 is a British statute, whereas there is separate railway legislation for England and Ireland on the one hand, and Scotland on the other; but it appears to me clear that the Legislature intended the words "mines of coal, ironstone, slate, or other minerals" to have the same meaning in all three countries.

In considering whether subsoil clay, such as we have to deal with in the present case, is one of the "other minerals" meant to be excepted, I have been unable to derive much assistance from such authorities as *Menzies* v. *The Earl of Breadalbane* (1 Shaw, App. Ca. 225), in which it was held that the reservation by a superior in a feu-contract of the "haill mines and minerals" that might be found within the lands disponed in feu did not give him right to a freestone quarry. Irrespective of other considerations which differentiate that case from the present, there is little analogy between a reservation of minerals coupled with an obligation to support the surface and a reservation not only of minerals but of the right to work them without giving support. Nor have I been able to obtain much light from *Hext* v. *Gill* (7 Ch. App. 699) and other English cases referred to in the opinion of Lord Shand, which his Lordship seems to regard as almost decisive of the present question. The only principle which I can extract from these authorities is this, that in construing a reservation of mines or minerals, whether it occur in a private deed or in an Enclosure Act, regard must be had not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or Act embodies. "Mines" and "minerals" are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used. In *Menzies* v. *The Earl of Breadalbane* Lord Eldon observed (1 Shaw, App. 228) that the "reservation is not contained in a lease but in a feu; and I take it there is a very great difference as to the principles that are to be applied to the construction of a feu and a lease—it is a question of a very different nature." In *Hext* v. *Gill* the controversy, which related to china clay, worked for the purpose of obtaining the felspar which it contained, arose between the lord of the manor and the purchaser of the freehold of a copyhold tenement within the manor, under a contract which excepted "all mines and minerals," and in these circumstances it was sufficiently clear that the copyholder had only right to the surface, and had no right to minerals of any kind.

I need not refer in detail to the provisions of the Water-Works and Railways Clauses Acts which follow and are connected with the sections of these Acts already noticed. The relation which they establish between seller and purchaser in regard to all minerals which may be held to be excepted appears to me to be, as Lord Westbury said in *The Great Western Railway Company* v. *Bennett* (2 E. & I. App. 42), clearly defined, useful to the railway company or water-works' undertakers, and at the same time fair and just to the mine-owner. The latter, who is forced to part with the surface of his land and all uses for which it is available, is not compelled to sell his minerals, whilst he is not in a position to ascertain their marketable value or the impediments which might be occasioned to the convenient working of his mineral field by his parting with a strip which intersects it. On the other hand, those who deprive him of a right to a portion of the surface and its uses, by compulsory purchase, enjoy the benefit of subjacent and adjacent support to their works without payment so long as the minerals below or adjoining these works remain undisturbed, but it is upon the condition that if they desire such support to be continued they must make full compensation for value and intersectional damage whenever the minerals required for that purpose are approached in working, and would in due course be wrought out.

It appears to me that the policy of the Acts in excepting certain minerals from conveyances to compulsory takers of land favours a liberal and not a limited construction of the reservation to the seller. The difficulty which I have felt in construing their enactments is due to the fact that they do not deal with "minerals" as something which may be different from and additional to "mines." They do not except mines and minerals, but "mines of coal, ironstone, slate, or other minerals"—that is to say, they only except minerals which when worked will constitute "mines" within the meaning of section 18

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of the Water-Works Act of 1847, and of the corresponding sections of the Railways Clauses Acts. It therefore becomes necessary to consider what meaning ought in these sections to be attributed to the word "mine," and also what are the "other minerals" mines of which are specially excepted? The solution of the second of these queries must necessarily be in a great measure dependent upon the answer to be given to the first.

There is a class of cases in the English books which determine that the word "mine" is according to its primary meaning significant merely of the method of working by which minerals are got; but that is not its only or necessary meaning. Shortly after the passing of the Act 43 Eliz. cap. 2, it was established by a series of decisions, the soundness of which has been often doubted, that occupiers of mines other than coal mines, are exempted from the incidence of the poor-rate. That point being settled beyond recall, the Courts gave a restricted meaning to the word "mine," and decided that in the sense of the Act of Elizabeth it must be taken to be a subterranean excavation. It was accordingly held that persons who worked lead, freestone, limestone, or even clay, by means of a shaft, and underground levels, were not liable to be rated in respect of their occupancy; whilst others who worked the same substances by means of excavations open to the light of day were held to be liable as occupiers of land. I do not suggest that the Courts erred in limiting, so far as they could, the exemption which, for some reason or other, had been established; but I may venture to express a doubt whether any such exemption or distinction with regard to the mode of working would have been recognised if the Act of 1601 had not become law until the year 1847.

I am unable to assent to the appellant's argument that in section 18 of the Water-Works Clauses Act "mines" must be understood in the same sense which it has been held to bear in the Statute of Elizabeth. Such may have been its original meaning, but it appears to me to be beyond question that, for a very long period, that has ceased to be its exclusive meaning, and that the word has been used in ordinary language to signify either the mineral substances which are excavated or mined, or the excavations, whether subterranean or not, from which metallic ores and fossil substances are dug out. It does not occur to me that an open excavation of auriferous quartz would be generally described as a gold quarry; I think most people would naturally call it a gold mine. The whole frame of section 18 indicates, in my opinion, that the Legislature intended it to include minerals got by open working, as well as minerals got by what has been termed mining proper. The clause excepts mines of slate, and also of "other minerals," an expression which must at the least include rock strata of the same homogeneous character, and generally worked, or capable of being worked, by the same methods as slate.

The fact is of sufficient notoriety to be noticed here, that although in the extreme south-west of the island slate is obtained by subterraneous workings, the reverse is the rule in North Wales and in Scotland, where it is quarried. The word "quarry" is no doubt inapplicable to underground excavations; but the word "mine" may, without impropriety, be used to denote some quarries. Dr Johnson defines a quarry to be "a stone mine." In framing section 18 and the corresponding Railway Clauses, the Legislature plainly intended that water-works' undertakers and railway companies should at the time when they take land by compulsion, pay full compensation for, and become at once proprietors of all surface and other strata which are not excepted. To adopt in these clauses

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the same construction of "mines" which has been followed for the purposes of the English poor-rate would, in my opinion, lead to consequences which the Legislature cannot have contemplated. In that case the extent to which minerals in the lands were sold or excepted at the date of the conveyance would depend upon the mode, underground or open-cast, by which they might be found at some future and far distant time to be workable, or upon the method according to which the landowner might then choose to work them. These factors being indeterminate it would be well nigh impossible at the date of the purchase to arrive at a fair estimate of the compensation payable for it. I cannot conceive that the Legislature in using the expression "mines of slate" meant to distinguish between the different methods of getting it, and to enact that slate, which may never be disturbed, shall be taken and paid for at once, if it would naturally be quarried, but shall not be taken and paid for until it is actually worked, if it would naturally be got by means of an underground level. It was certainly within the contemplation of the Legislature that water or railway works may rest upon excepted minerals, because it is expressly provided that the undertakers or the company are to be entitled to such parts of these minerals as require to be excavated for the purpose of constructing their works. When a railway company or water undertakers excavate in order to obtain a foundation for their works there is no roof to the excepted minerals; and it is difficult to understand how, in these circumstances, they could be got by proper mining.

I am accordingly of opinion that, in these enactments, the word "mines" must be taken to signify all excavations by which the excepted minerals may be legitimately worked and got. If coal, ironstone, or slate crops out at any part of the surface taken for water-works or railways purposes, the undertakers or the company acquire, in my opinion, no right save the right to use that part of the surface—they acquire no right to the minerals themselves except in so far as these are dug out or excavated in order to construct their works. The important question still remains,—What are the minerals referred to, other than coal, ironstone, or slate? My present impression is that "other minerals" must necessarily include all minerals which can reasonably be said to be *ejusdem generis* with any of those enumerated. Slate being one of them, I do not think it would be possible to exclude freestone or limestone strata. I may add that, so far as I can see, it is possible that there may be some strata which would pass to the compulsory purchaser if they lay on the surface, but may possibly be reserved to the seller if they occur at some depth below it. But I desire to say that, in the view which I take of the present case, it is not necessary to determine any of these points.

The enactments in question describe the excepted mines of minerals as lying under the land compulsorily acquired, and they appear to me to contemplate that the purchasers, as soon as they obtain a conveyance, shall become the owners of "the land." That expression, as it occurs in these enactments, obviously refers to surface, and the question therefore arises, what in ordinary acceptation is understood to be the surface crust of the earth which overlies its mineral strata? It is of course conceded that vegetable mould, which commonly forms a large ingredient of the topmost layer of the crust, is not within the exception; but it is also the fact that in many districts the cultivatable soil is mainly composed of clay, which is a mineral in this sense, that it is an inorganic substance. I have come to the conclusion that the expression "the land" cannot be restricted to vegetable mould or to cultivated clay, but that it naturally includes, and must

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be held to include the upper soil, including the subsoil, whether it be clay, sand, or gravel; and that the exceptional depth of the subsoil, whilst it may enhance the compensation payable at the time, affords no ground for bringing it within the category of excepted minerals.

I am accordingly of opinion that the interlocutor of the First Division of the Court of Session ought to be reversed and that of the Lord Ordinary restored.

Lord Herschell.—I have the misfortune to differ from the rest of your Lordships who heard the arguments in this case. I confess that my mind has wavered much as to the proper conclusion to be arrived at, and I need hardly say that I have the less confidence in my opinion when I find it differs from those which your Lordships entertain.

The point for decision in this case is a simple one, and may be shortly stated, but to my mind it is one of very considerable difficulty. The appellants in 1871 purchased a piece of land from a predecessor in title of the respondent for the purpose of constructing works authorised by the Glasgow Corporation Water-Works Act, 1866, for the sum of £11,000, and have constructed their works upon it. The disposition to the appellants contained a reservation in favour of the sellers of "the whole coal and other minerals in the said lands in terms of the Water-Works Clauses Act, 1847."

The Act just named, which is incorporated with the appellants' private Act, under which the land was purchased, provides (section 18) "that the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the water-works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

I may observe here that I cannot accede to the view that the present case is to be dealt with as if the "coal and other minerals" had been reserved to the respondent by the operation of the disposition alone without regard to the statutory provision I have quoted. It appears to me that whatever the statute excluded from the purchase was excluded in the present case, and that the issue between the parties depends entirely upon the construction to be put upon the statute in relation to the circumstances before us. Within and under the lands purchased, and the adjoining lands, there is a seam of clay which the respondent had been for some time working in the adjoining lands, and in March 1885 he intimated that he was desirous of working it under the ground acquired by the pursuers, and called upon them to state whether they would avail themselves of their right to prevent his working the seam, by making him compensation therefor in terms of the Water-Works Clauses Act, 1847. Hence the present action, the appellants insisting that the clay was included in their purchase, and that the respondent had no title to it.

In the 4th article of the condescendence, it is alleged that the seam of clay lies at an average depth of only two feet below the surface, and that it can be worked only by open workings, which would destroy or endanger the appellants' works. This is not admitted by the answer, which alleges that the clay in the ground adjoining "has been wrought open-cast, but previous tirring of the surface is not necessary." I understand this to mean that the clay under the appellants' land could be worked otherwise than from the surface. The answer further states that the seam is of great value. No proof was led, the learned Lord Ordinary being of opinion that it was unnecessary to do so. Upon the allegations I have referred to, the question arises, and I think it is the sole question in the case, whether this seam of clay was reserved within the terms "mines of coal, ironstone, slate, or other minerals," or whether the whole of it lying under the land conveyed passed by the conveyance.

The real question, then, to be determined is the meaning to be given to the words "mines or other minerals" in construing the Act of 1847. And I doubt whether we are very much assisted by the interpretation which has been put upon the same words appearing in a different collocation or in other instruments or enactments.

Your Lordships were referrd to various English authorities for the purpose of shewing that clay had been held in a case in the Court of Appeal to be within a reservation of minerals, and that in other cases a definition of minerals had been adopted sufficiently wide to include it. On the other hand, reliance was placed upon some Scotch authorities, and notably on *Menzies'* case in your Lordships' House as establishing that in a contract between superior and vassal a reservation of mines and minerals did not comprise freestone which could only be obtained by quarrying. Lord Mure, whose judgment in the Court below was in favour of the appellants, based his opinion upon the ground that though it might be settled by the English authorities that minerals had the extensive meaning contended for, yet it was settled by the Scotch law that in an ordinary contract of conveyance a more restricted interpretation must be adopted, and that there was no reason for construing differently the statutory reservation in question. It is to be observed, however, that the enactment with which we have to deal is intended to be incorporated with all Water-Works Acts, whether in England or Scotland, and that both the Scotch and English Railways Clauses Acts contain similar provisions. When the object and purview of these various statutes is regarded, it is not to be supposed that the Legislature intended the same or similar enactments in these various statutes to have a different meaning.

What we have to do then is, I think, to look at the purview and intent of the Acts, and to consider what the Legislature meant by the language they have employed. It is impossible to peruse the various provisions of the Act we are considering without seeing that the words "mines" and "minerals" are somewhat loosely used. Before proceeding to the interpretation of them, it may be well to inquire what was the object of the Legislature in reserving the minerals, and not vesting them in the undertakers of the works authorised by the Acts with which the general Act is incorporated.

This object is, I think, clearly stated by the learned Lords who delivered their opinions in the case of *Bennet* v. *The Great Western Railway Company*, 2 E. & I. Apps. 27. I think these provisions were inserted for the common advantage of the landowner and the undertakers. He was not to be compelled to sell minerals which were not needed for the purpose of the undertaking, and they were not to be compelled to purchase and pay for minerals which they did not want, which the owner of them might never desire to work, and as to which it would be often difficult to determine beforehand whether their working would be likely to affect the water-works or railway constructed on the surface of the land. I think, then, that we should expect to find reserved all minerals under the land

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of such a nature as are commonly worked, and which possessed a value independent of the surface.

I propose first to inquire what meaning ought to be attached to the word "minerals," supposing only the words "coal, ironstone, slate, or other minerals" had been employed without any mention of "mines." I think that the word "minerals" imports *prima facie*, and apart from any context, all substances other than the vegetable matters forming the ordinary surface of the ground. In this widest sense clay is unquestionably a mineral. But we have to look to the context to see whether the word is here used in a more limited sense, and if so, what is the limitation to be put upon it. I think the popular use of the word is often narrower, and that when people talk of minerals they frequently use the word in reference to metals or metalliferous ores. But it is impossible to give this restricted meaning to the word in the enactment we are seeking to construe. Coal and slate are specifically mentioned, and the words "other minerals" cannot be confined to metallic substances. Coal, slate, and ironstone are minerals most dissimilar in their character, and I have sought in vain for any mode of restricting the word "minerals" in this section, whether by confining it to things *ejusdem generis* with those specified or otherwise. There is no common *genus* within which coal, slate, and ironstone can be comprised except that they are mineral substances of sufficient value to be commonly worked.

But the words which I have hitherto discussed do not, as has been seen, stand alone. The things reserved are "any mines of coal, ironstone, slate, or other minerals" under the land purchased. It appears to me that this limits the reservation to mines of the substances named, and therefore to "mines" of the "other minerals" included in the general term. What, then, is the interpretation to be put upon the word "mines"? I think the primary idea suggested to the popular mind by the use of the word is an underground working in which minerals are being or have been wrought. It is certainly often used in contrast to "quarry" as indicating an underground working as opposed to one open to the surface. But to limit it in the enactment we are construing to an underground cavity in which minerals are being or have been wrought, would be obviously inadmissible. The enactment was clearly intended to extend to minerals lying underground which had hitherto been undisturbed. Is the true interpretation to be found by limiting the provision to those minerals which are commonly worked by means of underground working? The word "mines" is, I think in a secondary sense, very frequently applied to a place where minerals commonly worked underground are being wrought, though in the particular case the working is from the surface. For example, where iron is got by surface workings they are spoken of as iron mines, and so too with coal which crops out at the surface. No one, I think, ever heard of a coal or iron quarry. On the other hand, the term "slate quarry" is undoubtedly sometimes made use of though the workings are underground. I think it is impossible to obtain any assistance from this use of the word "mines" in construing section 18. It is no doubt exceptional to obtain coal and iron except by underground workings, but this is not so with slate, and the word "mines" is used alike in reference to all these substances.

I thought for some time that the language used must be construed as applying only to those seams or strata of the specified and other minerals which were capable of being wrought by underground workings. It seems to me that there is much to be said for that view, but after reflection I do not feel that it affords

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a safe basis for decision, nor is it clear that it would assist the appellants. It must be remembered, and I think this has an important bearing on the view adopted by the learned Lord Ordinary, that it is part of the scheme of the statute that the undertakers do not purchase any right to the support of the underlying strata of minerals. No one has doubted that if they refuse to purchase the reserved minerals, whatever is really within the reservation may be got even though the result be to cause a serious subsidence and even dislocation of the surface. In this respect the case differs from an ordinary reservation in a deed unaffected by statutory provisions. In such a case the owner of the reserved minerals can *only work such portions of them as can be removed without causing disturbance of the surface*, or if he remove more he must provide some substituted means of support. Therefore, when it is suggested that the reservation in question embraces only such mineral seams as are capable of being worked underground, that cannot mean such as are capable of being so worked without disturbing the surface. Once this conclusion is arrived at it is difficult to see any firm basis for a distinction between seams which lie at a considerable depth below the surface, the removal of which would be likely to affect it little, and those which lying near it could not be got without very seriously affecting it. What valid distinction could be drawn between a seam of coal or ironstone a hundred yards beneath the surface and one which came within two feet of it? and if the latter would be within the reservation, how can a seam of clay similarly situated be excluded? I have said that it is not clear that the proposed interpretation of the section would be of any advantage to the appellants, for proof not having been led, I cannot assume that the clay might not be got otherwise than by surface operations, by working on from the adjoining land, though of course its removal would cause subsidence and great disintegration of the surface. I own I have entertained very grave doubts as to the proper conclusion to be arrived at, but I do not see my way to differ from the judgment of the Court below. I think the reservation must be taken to extend to all such bodies of mineral substances lying together in seams, beds, or strata, as are commonly worked for profit, and have a value independent of the surface of the land.

I desire to guard myself against being supposed to decide more than I do. The pursuers in their action seek to interdict the defender altogether from working the clay under their land in any manner whatsoever. All that in my opinion arises for decision is whether they are entitled to do so. I say this because it was contended before us that inasmuch as the statute authorises the use of such part of the minerals as may be necessary for the pursuers' works, and the bed of clay forms the bottom and sides of their reservoir, the defender cannot be entitled to take away this clay. But this point, which is well worthy of consideration, does not appear to me to be raised at the present time. I therefore forbear from expressing any opinion upon it, or (assuming it to be well founded) upon the further question, how much of the clay can be considered as having been used for the purpose of the water-works, and therefore as having become the property of the appellants. I think the interlocutor appealed from ought to be affirmed.

LORD MACNAGHTEN.—Your Lordships are called upon to determine the meaning of the word "mines" in the 18th section of the Water-Works Clauses Consolidation Act, 1847. That section is the first and the most important section in a group of clauses collected under the heading "With respect to Mines."

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Corresponding provisions are to be found in the Railways Clauses Consolidatio Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845. The argument before your Lordships proceeded on the ground that so far a the present question is concerned the three Acts must be construed alike, an that in regard to mines under or near lands purchased for the purpose of th undertaking, railways are in precisely the same position as water-works. Th case therefore is one of considerable importance. But the question lies in narrow compass, and must, I think, depend for its solution on an examinatio of the sections in the Water-Works Act which bear upon the subject, with th aid of such light as may be derived from parallel passages in the Railway Acts.

Section 18 of the Water-Works Clauses Consolidation Act, 1847 (corresponding with section 77 of the English Railways Act and section 70 of the Scotch Act) is in the following terms,—"The undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the water-works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

The exception in favour of the vendor comprehends, it will be observed, mines of all sorts, mines of coal, ironstone, and slate, and mines of other minerals, but nothing else. Taking the words in their ordinary signification and in their grammatical construction, the exception does not extend to minerals other than minerals of which mines are composed. This seems clear from the latter part of the section, where the expression "such mines" refers to and sums up everything covered by the words of description previously used.

On this exception there is engrafted an exception in favour of the undertakers. It is one of very limited extent. But it throws, I think, considerable light on the meaning of the word "mines." It excepts only "such parts" of the mines under the lands purchased "as shall be necessary to be dug and carried away or used in the construction of the water-works."

Now, the meaning of the word "mines" is not, I think, open to doubt. In its primary signification, it means underground excavations or underground workings. From that it has come to mean things found in mines or to be got by mining, with the chamber in which they are contained. When used of unopened mines in connection with a particular mineral, it means little more than veins or seams or strata of that mineral. But however the word may be used when we speak of mines in this country, there is always some reference more or less direct to underground working.

In *Darvill* v. *Roper*, May 26, 1855 (3 Drewry's Reps. 294), and again in *Bell* v. *Wilson*, March 9, 1865 (2 Drewry and Smale's Reps. 395), Vice-Chancellor Kindersley had to consider the meaning of the term "mines." In the latter case he asks the question "What is a mine?" and he answers it thus,—"I cannot entertain the smallest doubt that a mine and a quarry are not the same. It would perhaps require some labour to define precisely what each is, but we know this, that a mine, properly speaking, is that mode of working for minerals by diving under the earth, and then working horizontally or laterally; whereas a quarry is where the working is *sub dio.* There is not the slightest doubt in my mind as to the difference between them." The case of *Bell* v. *Wilson* was taken to the Court of Appeal. In his judgment on the appeal (1 Ch. 303, 308), Lord Justice Turner asks the same question, and after referring to dictionaries answers it in much the same way. As regards that part of the case he expressed his entire concurrence with the Vice-Chancellor. It was admitted that there is no reported case which throws any doubt on the accuracy of the language used by the Vice-Chancellor in defining or describing a mine. If one wanted a recent authority to confirm the Vice-Chancellor, and to emphasise the ordinary meaning of the word "mines," one could not, I think, do better than turn to the judgment of Mr Justice Kay in the *Midland Railway Company* v. *Haunchwood*, March 22, 1882 (20 Ch. Div., p. 552). In describing the case the learned Judge says,—"The subject of litigation in this case is a bed of clay used for making a peculiar kind of brick, and of some value, from the circumstance that it contains a certain amount of iron. There are three or four feet of surface earth above this, except at one point where it crops out, but it is in no sense a mine, being got entirely by open workings."

Dealing, therefore, with section 18 alone there seems to be no reason for giving the word "mines" a strained or unnatural meaning. It has indeed been suggested that the mention of slate tends to shew that the word "mines" is used in a loose way without reference to any particular mode of working, because slate is usually got by open working. But as everybody knows, there are places where slate is worked underground. The Act excepts mines of slate; it is silent as regards slate quarries. The more natural inference would be that slate mines are excepted, and that slate quarries are not, especially as the Railways Clauses Acts make mention of slate quarries in another group of sections. It has also been suggested that the exception in favour of the undertakers points to minerals near the surface, and therefore to minerals which may be got by quarrying. But it seems to me that there is little force in this suggestion. The exception rather tells the other way. In constructing railways and water-works, in deep cuttings, in tunnelling, or in sinking wells, it is at least possible that minerals contained in mines may be met with. On such an event occurring, were it not for the exception, the operations of the undertakers or of the company might be brought to a standstill, and so the Act gives them as included in their purchase such parts of the mines, or in other words, so much of the minerals contained therein as they are obliged to interfere with in the construction of their works. But it gives them nothing more. How strictly railway companies are tied down when their powers are limited by reference to what is necessary is shewn by the decisions on sec. 16 of the English Act as to the diversion of roads and rivers (see *The Queen* v. *Wycombe Railway Company*, Jan. 26, 1867, L. R., 2 Q. B. 310; *Pugh* v. *Golden Valley Railway Company*, May 31, 1880, 15 Ch. Div. 330). The rights of the undertakers or of the company are limited by the necessity of the case. They are not at liberty to interfere with mines or to use the minerals contained therein merely because it may be a convenience or a saving of expense to do so. If the intention of Parliament had been to reserve to the vendor under the exception of "mines" all minerals of every description however they might be worked, and therefore such things as clay, stone, and gravel, which are ordinary materials for constructing or repairing the works, one would have expected to find the undertakers and the company authorised to use not merely such parts of the mines as might be necessary, but such parts as might be useful or proper for constructing their works, and, on the other hand, required to pay for what might be so used, and to work under the direction or inspection of the mine-owner or his surveyor.

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So far there seems to be no difficulty. The difficulty, such as it is, is created by the sections which follow, and which regulate the rights of owners of mineral property (if I may be allowed to use that expression as a neutral term), lying under or near the lands of the undertakers or the company. In these sections we find the expressions "mines or minerals," "such mines," "such mines or minerals," "such minerals, parts of mines," and "mines, measures, or strata," all applied to the mineral property within the scope of the enactment.

Now, the word "minerals" undoubtedly may have a wider meaning than the word "mines." In its widest signification it probably means every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life. In some of the reported cases it seems to be laid down or assumed that to be a mineral a thing must be of commercial value or workable at a profit. But it is difficult to see why commercial value should be a test, or why that which is a mineral when commercially valuable should cease to be a mineral when it cannot be worked at a profit. Be that as it may, it has been laid down that the word "minerals," when used in a legal document, or in an Act of Parliament, must be understood in its widest signification unless there be something in the context or in the nature of the case to control its meaning. It has also been held that the use of the word "mines" in conjunction with "minerals" does not of itself limit the meaning of the latter word. At the same time it cannot be disputed that the term "minerals" is not unfrequently used in a narrower sense, and one perhaps etymologically more correct, as denoting the contents or products of mines. Nor indeed are the authorities all one way in preferring the wider meaning of the word "minerals." For example, in *Church* v. *The Inclosure Commissioners*, Jan. 31, 1862 (11 C.B., N.S. 664), Mr Justice Williams observed, and apparently the rest of the Court agreed, that minerals in the ordinary sense meant "minerals which could be worked in the ordinary way underground, leaving the surface or crust unaffected."

In dealing with the sections which follow section 18, it is to be observed that their scope is not, like the scope of section 18 and the corresponding sections of the Railway Acts, limited to mineral property lying under the lands purchased and excepted or deemed to be excepted out of the conveyance. These sections have a much wider bearing. They extend to mineral property under the lands of the undertakers or the company, however it may have been severed in ownership from those lands. They also extend to mineral property within the prescribed distance, although the lands under which it lies do not belong to the undertakers or the company. It would therefore not be enough for the respondents to make out that these sections deal with minerals not contained in mines. They must shew that on the fair reading of these sections the word "mines" includes minerals, whether got by mining or not. If that could be established, it would go far towards proving that the word "mines" must have that meaning in section 18 and in the corresponding sections of the Railway Acts.

It may be conceded that in several places in these later sections the word "mines" is used as comprehending whatever is comprehended by the term "minerals" as therein used. But then comes the question, Is the word "minerals" to have its wider signification, and therefore to enlarge the meaning of the word "mines," or is the word "mines" to control the meaning of the word "minerals"? In the absence of an explanatory context or some indication to be gathered from the nature of the case, it has been held that the narrower meaning of the word "minerals" is not to be preferred. Still, it is

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not a strained or unnatural meaning. You are giving a strained and unnatural meaning to the word "mines" if you make it include minerals not got by mining, and therefore if the question were which of the two words should yield to the other, there could, I think, be no doubt as to the answer. The more flexible word must give way. You must do as little violence as possible to the language you have to construe.

Apart, however, from this argument, it seems to me that if you look at these enactments, carefully comparing one with the other, you will find enough to shew that the minerals spoken of are minerals that are "parts of mines," or minerals that are "contained in mines." I will illustrate my meaning by one or two instances. The sentence in section 78 of the English Act, "if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway," becomes in the Scotch Act, section 71, "if it appear to the company that the working of such mines either wholly or partially is likely to damage the works of the railway." In the rest of the latter section the two expressions "parts of mines" and "minerals" are used indifferently as convertible terms. The section proceeds as follows,—"And if the company be desirous that such mines or any parts thereof should be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines . . . which they shall desire to be left unworked, . . . and in such case such owner, lessee, or occupier shall not work or get the mines or minerals comprised in such notice." In the following section (section 72 of the Scotch Act) there is a passage which refers to minerals as being contained in mines, and the context shews that the minerals so referred to are the only minerals in the contemplation of the framers of the Act. The section begins with the following sentence,—"If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner, lessee, or occupier" (that is, the owner, lessee, or occupier of any mines or minerals lying under the railway or any of the works connected therewith, or within the prescribed distance) "to work the said mines, or such parts thereof for which the company shall not have agreed to pay compensation up to the limits of the mines and minerals for which they shall have agreed to make compensation in such manner as such owner, lessee, or occupier shall think fit, for the purpose of getting the minerals contained therein." Now, the expression "the minerals contained therein" must mean "the minerals contained in the mines." So the purpose to which the owner of the minerals and the purpose to which the owner of the mines is limited are one and the same, and the purpose of the owner of minerals in working is not to get minerals, using the word in its widest signification, but to get minerals contained in the mines.

I ought, perhaps, to refer to the passage in which the word "minerals" originally occurs in the later sections of the Water-Works Act. It occurs first in section 22, where it is provided that "if the owner, lessee, or occupier of any mines or minerals lying under or near" the works should be desirous of using the same, he is to give the prescribed notice, and then certain consequences follow. Every subsequent use of the word may be traced to that passage. Now, if the word "minerals" there means minerals whether got by mining or not, the word "mines" is plainly superfluous whatever meaning be given to it. But if the word "minerals" be restricted to minerals contained in mines, I doubt whether either word is superfluous. The risk to be guarded against, as it seems to me, was the loss of support by the withdrawal of minerals from the mines. The minerals might be worked by the owner, lessee, or occupier of the mines. But they might be worked by persons who could not properly be described as owners, lessees, or even as occupiers of the mines. They might be worked by persons having merely a licence to enter and search for minerals, and a grant of the minerals when obtained. The word "minerals" may have been added out of abundant caution to meet such a case as that, and being a less awkward expression for the draftsman's immediate purpose than the expression "parts of mines" which occurs in section 18. At the same time, if the word "minerals" in the sense of "parts of mines" or "minerals contained in mines regarded as separate from the chamber which contains them" be deemed superfluous, I would point out that less care seems to have been given to the framing of these sections than to the framing of section 18. The section and the corresponding sections of the Railway Acts, *mutatis mutandis*, are word for word the same. In the sections which follow in each of the three Acts there are changes from the language of the other two, and also variations of expression in the same Act in many cases where it is impossible to suggest any difference in meaning. These sections seem to have been taken at random from the different common forms without any attempt at precision or uniformity of language. In such a composition it is not surprising that a superfluous word should be found. It would be singular that in a short clause like section 18 of the Water-Works Act, which exhausts the particular subject dealt with, the leading word should be used in a strained and unfamiliar signification, and that the same peculiarity should be found in all three Acts.

There is no passage in any one of the Acts which requires the wider signification of the word "minerals." On the other hand, the provisions for inspecting mines, both before and during working, and the provisions for the ventilation of the minerals, for making airways and mining communications, all seem to point in the same direction, and to shew that the Acts throughout these clauses are dealing with mines, using the word in its proper and usual signification.

Little or no assistance is to be derived from the rest of the Water-Works Clauses Act. But it may be observed that section 12 authorises the undertakers to dig and break up the soil of the lands which they enter under the powers of their special Act, and "to remove or use all earth, stone, mines, minerals, trees, or other things dug or gotten out of the same." The mention of earth and stone in conjunction with minerals seems to shew that these substances were not considered by the framers of the Act to be necessarily comprehended by the term "minerals."

In considering the Railways Clauses Acts, it is, I think, worth while to refer to the group of sections prefaced by the heading, "With respect to the temporary occupation of lands near the railway during the construction thereof." (Sections 30 to 43 of the English Act, sections 25 to 36 of the Scotch Act.) These sections empower the company, for certain specified purposes to enter upon and use any lands within a distance from the centre of the line not measured by, or necessarily corresponding with, the limits of deviation, and to do so at any time before the expiration of the period limited for the completion of the railway, a period which generally, if not always, extends beyond the duration of the company's powers for the compulsory acquisition of land.

The purposes specified in the Acts include "the purposes of taking earth or soil by side cutting therefrom," and "the purpose of obtaining materials therefrom for the construction or repair of the railway." In exercise of these powers, the company is authorised "to dig and take from out of any such lands any clay, stone, gravel, sand, or other thing that may be found therein useful or proper for constructing the railway." Then comes a proviso, "that no stone or slate quarry, brick-field, or other like place which at the time of the passing of the special Act, shall be commonly worked or used for getting materials therefrom for the purpose of selling or disposing of the same shall be taken or used by the company."

It is clear, therefore, that in certain cases and for certain purposes a railway company may enter upon lands containing brick earth, and use that brick earth, although the lands may not be delineated in the deposited plans, and although the powers of the company to take lands compulsorily may have expired. But while working as temporary occupiers, they are bound (section 41 of the English Act) to work in accordance with the directions of the surveyor or agent of the owner of such lands.

Now, section 42 provides that in all cases where the company enters upon lands for temporary purposes, the owner may "serve a notice in writing on the company requiring them to purchase the said lands." The company thereupon is "bound to purchase the said lands."

Nothing is said about mines or minerals in this section, or in this part of the Act, and as I have already pointed out, there may be cases when the company is not in a position to serve a counter notice, requiring the owner to sell his mines.

Section 43 provides that "where the company shall not be required to purchase such lands" compensation shall be made for their temporary occupation, and that such compensation shall include "the full value of all clay, stone, gravel, sand, and other things taken from such lands."

It seems to follow from the consideration of these sections that where lands taken by the company for temporary purposes are purchased in pursuance of a statutory notice given by the owner, the purchase vests in the company, as part of the property purchased, clay, stone, gravel, sand, and other things of that sort, useful or proper for constructing the railway, although not expressly purchased or expressly named in the conveyance and conveyed thereby, and also that after the purchase the company are free to work as they please, without being subject to the directions of the surveyor or agent of the vendor.

This result, however, seems somewhat incompatible with the view which the respondent takes of the meaning of the term "mines" in section 77. It must be borne in mind that that section is not confined to lands which the company require to purchase for the purpose of their undertaking. It applies to "any land purchased" by the company, and therefore to lands which the owner requires the company to purchase under section 42. If the respondent's view be correct, a railway company which has lawfully entered on lands for the purpose of taking clay or gravel therefrom might find its operations suspended by a notice to purchase those lands. If clay and gravel be comprehended in the term "mines," and if the time for compelling the landowner to sell mines has passed, the company is helpless. Purchase it must. But the purchase prevents it using the lands for the only purpose for which they were wanted, unless indeed you are prepared to do extreme violence to plain language, and to read the provision vesting in the company such parts only of the mines under th lands purchased by them as shall be necessary to be used in the construction o the railway as vesting in them, to an unlimited extent, whatever may be useful or proper for constructing the railway.

It was urged before your Lordships that the enactments dealing with mine were passed for the benefit of persons authorised to construct water-works and railways, that, to use Mr Justice Kay's language, there was "no reason therefor for putting a narrow or restricted construction upon the word 'mines,'" and that consequently the word ought to be held to include minerals of ever description. I am inclined to think that when you make the word "mines" include that "which is in no sense a mine," you do something more than avoid a narrow and restricted construction. And I am not convinced that it is a proper mode of construing an Act of Parliament to strain the language in favour of those for whose benefit the enactment may be supposed to have been passed.

However that may be, it appears to me that the enactments under consideration were not intended to benefit water-works or railways at the expense of those whose lands might be required for the purpose of the undertaking. Indeed, if Lord Cranworth's suggestion in *Great Western Railway Company* v. *Bennett* (L. R., 2 E. and I. Apps. 27) be right, the main object of these enactments in their ultimate shape was to prevent the hardships resulting to landowners from the application of common law rights to compulsory purchases. I doubt whether railway companies were special favourites with the Legislature in those days. I should rather have supposed that Parliament considered the division of property and the adjustment of rights effected by these enactments a fair arrangement, and one equally beneficial to both parties. And so it is if the language used has its ordinary and proper signification. Confine the enactment to mines, and nothing can be fairer. Where lands containing mines are taken by a railway company, it would probably be a most serious injury to the vendor to compel him to include his mines in the sale. In most cases he would be selling a long narrow strip of minerals which might form an impassable barrier in the middle of his mines. If the sale were a voluntary sale to an ordinary purchaser it would be a matter of course to reserve the mines. On the other hand, neither railway companies nor persons who construct water-works require mines as such, or are capable of working mines for profit. Mines are only useful to them so far as they may contribute to the support of the lands under which they lie. In many cases they may be worked without interfering with the beneficial enjoyment of the surface.

These considerations, however, do not apply to the case of gravel and clay and things of that sort, which may be termed surface minerals. Remove surface minerals from under the track, and the railway becomes a heap of rubbish. For the very existence of the line it is necessary that they should be left undisturbed. And yet, according to the respondent's argument, a railway company is not to pay for the use they make of surface minerals which do not belong to them. Why? Because the person to whom they do belong does not actually want his property just yet. In the meantime it is more useful to the railway company than it is to the owner. In other words, to put it plainly, a railway company is to have a forced loan of their neighbour's property without consideration—without any corresponding advantage to him, so long as he may be unable to work it or get it worked at a profit. The doctrine involved seems to me somewhat advanced, and I should hesitate to attribute it to the Legislature unless I found it clearly expressed in an Act of Parliament.

Observe how unreasonable the proposition is. The surface minerals must either add to the value of the lands at the time of the purchase or not. If they do not add to the value, why is the railway company paying the full value of the lands not to have the surface minerals? They may be useful for the construction of the line; they are necessary for its existence. On the other hand, if they do add to the value of the lands, why is the landowner not to be paid for them at once, though he may not be able for some time to deal with them profitably when they are separated in ownership from the surface? In the case of surface minerals there is no peculiar hardship in taking a strip of the minerals. If the landowner were selling a strip of his lands to an ordinary purchaser, he would in ordinary course sell the surface minerals too, and so get a better price. When he is made to sell for the benefit of the public, why should he be compelled to sell his property in slices, and to wait for half the price (to take the figures from the present case), until he is in a position to intimidate the railway company? This seems very unreasonable and very unfair to the landowner, who gets nothing by way of compensation if the Act, as interpreted by the respondent, be honestly carried out. But I must say I much doubt whether the Act so interpreted could be carried out honestly. There is no difficulty in valuing lands on the assumption that they contain no mines. But there would, I think, be considerable difficulty in arriving fairly at the value of lands required for a railway, treating them merely as so much surface, not entitled to any right of support, and as separated for the purpose of valuation from such ordinary constituents of the subsoil, as gravel, clay, and stone. If the decision under appeal be upheld, railway companies may, no doubt, protect themselves in future purchases. But I suspect that in many cases of past sales a railway company would be called upon to pay over again for what it has bought and paid for long ago.

It was said that unless the word "mines" be held to include surface minerals, railway companies may be exposed to the risk of having the safety of their works endangered by the removal of clay and gravel and other surface minerals in the immediate proximity of their lands. The answer is that railway companies must judge for themselves what extent of land is required, and take sufficient to ensure the stability of their works against accidents which can readily be foreseen when the nature of the subsoil is known.

I desire to base my judgment on what seems to me to be the plain meaning of the words of the Act, but at the same time it is satisfactory to find that the result is consistent with what may be presumed to have been the intention of Parliament, and not likely to lead to inconvenient consequences.

For these reasons I am of opinion that the interlocutor under appeal should be reversed.

INTERLOCUTORS appealed from reversed: Interlocutor of the Lord Ordinary of the 16th of December 1885 restored; the respondent to pay to the appellants their costs in the Court below and in this House.

SIMSON, WAKEFORD, & CO.—CAMPBELL & SMITH, S.S.C.—GRAHAMES, CURREY, & SPENS—HAMILTON, KINNEAR, & BEATSON, W.S.

No. 15.

Aug. 10, 1888.*

Bowie v. Marquis of Ailsa.

JAMES BOWIE, (Pursuer) Appellant.
THE MARQUIS OF AILSA, (Defender) Respondent.

Appeal to House of Lords—Petition for leave to appeal in forma pauperis—Public right.—In an action for declarator that the pursuer as a member of the public had right to fish with rod and line in a river on the defender's property the Court of Session assoilzied the defender. In a petition for leave to prosecute an appeal to the House of Lords *in forma pauperis*, the Appeal Committee *refused* the petition.

Appeal Committee of House of Lords.
Lord Watson.
Lord Macnaghten.

(IN the Court of Session 18th March 1887, 14 R. 649.)

James Bowie, who was an upholsterer in Glasgow, afterwards residing in Ayr, was apprehended on the night of 11th August 1884 by Robert Armour, water-bailiff to the Marquis of Ailsa, on a charge of poaching in the river Doon. In October following Bowie raised an action in the Sheriff Court at Ayr against the Marquis, calling Armour also as a defender, in which he prayed the Court "to find and declare that the pursuer as a member of the public has an undoubted right and privilege of fishing with single rod and line for trout, flounders, eels, and other fish which are not salmon, sea-trout," &c., "in the river Doon, at least in that part of it within the tidal influence of the sea,"—then followed a prayer for interdict.

The Sheriff (Brand) assoilzied the defender.

The pursuer appealed.

The Second Division, having doubts as to the competency of the action in the Sheriff Court, agreed to allow the action to stand over, to give Bowie an opportunity of bringing an action in the Court of Session.

Bowie then raised an action in the Court of Session concluding for declarator "that the pursuer as a member of the public has right to fish with single rod and line for trout," &c.

The Second Division on 18th March 1887 assoilzied the defender in both actions.

The pursuer presented a petition to the House of Lords for leave to prosecute an appeal *in forma pauperis.*

The respondent's agent objected on the ground that the appellant was trying a question of public right, and that a committee had been appointed to collect subscriptions to assist Bowie in the litigation.†

The agent for the appellant read affidavits to the effect that the appellant had raised this action for his own protection, and relying on his own resources, in consequence of the criminal process against him by the

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* Decided Nov. 18, 1887.

† In the Sheriff Court action the pursuer when examined as a witness deponed,—"I gave instructions for carrying on this case, and it is carried on under my responsibility, and I am not aware that any subscriptions have been promised. I should be very glad of subscriptions."

Alexander Mitchell, fishing-tackle maker, in cross-examination deponed,—"I have agreed to subscribe to help to carry on this case. A subscription sheet was drawn up and I put my name to it. The sheet did not specify the sums I and the others who subscribed were to be liable for. Pursuer told me he was going to try this case, and I told him we would assist. I am not sure that I shewed this sheet to the pursuer. I handed the money that had been subscribed to the pursuer's agent. The pursuer knew that there was going to be a subscription. I cannot say if he knew that it had been actually subscribed. . . . The subscribers, so far as I can remember, are, in addition to myself, Mr Hanley, pipe manufacturer, and William Douglas, grocer. Re-examined.—I cannot say how much has been subscribed for this action, it is not much."

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Marquis of Ailsa for fishing in the tidal waters of the Doon, and that he was not prosecuting this appeal on behalf of the public or of any person other than himself.

Lord Watson referred to the evidence of Alexander Mitchell, and was of opinion that the petition should be refused.

Lord Macnaghten concurred.

This decision was reported to the House, and agreed to.*

J. B. Allan—W. A. Loch.

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* This decision was followed by the Appeal Committee on 6th July 1888, in the appeal of *Fauld and Others* v. *Vere and Others* (Court of Session, Jan. 28, 1887, 14 R. 425), where the appellants, representing the public, were defenders in an action brought by the pursuers for declarator that there existed no public right of way over certain roads. See L. R., 13 App. Cases, 372, note.

CASES

DECIDED IN

THE COURT OF JUSTICIARY,

1887–88.

No. 1.

Oct. 28, 1887.

Robertson v. H. M. Advocate.

Alexander Robertson, Petitioner.—*Party.*
Her Majesty's Advocate.—*Lord-Adv. Macdonald—Blair, A.-D.*

Procedure—Private Prosecutor—Concurrence of Lord Advocate.—Circumstances in which the Court, while indicating that in very exceptional circumstances they might authorise a private person to prosecute without the concurrence of the Lord Advocate, *refused* to grant such authority.

High Court.
Lord Justice-Clerk.
Ld. Craighill.
Ld. M'Laren.
Justiciary Clerk.

This was a bill at the instance of Alexander Robertson, residing in Glasgow, praying for criminal letters to institute a prosecution against Robert Thomson, inspector of police, Glasgow, for perjury. The perjury was alleged to have been committed by Thomson on 11th November 1885 in the Sheriff Small Debt Court, Glasgow, as a witness in a cause at the instance of the complainer against the Magistrates of Glasgow for payment of £12 as damage and *solatium* on account of the complainer having been unlawfully extruded from the Circuit Court at Glasgow, on 30th August 1885. The bill set forth that Thomson had sworn that he had refused the complainer admittance to the said Circuit Court on account of there being no room therein, whereas there was not (as the bill set forth), during any of the sederunts of the said Court, any pressure or crowd, and particularly when the complainer applied for admittance in order, as he intimated to Thomson, that he might make an application to the Court. The bill further stated that the concurrence of the Lord Advocate had been applied for, and that no reply had been given.

The Court ordered intimation to be made to the Lord Advocate.

At the calling on 28th October the Lord Advocate appeared personally, and stated that he had very carefully considered the case, and had come to the conclusion that it would be oppressive to prosecute or to grant his concurrence to a prosecution. His Lordship then withdrew, and the complainer was heard personally in support of his application.[1]

Lord Justice-Clerk.—It is always a matter of regret to this Court, as it must be to everyone, that any of the citizens of this free country should think that he is deprived of redress when he considers that a wrong has been done to him. I have considered very carefully the application which has been made here. It is an application of an unusual kind, although not without precedent, and I am not aware that there is any instance of such an application having been granted since the Revolution. The principle upon which this matter has been considered by the Court and by our most eminent lawyers is simply this,—that criminal procedure in Scotland is conducted by the hand and at the discretion and on the responsibility of the Lord Advocate, whose duty it is to superintend prosecutions of crime, and who has very large powers and very large assistance in the conduct of this important matter. We have, I think fortunately, been under this system during many years—many centuries, I may say—and my impression is, having had some experience of the matter, that on the whole a more efficient and a more satisfactory mode of conducting criminal affairs,—charges of crime against the citizens of this free country,—does not exist in any country in the world. Of course, there are now and then instances where doubts and difficulties are raised, but I think I am right in stating that as the general result of the system. But then it may be asked, "If the Lord Advocate refuses to prosecute, is there any remedy? and if so, what is the remedy?" Now, that question came up in a case seventeen years ago, in which I was one of a very full bench. It was raised by a gentleman of the name of Mackintosh, who presented an application to this High Court for criminal letters against a medical man who, he said, had been instrumental in having him confined in a lunatic asylum. The Lord Advocate did not concur in the prosecution, but we ordered the application to be intimated to him, and he appeared and stated very fully the grounds upon which he proposed not to concur in the prosecution. And then we had to consider and decide, which we did after a very full argument, whether in such a case we could either compel the Lord Advocate to give his concurrence, or permit the private party to prosecute without that concurrence. The conclusion to which we came was this: not that the Lord Advocate is the absolute despot of the case, but that in the ordinary case, unless some very special cause is shewn for our interference, we will not permit a private party to proceed if the Lord Advocate does not give, and states his reasons for refusing to give, his concurrence. I shall just quote one paragraph from the opinion of Lord Ardmillan, a very experienced criminal Judge, which states very simply and very accurately the principle upon which, I think, this Court ought to proceed, and always has proceeded:—"The concourse of the Lord Advocate is not a mere form. I am quite satisfied that the Lord Advocate is not bound to give his concourse in every case to every person applying for it, and desiring to prosecute—not bound to aid the prosecution by every reckless accuser, by every angry or spiteful person. The right and duty of prosecution for crime is, according to the law and constitution of this country, primarily in the hands of the public prosecutor; and a very great trust is necessarily implied in that office and reposed in the Lord Advocate. I think it is according to all our past experience and practice that the giving of the concourse to the public prosecutor is not a matter of form or a matter of course, and the Lord Advocate is not bound to give it when he thinks it his duty to refuse it." In that case we declined to allow Mr Mackintosh to prosecute by himself, and we declined to require the Lord Advocate to concur in the prosecution, although he intimated, as such an officer was sure to do, that if it was the opinion of the Court that he ought to prosecute, he was ready to carry out that opinion. In the present case, I have come to the same conclusion. I do not think there is here at all the kind of case which was reserved in our opinions in the case of *Mackintosh*. What we had in view there was, that if a case of oppression occurred, or a clear miscarriage of justice, where a party was deprived of his legitimate remedy—there may be such case, although none such has yet appeared in our

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[1] Mackintosh v. H. M. Advocate, May 20, 1872, 2 Coup. 236, 44 Scot. Jur. 418.

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Courts as far as I am aware,—in that case we may allow the party to prosecute himself, or require the Lord Advocate to grant his concurrence. In the case of *Mackintosh* the wrong complained was a very great and grievous one, and we refused either to allow the party to prosecute alone, or to require the Lord Advocate to concur. The injury to which this application refers is of a slighter kind certainly, but still one of materiality and importance. My opinion here is, as it was in the case of *Mackintosh*, that no ground—no exceptional ground—has been shewn to entitle this petitioner to the exceptional remedy which he asks for.

Lord Craighill concurred.

Lord M'Laren.—With reference to the requirement of our law that the Lord Advocate should concur in private prosecutions, I venture to ask whether it would be consistent with order or with the true liberty of the subject that any citizen, however high his position, however estimable his character, however ireproachable his conduct, should be liable to be placed in the dock of a criminal Court at the suit of a private individual upon charges which might be frivolous, and the motive of which might be prejudice, ill-feeling, or spite. I say that such a state of things would be intolerable, and I am not aware that there is any civilised country in which the unlimited right of private prosecution exists. In every country of whose laws I have any experience some provision is to be found by which a check is put on the unlimited right of private prosecution. In England the Attorney-General by an entry on the record can always stop a private prosecution which, in his opinion, is frivolous or prejudicial to the public interest. In this country the check is that the preliminary consent of the Lord Advocate must be given. This is a most wholesome check, and one which I am sure this Court would be very sorry in any way to relax. Judging from past experience, the action of the office of the Lord Advocate has been so salutary that private prosecution in this country may be said to have almost ceased to exist. In every case where there was a reasonable ground for prosecution the public authorities, acting under the Lord Advocate, have been found ready to undertake it, and where the authorities were satisfied that there were no sufficient grounds for a prosecution the parties interested, with few exceptions, if any, have acquiesced in the decision. Nevertheless, the right of private prosecution does exist, and one sees that there may be cases in which the public prosecutor may not think fit to undertake the responsibility of directing a prosecution, although he may consider it his duty to give his concurrence to a private prosecution. Apparently this is not a case of that description, because the Lord Advocate has informed the Court that after full consideration he found that there was no *prima facie* case such as would justify him in giving his concurrence. In such circumstances, without doubting the complainer's sincerity, without doubting that he believes he has some grounds for a prosecution, I should have expected of the petitioner as a reasonable man that he would have acquiesced in the decision of the authority to whom the law has given a certain jurisdiction in this matter. I trust that on reflection he may yet see that it would have been better to have acquiesced in that decision. The complainer, however, has come here, and is entitled to our judgment. All I can say, concurring with your Lordship and Lord Craighill, is that I can see no ground whatever for interfering with the decision of the Lord Advocate in this matter in the only way in which we can interfere, namely, by authorising

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a prosecution without the Lord Advocate's concurrence. I should be very sorry were a case to arise in which the Court should feel itself obliged to exercise its discretion in that way, and certainly this is not such a case.

THE COURT refused the prayer of the bill.

PARTY—CROWN AGENT—Agents.

No. 2.

Nov. 3, 1887.
Hood v. Malcolm.

WILLIAM WYLIE HOOD, Appellant.—*Fleming*.
JOHN MALCOLM (Procurator-Fiscal of Dumfries Burgh Court), Respondent.—*Young*.

Weights and Measures Act, 1878 (41 *and* 42 *Vict. cap.* 49), *sec.* 59—*Proof —Onus.*—The Weights and Measures Act, 1878, sec. 59, enacts that where any false weight is found in the possession of any person carrying on trade, such person shall be deemed, for the purposes of the Act, until the contrary is proved, to have such weight for use for trade. Evidence stated by magistrates in a case under the Summary Prosecutions Appeals Act, 1875, which was *held* (*diss.* Lord Rutherfurd Clark) not to warrant the magistrates in convicting a trader of a contravention of the above Act, and conviction *quashed* accordingly.

Per Lord Young—The preliminary necessity is that the magistrate shall be satisfied that the weights were used, or intended to be used, and if the magistrate is satisfied that they were not, or is not satisfied that they were used, or intended to be used, he is not to convict merely because the accused has led no evidence, or has not proved, that they were not used, or intended to be used.

HIGH COURT.
Lord Justice-Clerk.
Lord Young.
Lord Rutherfurd Clark.
Justiciary Clerk.

WILLIAM WYLIE HOOD, grocer, Dumfries, was charged in the Burgh Court there at the instance of the procurator-fiscal on a summary complaint setting forth a contravention of the Weights and Measures Act, 1878 (41 and 42 Vict. cap. 49), in so far as upon the 15th July 1887, within his shop in Dumfries, he "did unlawfully use, or have in his possession for use, for trade four weights which were false or unjust."

The accused was convicted, and fined 2s. 6d., with expenses.

He obtained a case. The facts stated by the magistrates were:—"On the date libelled, within the appellant's premises libelled, an inspector of weights and measures and his assistant found and seized four 56lb weights, all of which were deficient in weight. Two of them were deficient to the extent of one ounce each, one of them was deficient to the extent of 3 ounces and 8 drachms, and the fourth was deficient to the extent of 3 ounces. The weights which were deficient were in the appellant's back shop, immediately communicating with the front shop. His weights in the front shop were found correct. It was also proved that there were no scales on which the weights could be used, but that there was a beam from which they could be hung. It was further proved that the weights were rusty, and that the appellant regularly got heavy goods weighed at Messrs Ballantyne & Brown's premises next door.

"The appellant's allegation in defence was that the false weights were not in use, and had not been used by him, but the evidence did not satisfy us that the said allegation was proved."

The question of law was,—"Whether the facts found proved are sufficient in law to warrant a conviction under the charge libelled?"

Argued for the appellant;—There was no evidence, legally sufficient, of the weights being in possession of the accused; at all events, there was no such evidence of any intention on his part to use them.

Argued for the respondent;—The statute by its 59th section * created

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* The Weights and Measures Act, 1878 (41 and 42 Vict. cap. 49), sec. 59, enacts,—"Where any weight, measure, scale, balance, steelyard, or weighing-machine is found in the possession of any person carrying on trade within the

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a presumption which the accused, on whom the *onus* lay, had failed to rebut. Whatever inferences favourable to him might be drawn from certain of the facts stated in the case, there was no statement that the weights had never been used by him; on the contrary, there was a statement that he had attempted to prove non-use, but failed. These being facts, it was impossible to say that the magistrates were not legally entitled to convict, and if so, this Court had no jurisdiction. It might, no doubt, have been better to libel possession only, not use, but the objection of an alternative charge and a general conviction had not been taken, and was in the present case unsound.

LORD JUSTICE-CLERK.—I have a very strong feeling that this is a very hard case on the evidence so far as we see. I say nothing about the first alternative, because no question has been raised in regard to it, but I shall assume that the charge here was that of having in the possession of accused false weights intended for use. That is under the statute a sufficient allegation of fact to infer crime; and I shall assume that such was charged. The question is whether there has been shewn any ground for setting the conviction aside, and this we can only find on the case stated; and the case stated shews that these alleged false weights were kept in a back shop, that they were rusty, and that there were not there any ordinary means for using them for the purpose of trade. There was a beam in the back shop to which they might have been attached, but there is no evidence that they ever were used, and it is proved that the heavy goods were weighed at a shop next door. In this state of the facts, and with the addition that the magistrates say they were not satisfied with the evidence adduced for the purpose of shewing that the weights were not intended for use, the magistrates have convicted the appellant. My Lords, I am not altogether satisfied with that. The statute, it is quite true, lays the *onus* on the accused in the first instance of shewing that weights which are false and are in the possession of the accused were not so possessed with the intention of using them; but I think that *onus* may be shifted. Here they were not proved to be used. They were not in an ordinary place for use. That is not alleged; and apparently they were not in a state to be used owing to their rustiness. Under these circumstances I should have desired some evidence, if any could be procurable, that they had been used or that the accused intended to use them, and the entire absence of it inclines me to doubt if such was the fact. I have very considerable hesitation, but I think that the evidence here and the grounds on which the magistrates proceeded were slender; and I am disposed to cast the balance in favour of the appellant.

LORD YOUNG.—I am of the same opinion. The case is not unattended with difficulty, I own, but I am persuaded that we shall do justice by setting aside this conviction. I rather think too—it is the conclusion at which, on the whole, I arrive—that the magistrates convicted under an erroneous impression of the law, and that is precisely the ground for an appeal on a case stated. I think that upon the case stated it appears that the magistrates were under such an erroneous impression. I think that the true view of the law is that the magi-

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meaning of this Act, or on the premises of any person, which, whether a building or in the open air, whether open or enclosed, are used for trade within the meaning of this Act, such person shall be deemed for the purposes of this Act, until the contrary is proved, to have such weight, measure, scale, balance, steelyard, or weighing-machine in his possession for use for trade."

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strate before he convicts of this statutory offence must be satisfied in point of fact by the evidence laid before him that the false weights found in the shop were used, or were intended to be used—were there for the purpose of use. There may be more or less importance in the provision of the statute that it shall be for the accused party to shew that the weights were not used, and were not intended to be used, but I think the preliminary necessity is that the magistrate shall be satisfied that they were; and that if the magistrate is satisfied that they were not, or is not satisfied that they were used or intended to be used, he is not to convict merely because the accused party has led no evidence, or has not proved, that they were not used or intended to be used. Now, taking the facts as laid before us here in the case, they all go to the conclusion that the weights were not there for use. I think every one of the facts stated, without exception, points in that direction. The weights were rusty, shewing not only no appearance of having been used, but every appearance of not having been used; they were in the back shop, where there were no scales in which they could be used, although it was physically possible that they could be attached to the beam so as to weigh heavy goods, but the heavy goods were regularly weighed elsewhere. These facts point to the conclusion that they were not used, nor intended to be used. And the magistrates do not tell us by any means that they were satisfied of the fact that they were used or intended to be used. They say they convicted because they were not satisfied with the accused party's evidence that the weights had never been used. I think that shews that they proceeded on an erroneous view of the law—the view, namely, that they were bound in law, on a correct view of the statute, to convict, although not satisfied that the weights ever had been used or were intended to be used, if the accused party did not succeed in proving by evidence of his own that they never had. I think that is an erroneous view of the law. It is only put on the accused parties to prove that the weights had not been used in order to meet a *prima facie* case against them that they had; and it would be monstrous to put any other construction on it, for it would come to this, that even if it appeared on the prosecutor's evidence, clearly and satisfactorily, that the weights had never been used and were not intended to be used—although the prosecutor's evidence led to that result—yet because the statute says so, you are to hold the contrary unless the accused by his evidence shews the opposite. That is the legal error into which I think the magistrates have fallen. It is not for the accused party to lead evidence in order to avoid a conclusion unless there is *prima facie* evidence for that conclusion, and certainly not if there is *prima facie* evidence against it; and to say that we must arrive at that conclusion in the teeth of the prosecutor's evidence, because the accused has led no evidence to combat a conclusion which the prosecutor's evidence by itself negatives, is a palpable absurdity. On the whole matter I am inclined to sustain the appeal and set aside the conviction, which I think is tainted by the legal error in the minds of the magistrates to which I have alluded.

Lord Rutherfurd Clark.—I am sorry to say that I differ from the conclusion at which your Lordships have arrived. It appears to me that we are bound to sustain the conviction. The appellant is charged under the Act of 1878 with having false weights and measures in his possession intended for use. It is not disputed that he had four false weights in his possession. The magistrates state some circumstances which were proved at the trial. They say the weights were

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rusted, that there was no proper scale for them, though they might be used by means of a beam, and that heavy goods belonging to the appellant were regularly weighed on the premises of a neighbour. They further state that the appellant attempted to satisfy them that the false weights were not in use, and had not been used by him, but that he failed in this attempt, from which I should infer that they did not believe the witnesses adduced for the appellant. The only question which they submit to us is whether the facts found proven are sufficient in law to warrant a conviction, or in other words, were the magistrates on that state of the facts legally entitled to convict. If they were legally entitled to convict, the conviction will stand, if not, it must be quashed, but on that ground only. I cannot see how it is possible to hold that they were not legally entitled to convict, for the statute says that the possession of false weights raises a presumption that the trader possessing them intends to use them. I read the statute as meaning that if false weights are proved to be in the possession of a trader, and nothing more, the magistrates are entitled to convict. That is exactly what we have here. False weights were found, and the statute has created a presumption that warrants the magistrates in convicting. It is, therefore, impossible for me to set aside the conviction. The case goes further. The magistrates had before them not only the fact that the weights were false but also the fact that the appellant had attempted but failed to prove that they were not intended for use. How is it possible to say that they were not legally entitled to convict, or that the facts found proven did not warrant a conviction, unless, indeed, we say the magistrates were not entitled to proceed on the statutory presumption? I am therefore of opinion that we should refuse the appeal. I may add that I am bound to take the case as it stands, and to decide the question which it presents and no other. I cannot presume that the magistrates intended to raise a different point for our decision than that which is stated in the case, or to inquire how far they were bound to proceed on the statutory presumption, or in what circumstances they might disregard it.

THE COURT sustained the appeal, reversed the determination of the inferior Judge, and found the appellant entitled to expenses.

W. B. RAINNIE, S.S.C.—WHIGHAM & COWAN, S.S.C.—Agents.

No. 3.
—
Nov. 3, 1887.
Collins v.
Lang.

THOMAS COLLINS, Complainer.—*Rhind.*
JOHN LANG (Procurator-Fiscal of River Baillie Police Court, Glasgow), Respondent.—*Sol.-Gen. Robertson—Ure.*

Instance—Complaint—Desertion of diet pro loco et tempore.—When a prosecutor deserts a complaint *pro loco et tempore* the complaint falls, and it is incompetent again to cite the accused to answer to it, though the prosecutor may raise a new complaint in the same terms.

Review—Suspension—Glasgow Police Act, 1866 (29 *and* 30 *Vict. cap. cclxxiii.*), *secs.* 131, 132.—A person accused before a Glasgow Police Court having appeared to answer to the complaint, the diet was on the prosecutor's motion deserted *pro loco et tempore,* and he was liberated, and a pledge he had left for his appearance was returned to him. The prosecutor into whose hands the complaint had come subsequently obtained a warrant to re-cite, and it was again served upon the accused. He did not appear, but was apprehended, tried, and convicted. In a suspension of the proceedings brought by him, it was maintained that a suspension was incompetent, his remedy being under the local Police Act, which prescribed a different mode of appeal, or being by appeal on a stated case under the

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HIGH COURT.
Lord Justice-Clerk.
Lord Young.
Lord Rutherfurd Clark.
Justiciary Clerk.

Summary Prosecutions Appeals Act, 1875. *Held* that the objection could no be sustained, because the proceedings against him under the new citation we fundamentally null, and therefore liable to suspension.

THOMAS COLLINS, a cattle-dealer, was on 8th August 1887 charged i the River Baillie Police Court, Glasgow, with the crime of assault to th injury of the person, the time of the alleged crime being 7th August, an the place a vessel in the harbour of Glasgow.

Collins pleaded not guilty, and the case was continued till 10th Augus The interlocutor contained a warrant to detain Collins meantime i custody. He was, however, liberated on a pledge of £2, 2s.

On 10th August Collins appeared, but in consequence of the absenc of witnesses the procurator-fiscal was not in a position to proceed to tria He did not ask a warrant to compel the attendance of the absent witnesse and Collins was allowed to go, and his pledge of £2, 2s. was returned t him by the police.

On that date, however, there was made a note in the books of Court "Diet deserted *pro loco et tempore.*" It was also noted that the pledge wa given up. Thereafter Collins was again cited on the old complaint, t appear on 22d August for trial. There appeared in the Police Cour books, under date 15th August, opposite the name of Collins, the word "Re-cite." The citation was made by an officer of Court. Collins did no appear, and on the 22d, the citation having been proved, warrant to apprehend and bring him for trial was granted by the magistrates. The entr in the books of Court at this date was "Absent, citation proved, warran granted to apprehend." He was apprehended, but again liberated on a pledge of £2, 2s., by the police.

On 26th August Collins again appeared, and with him there appeared an agent, who objected to the trial proceeding, on the ground that the original complaint had fallen, and that no proceedings upon it were now competent. The objection was repelled, and the case went to trial. On the evidence the magistrate convicted Collins, and fined him £3, 3s., with the alternative of thirty days' imprisonment.

This suspension was then brought. The suspender pleaded that in the circumstances his arrest, trial, and conviction were incompetent and irregular, and that the whole proceedings were inept.

The respondent objected to the competency of the appeal. Argued for him;—The complainer, if he had suffered any injustice, had his remedy by (1) an appeal on a stated case setting forth the facts, and the question of law; or (2) an appeal to the next Circuit under the Glasgow Police Act, 1866, sec. 154 *et seq.* Now, the complaint here made was one of deviation from form. It was said that there ought to have been a formal continuation of the diet. If that was the objection it fell to be dealt with under section 131.* And then the statute went on by the next section, 132, to provide that the only appeal was to be by way of appeal to the next Circuit Court at Glasgow. To that mode had since been added that of appeal by stated case under the Summary Prosecutions Appeals Act, 1875. But neither of these modes had here been taken, and there was no other. To meet that, it would have to be said, on the other side, that

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* Sec. 131.—"No warrant granted by the magistrate, or citation made in pursuance of the provisions of that Act, and no charge or complaint, and no proceeding or trial before the magistrate, and no order or sentence of the magistrate thereon, or the extract thereof, shall be quashed or vacated for any misnomer or informality, or be subject to suspension, reduction, advocation, or appeal, or to any other form of review, or stay of execution, unless in manner, and on some or more of the grounds hereinafter specified."

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there was a fundamental nullity in the proceedings, but there was none. The new citation needed no special authority from a magistrate, but might be merely served by the police, since the Glasgow Police Act[1] gave warrant to them, "without any other authority than this Act," to cite any person accused of an offence to appear before a Police Court. When the libel in a criminal proceeding is deserted by the prosecutor *pro loco et tempore* he may raise a new libel exactly the same. Indeed, that is the usual case, the desertion being because of the absence of material witnesses or the like. If then a libel exactly the same might be raised there could be no objection to serving anew exactly the same libel which had been deserted *pro loco et tempore.*[2]

The suspender was not called on.

Lord Justice-Clerk.—I have listened to Mr Ure with attention, but not, I confess, without some impatience, because I could not avoid forming the opinion from an early stage of his argument that in the circumstances of this case the objection to competency could not be sustained.

This complaint was presented under a local statute to a magistrate in the River Baillie Court, who granted warrant to cite the complainer in this suspension. He appeared, and on the first occasion, the witnesses not being in attendance, the case was continued till the 10th October, when he again attended. Again no witnesses against him were in attendance, and so completely did those in authority seem to hold that further proceedings were not to be taken, that he had his pledge of £2, 2s. returned to him and went away.

Thereafter he was cited to attend again on the old complaint, which had been deserted *pro loco et tempore*, and which, according to the formalities which I had understood to be long well settled, was at an end altogether as a judicial proceeding, and incapable of having any further proceedings taken upon it. What was done, however, was apparently to enter the words "continue," "recite" in the books of Court, and then to cite the complainer again on the old complaint.

That citation, I think, was an absolute nullity. According to universal practice a desertion *pro loco et tempore* puts an end to a libel, but, unlike a desertion *simpliciter*, leaves the prosecutor able to defend himself against a plea of *res judicata* and to prosecute again on a new libel for the same offence. That was not done, and the proceedings were therefore illegal.

I think, therefore, that the objection to the suspension, that the remedy ought to have been by way of appeal to Circuit or appeal on a stated case to this Court, ought to be overruled, since a suspension is competent where the proceedings are *ex facie* without foundation.

Lord Young.—(After concurring with the Lord Justice-Clerk on another ground not necessary to be here reported)—I must say I thought it long settled that when the Court deserts a diet *pro loco et tempore* it destroys that libel and instance utterly, but leaves the prosecutor at liberty to raise another to the same effect. Accepting that view, it is argued,—"Well, if the prosecutor gets possession of the old complaint and cites again upon it, that is equivalent to raising a new one." Now, that has never yet been attempted. I understand it as an argument, but am little inclined at the end of this year 1887, and in this petty case, to raise or determine the question whether when a diet is deserted *pro loco et tempore* the prosecutor may do what he has never attempted yet—get hold of

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[1] Section 88.

[2] See Hume, ii. 276.

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the old libel and use it for further proceedings. If I had to consider that question I think I should adhere to the old rule and not interfere with a practice so unbroken and so continuous.

On the whole I think there has been a blunder here, and that no great harm will be done by letting the complainer have the benefit of it and be set free. I think the suspension should be sustained.

Lord Rutherfurd Clark.—The objection to this conviction is that the proceedings are *funditus* null. If they are so in law, there is no doubt that suspension is a proper remedy. The objection to competency of discussing whether this nullity exists depends on whether the libel is dead so that it could not be revived. Now, the practice has been uniformly to the effect that after a desertion *pro loco et tempore* it was impossible to proceed on the libel on which an interlocutor deserting the charge *pro loco et tempore* had been pronounced. No such attempt to revive a libel has ever been made. Therefore I am of opinion that the existing practice should be followed and that this libel must be held to have been altogether dead. I therefore agree that the suspension should be sustained.

The Court repelled the objections to the competency of the suspension, passed the bill, and suspended the conviction and sentence, with modified expenses.

William Officer, S.S.C.—Campbell & Smith, S.S.C.—Agents.

No. 4.

Nov. 3, 1887.
M'Gregor v.
Rose.

Archibald M'Gregor and Others, Appellants.—*A. S. D. Thomson.*
David Rose, Respondent.—*Gloag.*
Francis Gebbie, Sheriff-substitute of Dumbartonshire, Respondent.—*Gloag.*

Procedure—Appeal—Bond of caution—Summary Prosecutions Appeals Act, 1875 (38 *and* 39 *Vict. cap.* 62), *sec.* 3, *subsec.* 1.—In a note to have a Sheriff ordained to state a case for appeal under the Summary Prosecutions Appeals Act, 1875, it appeared that the bond of caution required by the Act to be lodged by a party desiring to have a case for appeal stated reached the Sheriff-clerk on the morning after the statutory period of three days had expired (having been posted the evening before), but no special circumstances were stated. The Court *declined* to ordain the Sheriff to state a case.

Question whether the Court has power in special circumstances to authorise a bond to be received after the lapse of the three days.

High Court.
Lord Justice-Clerk.
Lord Young.
Lord Rutherfurd Clark.
Justiciary Clerk.

On 5th September 1887, Archibald M'Gregor and others, all residing in Paisley, were convicted by the Sheriff-substitute (Gebbie), at Dumbarton, on a summary complaint at the instance of David Rose, fish-watcher, Alexandria, Dumbartonshire, of a contravention of the Salmon Fisheries Acts, 1828 and 1844 (9 Geo. IV. cap. 39, and 7 and 8 Vict. cap. 95), committed on the river Clyde, near Dumbarton. They subsequently craved the Sheriff-substitute to state a case under the Summary Prosecutions Appeals Act, 1875 (38 and 39 Vict. cap. 62), but the Sheriff-substitute refused to do so, on the ground that they had failed to comply with section 3 of the Act, in respect that they had not found caution by lodging a bond within the three days prescribed by that section, the bond having been tendered to the Clerk of Court only on the 9th September.

The appellants then presented a note to the High Court of Justiciary to have the Sheriff-substitute and Rose, the prosecutor in the Sheriff Court, ordained to shew cause why a case should not be stated, which note was appointed to be intimated to the Sheriff-substitute and Rose.

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In the note the appellants gave this account of the circumstances connected with the lodging of the bond of caution:—"The trial of the appellants took place on 5th September 1887, at half-past 11 o'clock A.M. A verbal appeal was made by the appellants' agent at the conclusion of their trial. Following upon said verbal appeal, the appellants' agent, on 8th September 1887, intimated his intention of becoming cautioner for the expenses in connection with the said appeal. A copy of said letter is herewith produced.* On the evening of said 8th September 1887, the Sheriff-clerk dispatched the bond of caution for the appellants' signature, which letter and said bond did not reach the appellants' agent until the morning of the 9th September 1887, when it was duly signed and attested, and forwarded to the Sheriff-clerk."

The appellants therefore submitted that "the bond of caution having been dispatched on the third day after the trial, and not having, as already stated, reached the appellants' agent until the morning of the fourth day, and no undue delay having taken place, the appellants should have a case stated for appeal."

It further appeared from the case that the question to be raised on the merits was whether the Sheriff-substitute was in error in convicting the appellants of fishing for salmon merely on evidence that they were shooting their nets in a way calculated to take salmon, while, as the appellants maintained, they were in fact fishing for herring and other white fish.

The appellants argued that the Court had power in special circumstances to authorise a bond of caution to be received even after the lapse of the three days,[1] and that the circumstances brought the case within that rule.

Counsel for the respondents was not called on.

LORD YOUNG.—I am of opinion that this application should be refused. I was rather under the impression that when the appellant had in exceptional circumstances been accidentally prevented from lodging his bond of caution in the hands of the Clerk of Court until the fourth day, we had, notwithstanding the words of the Act of Parliament, allowed the appeal to proceed. It seems that that is not so, but only that after the Sheriff had stated a case, and the appellant had been allowed to open without any objection being taken to the competency of the appeal, we held that he was not to be thrown out on the technical ground that his bond of caution had not been timeously lodged. I do not think it necessary to express any opinion here as to our power to afford a remedy in a case of hardship, when there has been a failure to comply literally with the terms of the Act of Parliament, although there has been a substantial compliance. We must regard any such appeal as an appeal for indulgence, and so regarding it, must look to the nature and character of the case in which the indulgence is sought; and looking to the nature and character of the case here, I can see nothing to support the appeal to our indulgence. I can see nothing which might not be said in any case in which the lodging of the bond of caution was delayed till the fourth day. I think, therefore, that we should refuse the application, but I repeat that on the question whether we have a power in ex-

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* In that letter the agent (who lived in Paisley) stated that he "confirmed in writing the verbal appeal," intimated his willingness either to sign a bond of caution, or to consign, and requested that a draft case should be prepared and sent to him. The Sherff-clerk's reply, enclosing a bond of caution for signature, but declining, in the meanwhile, to prepare a draft case, was dated "8th September 1887, 5.30 P.M."

[1] Thom v. Caledonian Railway Co., Nov. 12, 1886, 14 R. Just. Cases, 5.

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ceptional cases to grant this indulgence I reserve my opinion until a case o hardship arises.

Lord Rutherfurd Clark.—I am of the same opinion. I think this question has already been decided by the case of *Hutton* v. *Garland*,[1] for I find that the opinion of the Court was that the party has no right to have a case stated unless within three days he either lodges a bond of caution or makes consignation of a sum to meet the expenses of the appeal. The case there was a hard enough one. The trial took place on a Saturday, and the question was whether the Sunday was to be counted as one of the three days. The Court held that the Act was so peremptory that they had no alternative but to include the Sunday, and the result was that the appeal was held to be incompetent because the bond of caution had not been lodged till the Wednesday following. That, I think, is conclusive of the present case, because I cannot doubt that if the Court thought they had power to grant indulgence in special circumstances they would have exercised that power there.

Lord Justice-Clerk.—Your Lordships refuse the note.

The Court refused the note.

W. R. Patrick, L.A.—Tawse & Bonar, W.S.—Agents.

No. 5.
Nov. 4, 1887.
Osborne v. Anderson.

David Osborne, Appellant.—*Low.*
Andrew Greig Anderson, Respondent.—*Murray.*

Fishing — Salmon-fishing — Weekly close time, calculation of — Salmon Fisheries Act, 1862 (25 *and* 26 *Vict. cap.* 97), *sec.* 7—*Salmon Fisheries Act*, 1868 (31 *and* 32 *Vict. cap.* 123), *sec.* 24, *and sched. D, bye-law.*—The Salmon Fisheries Act, 1862, sec. 7, makes provision for a weekly close time for salmon-fishing, other than by rod and line, "from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning," but gives power to the Salmon Fishery Commissioners to vary the commencement of the period in any salmon-fishery district, or part of a district, in so far as they may think reasonable or expedient, provided that such weekly close time shall in no case be less than thirty-six hours.

The Salmon Fisheries Act, 1868, sec. 24, enacts that the proprietor or occupier of every fishery at which *inter alia* fly-nets are used shall, in regard to such nets, do all acts required by any bye-law in force within the district in which such fishery is situated for the due observance of the weekly close time.

Schedule D, bye-law, sec. 2, annexed to the last-mentioned Act (being one of the regulations with respect to the due observance of the weekly close time in, *inter alia*, the Forth district), provides that fly-nets shall be thrown out of fishing order in a certain way specified so as effectually to prevent the capture or obstruction of salmon.

The occupier of a fishery in the Forth district was charged with a contravention of the 24th section of the Act of 1868, and the above bye-law, in so far as during the weekly close time, on a particular Saturday, he had failed to have three fly-nets thrown out of fishing order, in terms of the bye-law. It was proved that at six o'clock on the evening in question the tide had just begun to ebb; that at this state of the tide it was impossible to throw fly-nets out of fishing order so as to comply with the bye-law; that the earliest hour thereafter at which this could be done was between eight and nine o'clock p.m., being half ebb; that the nets in question were then thrown out of fishing order; that this state of the tide occurred once every fourteen days; that when it occurred on a Saturday it would be necessary to throw the nets out of order at the previous half tide, *i.e.*, about eight a.m., so that they might be out of fishing

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[1] June 13, 1883, 5 Coup. 274, 10 R. (Just. Ca.) 60.

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order at six P.M., and that being thrown off fishing order at nine P.M. the nets could at soonest be put into fishing order again at the same state of the tide, i.e., between nine and ten A.M. on Monday following, and thus would necessarily be out of fishing order for upwards of thirty-six hours.

The Sheriff found the accused not guilty. On appeal the Court (*diss.* Lord Rutherfurd Clark) affirmed the judgment of the Sheriff-substitute, holding that the practice of throwing nets out of fishing order after six P.M. on Saturday nights, when the state of the tide rendered compliance with the bye-law at that hour impossible, which was admitted to have existed in the Forth district since 1862, made it inexpedient for the Court to interfere with a judgment of acquittal.

HIGH COURT.
Lord Justice-Clerk.
Lord Young.
Lord Rutherfurd Clark.
Justiciary Clerk.

ANDREW GREIG ANDERSON, fish and game dealer, Edinburgh, tenant of the Dumbarnie salmon-fishings on the Firth of Forth, was, on 8th September 1887, charged in the Sheriff Court at Cupar, on a summary complaint at the instance of David Osborne, prosecutor on behalf of the Forth District Fishery Board, with a contravention of the Salmon Fisheries (Scotland) Act, 1868, sec. 24, and sec. 2 of the bye-law schedule D annexed to the said Act, made by the Commissioners under the Salmon Fisheries (Scotland) Acts,* in so far as on the evening of Saturday 9th July 1887, and within or during the weekly close time for the district of the river Forth, he "did omit or fail to have raised and tied to the upper ropes, or lowered and tied to the lower ropes, the pouches, traps, or chambers of three fly-nets placed in the sea at a part thereof at or near the east end of Largo Bay, opposite the lands of Dumbarnie, situated in the parish of Newburn and county of Fife, so as effectually to prevent the capture or obstruction of salmon by said nets."

Anderson pleaded not guilty. Evidence was led, and thereafter the Sheriff-substitute (Henderson) found the accused not guilty.

Osborne obtained a case.

The following were the facts stated by the Sheriff-substitute:—"At the trial of the cause it was proved that at six o'clock on the evening in question the tide had just begun to ebb, and that there would be from sixteen to eighteen feet of water above the highest part of the seaward end of the nets. That at that state of the tide it is impossible to throw fly-nets out of fishing order so as to comply with the provisions of the bye-law above referred to. That the earliest hour thereafter at which this could be done was between eight and nine o'clock P.M., being at half

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* The Salmon Fisheries Act, 1862 (25 and 26 Vict. cap. 97), sec. 7, enacts,—"The annual close time for every district shall continue for 168 days; and the weekly close time, except for rod and line, shall continue from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning, but the Commissioners shall have power, on the application of the district board, or of any two proprietors of fisheries in any district, to vary the period at which the weekly close time shall commence in any district, or any part thereof, in so far as they may think reasonable or expedient, provided that such weekly close time shall in no case be less than thirty-six hours."

The Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. cap. 123), sec. 24, enacted,—"The proprietor, or when let, the occupier, of every fishery at which stake, weir, or stake-nets, fly-nets, or bag-nets are used, shall in regard to such nets do all acts required by any bye-law in force within the district in which such fishery is situated for the due observance of the weekly close time." Then followed a provision as to penalties.

The following was sec. 2 of the bye-law, schedule D (being "regulations with respect to the due observance of the weekly close time," in, *inter alia*, the Forth district), "that the pouches, traps, or chambers of each and every fly-net shall be either raised and tied up to the upper ropes of the same, or lowered and tied to the lower ropes, so as effectually to prevent the capture or obstruction of salmon."

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ebb, and that the nets which up to that time had been in fishing order were then thrown out of fishing order. That this state of the tide occurs once every fourteen days during the fishing season, and that in order to ensure the nets not being in fishing order after six P.M., when such state of tide occurs on a Saturday, it would be necessary to throw them out of fishing order at half tide, about eight A.M. of that day. That as fly-nets can at soonest be thrown out of fishing order at half tide, so they can at soonest be put again in fishing order at the same state of the tide, and on the occasion in question the nets could not be put in fishing order till between nine and ten A.M. on the following Monday. That the space of time during which fly-nets are thus necessarily out of fishing order is upwards of thirty-six hours."

The following was the question of law:—"Whether in the circumstances held as proved the respondent was bound by the terms of section 7 of the Salmon Fisheries (Scotland) Act, 1862, to have his fly-nets out of fishing order as directed by the bye-law, schedule D, from six o'clock on Saturday evening till six o'clock on Monday morning, or whether he had not sufficiently complied with the requirements of the bye-law by having the nets out of fishing order as soon as he possibly could without losing a tide, namely, at half tide on Saturday night, and leaving them in that state till half tide on Monday morning, thus observing a weekly close time of upwards of thirty-six hours?"

Argued for the appellant;—The provisions of section 7 of the Act of 1862 were unambiguous and imperative, and left the Judge no option but to convict in a case like the present. The respondent ought to see whether some mechanical alteration of fly-nets could not be invented which should make it possible to throw them out of working order at any state of the tide; or if that was impossible, and a case of real hardship existed, he ought to apply to the Fishery Commissioners to have the bye-law altered. Possibly a deviation from the letter of the Act by a quarter of an hour might not be regarded as of importance, but three or four hours was another matter. The Sheriff-substitute seemed to have thought that there was a sufficient compliance with the Act if these particular nets were out of fishing order for a period of thirty-six hours. But the policy of the statute was not merely that a period of thirty-six hours should be the weekly close time, but that the same thirty-six hours should form that period—at least in each district. But the respondent's construction ignored that consideration, inasmuch as the tide varied at different places, and so consequently on his construction would the time of putting the nets out of fishing order. Further, bag-nets which were put out of order at six o'clock exactly might be used alongside of fly-nets, which could not—indeed they were so used in the present instance. This would introduce another variation, and would practically lessen the period of the weekly close time. It was an error to suppose that no fish were caught after 6 P.M. during the period in dispute. Salmon were commonly caught for some hours on either side of high-water, and therefore for a part at least of the period here. The policy of the Act was to lay down a hard and fast rule, and not to make the question of whether there had been any contravention or not depend on whether fish were being caught or were likely to be caught. It was true that in this district the mode of fishing complained of had gone on without objection since 1862, but that was because the inspector did not make his inspection till Sunday, when of course everything was in apparent compliance with the Act.

Argued for the respondent;—In the first place, as a matter of common sense the question came to this, Was this a reasonable compliance with

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the Act? The Sheriff-substitute had decided that it was, and looking to the practice of twenty-five years, and in the whole circumstances, that judgment ought not to be interfered with. The appellant had admitted that a reasonable construction was to be put on the Act when he conceded that a quarter of an hour would not amount to a contravention. The question was one of degree, and the Court would be slow to interfere with the judgment of the Sheriff on such a point. But secondly, if a strict interpretation was to be put on the Act by the appellant, the respondent was entitled to the same privilege. Now, looking to the strict letter of the complaint, he had not contravened section 7 of the Act of 1862, but only section 24 of the Act of 1868 and the relative bye-law, and in neither of them was any mention made of a time within which the operation enjoined was to be performed. The prosecution was a prosecution for not performing an operation in connection with the weekly close time, not for violating the close time itself. It was an implied condition that these operations should be performed at such a time as should not interfere with the weekly close time, but there was nothing to shew that they must be performed by 6 P.M. if in point of fact no practical injury, *i.e.*, no fish were caught, by postponing the operation to a later period. That was the case here; few, if any, fish were taken (*i.e.*, would enter the nets) after 6 P.M., when the tide was in the state it was on the occasion complained of.

LORD YOUNG.—In this case the respondent in the appeal—for he was acquitted in the lower Court—was brought to trial before the Sheriff-substitute at Cupar on a charge of having contravened a certain bye-law which has been passed by the Salmon Fishery Commissioners under the Act of 1868, having reference to the weekly close time. That necessarily takes us back to the Act of 1862, which prescribes the weekly close time, and in these words:—"The weekly close time, except for rod and line, shall continue from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning." The bye-law said to have been contravened is to the effect that the nets shall be thrown out of fishing order in a certain manner. The charge therefore is that on a certain occasion the nets of the respondent were not out of working order between six o'clock on Saturday night and six o'clock on Monday morning. The Sheriff-substitute states this case for our opinion on a question of law, and this is his statement of the facts which he held to be proved:—"At the trial of the cause it was proved that at six o'clock on the evening in question the tide had just begun to ebb, and that there would be from 16 to 18 feet of water above the highest part of the seaward end of the nets. That at that state of the tide it is impossible to throw fly-nets out of fishing order so as to comply with the provisions of the bye-law above referred to. That the earliest hour thereafter at which this could be done was between eight and nine o'clock P.M., being at half ebb, and that the nets which up to that time had been in fishing order were then thrown out of fishing order. That this state of the tide occurs once every fourteen days during the fishing season, and that in order to ensure the nets not being in fishing order after 6 P.M., when such state of tide occurs on a Saturday, it would be necessary to throw them out of fishing order at half tide, about 8 A.M. of that day. That as fly-nets can at soonest be thrown out of fishing order at half tide, so they can at soonest be put again in fishing order at the same state of the tide, and on the occasion in question the nets could not be put in fishing order till between 9 and 10 A.M. on the following Monday. That the space of time during which fly-nets are thus necessarily out of fishing order is upwards of thirty-six hours." Upon that state of the facts he found the respondent not guilty, but at the request of the prosecutor he has stated this case for our opinion, the legal question being,—"Whether in the circumstances held as proved the respondent was bound by the terms of section 7 of the Salmon Fisheries (Scotland) Act, 1862, to have his fly-nets out of fishing order as directed by the bye-law, schedule D, from six o'clock on Saturday evening till six o'clock on Monday morning, or whether he had not sufficiently complied with the requirements of the bye-law by having the nets out of fishing order as soon as he possibly could without losing a tide, namely, at half tide on Saturday night, and leaving them in that state till half tide on Monday morning, thus observing a weekly close time of upwards of thirty-six hours?"

It was stated to us by way of explanation that according to the construction of the statute contended for by the respondent—viz., that the nets should be thrown out of working order at six o'clock, or as soon thereafter as possible—there would be no injury to the fish or to anyone, the postponement of the beginning of the weekly close time being commensurate with its corresponding postponement at the end, and in this way giving a weekly close time of thirty-six hours in any event; while the contrary interpretation of the statute—that the nets must be absolutely out of fishing order when the hour of six strikes on Saturday night—would every fortnight impose the necessity of throwing them out of such order on the preceding tide or at the preceding ebb, and in this way they would be out of fishing order of absolute necessity for many hours before six in order that they might be out of fishing order at six. It is stated that this would be a grievance to the fishermen occurring once a fortnight, and that there is nothing in the statute to signify that that was contemplated. It was indeed said, or suggested in argument, that it was very important to have the nets both at the mouth of the river and all up the river thrown out of fishing order during the same thirty-six hours. I do not quite see the difficulty. The nets in the estuary are affected by the consideration which gives rise to this case, but not those higher up the river, where the tidal influence is less important. But the construction of the statute by which, if the view of the respondent is well founded, nobody is injured and the fish have a full period of Saturday night and Sunday slap, has been the interpretation that has been acted on since the Act was passed twenty-five years ago, and that without observation or question. I quite see the argument upon a close and literal construction of the statute by which the penalty will be incurred if throwing the nets out of fishing order is postponed for three hours, just as I see the argument upon a close and literal interpretation of the statute by which the penalty will be incurred if throwing the net out of fishing order is postponed for half an hour or for a quarter of an hour or any other short period. I think we are dealing with a short period, and not dealing with a matter which is very substantial on the one view, although it would be substantial on the other by depriving the fishermen of their legitimate fishing during a period of which it was not, as far as I can see from anything in the statute, the intention of the Legislature that they should be deprived. I think we should be imputing an idea to the Legislature which it had not entertained if we are to suppose that it was intended that the fishermen should be deprived of an extra tide's fishing once a fortnight. I do not think that that was at all in contemplation, and except in the view which would lead to that result we are dealing with a

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very trifling matter. Now, looking to what I am disposed to regard as the good sense of the matter, which is in accordance with the practical construction which has been put without question on the statute for a quarter of a century, and to the opinion of the Sheriff-substitute, whose judgment we are reviewing here, and who tried the case and acquitted the man, I think we are not warranted in disturbing that acquittal. For my own part, I think the Sheriff-substitute was right, but I think we had better do no more than refuse the appeal and affirm the judgment of the Sheriff-substitute, because if there be anything in the view which is suggested on the part of the local Commissioners, the prosecutors here, that there will be a real injury to a legitimate fishing interest, the most legitimate of all being the interest of the public, by reason of the weekly close time not being observed in the way the prosecutors contend for, the matter may be made quite clear and removed out of the region of controversy altogether by an order of the General Commissioners upon an application to the Secretary for Scotland, and therefore I think we shall sufficiently deal with this case in the manner I have suggested by affirming the judgment of the Sheriff-substitute.

LORD RUTHERFURD CLARK.—I cannot concur in the judgment proposed by Lord Young, because I think in doing so we should be doing violence to the plain words of the statute. The statute says that there shall be a close time, from six o'clock on Saturday night till six o'clock on Monday morning. I think that these words are capable of one meaning only, and that they are not open to any construction. I am bound to follow the plain words of the Act according to the only meaning of which they are susceptible, and I therefore think it illegal to have any obstruction in the statutory close time. It is said that this is a strict construction. I think it is the only admissible construction. It is said that the spirit of the Act is otherwise. I must say I cannot see that it is so. But, as I have said, I am bound to give effect to the words of the statute according to their natural and only meaning, and I am not entitled to set the statute at naught.

LORD JUSTICE-CLERK.—I think there is a great deal in the observations of Lord Rutherfurd Clark on the construction of the words of the statute as they stand; but I am not prepared to differ from Lord Young's suggestion. I think we should not interfere with the judgment of acquittal by the Sheriff, after full investigation, except on clear considerations. Now, here, I think, the considerations are mainly in the opposite direction. For twenty-five years the way in which the weekly close time has been observed in this district has been that which is now challenged as illegal, and a certain customary understanding has grown up that, looking to the nature of the engines used for the catching of the salmon, it is sufficient if the nets are closed at a later period on the Saturday night than six o'clock, and upon this ground, that, according to the construction of the net, it is impossible at certain times of the tide to comply literally with the words of the statute. If this question had arisen shortly after the statute was passed I should have thought it a very grave one; but it is perfectly plain that no material injury has been done during the quarter of a century for which this custom has prevailed, and therefore, with these facts, I am not prepared to interfere with the judgment which the Sheriff-substitute has pronounced. I think the suggestion that parties should combine in going

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to the General Commissioners and communicating with the Secretary for Scotland in this matter to have the rule made uniform is a good one. There may be difficulties in the way, but I think it is a suggestion which may well be considered by the parties.

THE COURT dismissed the appeal, and affirmed the determination of the Sheriff-substitute.

FRASER, STODART, & BALLINGALL, W.S.—MACKENZIE & BLACK, W.S.—Agents.

No. 6.
Nov. 4, 1887.
Taylor v. Lamb.

WILLIAM TAYLOR, Appellant.—*Kennedy*.
ROBERT LAMB (Procurator-Fiscal of the Aberdeen Police Court).—*J. C. Thomson*.

Police—Road—Exposing goods to the obstruction or annoyance of the residents or passengers—Aberdeen Police and Water-works Act, 1862 (25 *and* 26 *Vict. cap. cciii.*), *sec.* 134.—The Aberdeen Police and Water-works Act, 1862, sec. 134, enacts,—"Every person who, in any street or in any public place within the limits of this Act, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall for every such offence be liable to a penalty" specified, "(that is to say), *inter alia*, every person who places, hangs up, or otherwise exposes to sale any goods, wares, merchandise, matter, or thing whatsoever, so that the same project into or over any footway, or beyond the line of any house, shop, or building, at which the same are so exposed, so as to obstruct or incommode the passage of any person over or along such footway."

Held that a shopkeeper who was proved to have had, during a whole day, a quantity of drapery goods hung over the front of his shop, except the windows, so that the goods projected over the footway of the street to an extent varying from six to eleven inches, within six feet from the level of the footway, had rightly been convicted of a contravention of the foregoing enactment, although it was not proved that any persons had actually been obstructed by the goods.

HIGH COURT.
Lord Justice-Clerk.
Lord Young.
Lord Rutherfurd Clark.
Justiciary Clerk.

WILLIAM TAYLOR, draper in Aberdeen, was charged in the Police Court there, on a complaint at the instance of the Procurator-fiscal, with a contravention of section 134 of the Aberdeen Police and Water-works Act, 1862 (which is quoted in the rubric, and is substantially in the same terms as the General Police and Improvement Act, 1862 (25 and 26 Vict. cap. 101), sec. 251), in so far as on 19th September 1887, in or near Castle Street of Aberdeen, he did place, hang up, or otherwise expose for sale, a quantity of drapery goods, or other wares or merchandise, on the front of the shop or premises in said street occupied by him, so that the same projected over the footway of said street, or beyond the line of his said shop or premises, to the obstruction or annoyance of the residents or passengers.

The accused was convicted, and fined 20s.

He obtained a case. The Magistrate stated:—"It was proved that on the day libelled, and during the whole course of that day, the appellant hung up a quantity of drapery goods, or other merchandise, on the front of the shop or premises in Castle Street occupied by him—over the whole surface of the shop front, except the windows—so that the goods projected over the footway of said street, or beyond the line of his said premises, to an extent varying from six to eleven inches, within six feet from the level of the footway. Incidentally the appellant proved that he had been in the habit of so exposing his wares for some time past. In exculpation six persons were examined, who stated that they themselves experienced no obstruction in passing the appellant's premises. It ap-

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peared to me that the nature and character of the act, which had been proved, made it an obstruction in the sense of the statute, irrespective of the actual results, and I accordingly convicted the appellant."

The appellant argued;—(1) The complaint ought to have charged that the exposure of the goods was to the "danger" as well as to the "obstruction" and "annoyance" of the residents or passengers. (2) The facts stated did not amount to the obstruction or annoyance of the residents or passengers in the sense of the statute.[1]

The respondent was not called on.

LORD JUSTICE-CLERK.—I do not think that the difficulties in the cases to which Mr Kennedy has referred arise here. This was something more than mere obstruction; it was the actual taking possession of a part of a public footway. The appellant has no right so to limit a footway which the public are entitled to use. On that simple ground I am for refusing the appeal.

LORD YOUNG.—I am of the same opinion, and on the same simple ground.

LORD RUTHERFURD CLARK concurred.

THE COURT dismissed the appeal, and affirmed the determination of the inferior Judge.

J. D. MACAULAY, S.S.C.—W. R. WEIR, S.S.C.—Agents.

ALEXANDER FORBES, Appellant.—*R. L. Orr.*
THOMAS LINTON (Procurator-Fiscal of Edinburgh Police Court), Respondent.—*D.-F. Mackintosh—Boyd.*

No. 7.

Nov. 10, 1887.
Forbes v. Linton.

Statute—Construction—"Owner"—Prosecution of factor as owner—Edinburgh Municipal and Police Act, 1879 (42 *and* 43 *Vict. cap. cxxxii.*), *sec.* 5.—The Edinburgh Municipal and Police Act, 1879, sec. 5, defines the word "owner" to include "the factor, agent, or commissioner of" the true owner, "or any other person who shall intromit with or draw the rents" of the property. *Held* that under this provision a person who, as factor, drew the rents and otherwise managed a tenement with a common stair, the owner of which was resident in Edinburgh, had rightly been convicted of a contravention of section 95 of the Act, in respect that he had, "as owner" of the stair, failed to provide the necessary supply of gas for lighting it.

Question, whether a mere rent-collector could have been prosecuted as "owner."

HIGH COURT.
Lord Justice-Clerk.
Lord Young.
Ld. Craighill.
Lord Rutherfurd Clark.
Lord Trayner.
Justiciary Clerk.

ON 1st July 1887, Alexander Forbes was charged in the Edinburgh Police Court, at the instance of the Procurator-fiscal, with a contravention of section 95 of the Edinburgh Municipal and Police Act, 1879, and section 41, subsection 2, of the Edinburgh Municipal and Police Extension Act, 1882, in so far as he, being the owner of a common stair in Dumbiedykes Road, Edinburgh, did, on and since the 10th day of May 1887 years, fail to provide the necessary supply of gas for lighting two lamps in the said common stair.*

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[1] Simon v. Reid, March 20, 1879, 4 Coup. 220; M'Donald v. White, June 9, 1882, 9 R. (Just. Cases), 43, 5 Coup. 19; Black v. Simpson, Feb. 7, 1883, 5 Coup. 212; Leisk v. Galloway, Nov. 12, 1884, 12 R. (Just. Cases), 5, 5 Coup. 498.

* The Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.) sec. 95, enacts,—"The owner of any common stair, passage, or court, belonging to lands and heritages shall, in addition to providing the necessary lamps, brackets, and other means of lighting, provide the necessary supply of

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Forbes, while admitting that he drew the rents from the tenants of the tenement, objected to the competency of the complaint, and submitted that he was not liable in respect that he was not the true owner of the common stair, and the owner was resident in Edinburgh, and he founded on section 334 of the Edinburgh Municipal and Police Act, 1879.*

The prosecutor submitted that in respect Forbes drew the rents of the property in question, he was the true owner within the meaning of section 5 of the Act.†

The Sheriff-substitute (Rutherfurd) repelled the objection, and the case went to trial.

The Sheriff-substitute found the charge proved, and fined the accused 5s., with the alternative of one day's imprisonment.

Forbes obtained a case. The facts stated were,—"That the appellant drew the rents from the tenants of the said common stair, and signed receipts therefor; that on the 10th of May 1887 the Magistrates and Council of Edinburgh authorised the inspector of lighting and cleaning to order the owner of the said common stair to provide a supply of gas therein; and that the appellant had failed to provide the said supply of gas, although ordered to do so by the inspector of lighting and cleaning."

The question of law was,—"Was the appellant the owner of the common stair referred to within the meaning of the Edinburgh Municipal and Police Act, 1879, section 95?"

After a hearing before the Lord Justice-Clerk, Lord Young, and Lord Rutherfurd Clark, on 4th November, the case was put out on 10th November to be heard before a bench of five Judges.

At the second hearing it was admitted at the bar that the appellant did not merely draw the rents of the property, but managed it for the owner. It was also admitted that the owner was resident in Edinburgh.

Argued for the appellant;—Literally construed, the interpretation clause of the Act (sec. 5) included factors within the definition of

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gas; and the occupiers of such lands and heritages shall be bound to clean, light, and extinguish such lamps or lights" as the magistrates may direct.

The Edinburgh Municipal and Police Extension Act, 1882 (45 and 46 Vict. cap. clxi.), sec. 41, enacts,—"The recited Act [of 1879] shall be and is hereby amended as follows:— . . . (2) In section 95, in addition to the obligation on every owner of any common stair, passage, or court, to provide the necessary lamps, brackets, or other means of lighting, and providing the necessary supply of gas, he shall be liable to a penalty not exceeding 40s. for not providing such supply of gas, provided always that the owner so providing a supply of gas" should have a right of relief against the occupiers for the amount so expended in proportion to their rents.

* The Edinburgh Municipal and Police Act, 1879, sec. 334, enacts that in all proceedings under the Act against owners of houses "where all or any of such owners reside beyond the jurisdiction of the Judge of police, such owner may be cited by delivering the citation to his known factor or agent or person drawing the rents; or, if there be no factor or agent or person drawing the rents, the occupiers of the premises, or any of them, may be cited, and shall take burden for the owners, with relief as before provided."

† The Edinburgh Municipal and Police Act, 1879, sec. 5, enacts,—"In this Act the following words and expressions shall have the several meanings by this section assigned to them, unless there be something in the subject or context repugnant to such construction—that is to say, . . . the word 'owner' shall include joint owner, fiar, liferenter, feuar, bondholder, or other person in the actual possession or receipt of the rents of lands and heritages, and the factor, agent, or commissioner of such persons, or any of them, or any other person who shall intromit with or draw the rents."

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"owner"; but section 334 made it plain that the policy of the Act was to treat factors as owners only when the true owner was not resident in Edinburgh, and the true owner here was resident in Edinburgh. This view was confirmed by section 313 (1).* To read section 5 in the way contended for by the respondent would be to give the magistrates at least two "owners," against either or both of whom they might bring a prosecution for the same offence.

Argued for the respondent;—The policy of the Act was to ensure the due lighting of common stairs by those actually in charge of the stairs. It was for the advantage of the municipal authorities that they should have power to proceed against the actual manager of the property, and it was for the advantage of the true owner also, who might know nothing about the details of the management of the property, though his own. The word "owner" was unambiguously defined in section 5, and nothing in the other clauses of the Act controlled that definition. "Owner" at the end of section 313 (1) meant "owner" in the wide sense of section 5. The Act did not give the authorities a right to prosecute both the true owner and the factor; they had a right of election merely.

Lord Justice-Clerk.—This case was appointed to be heard before five Judges, because it was thought to be one of very considerable importance in the management of municipal affairs; for there can be no doubt that the lighting of premises such as the premises referred to in the complaint is a matter of very considerable moment. We apprehended that if there was any doubt as to that matter it might throw an impediment in the way of the magistrates or the authorities in enforcing very necessary provisions. Some difficulty arose in the consideration of the case the other day, which we thought it would be desirable to have deliberately considered and decided. Accordingly, to-day we have a full bench of five to deliberate upon this question.

For my own part, my opinion has been from the first that the provision of the statute here which defines the word "owner" to include factor, or the person drawing the rents, must be enforced to the full extent implied by the words. I see nothing in the kind of duty imposed upon the factor in any case like the present which should exempt him from the operation of the clause. I think the case is well directed against the factor, independently of the question which gave rise to the difficulty when the case was last before us. That difficulty has to a great extent been relieved by the admission that not only does the factor draw the rents, but he also substantially manages the property for the owner. That being so, we are now agreed that the factor was rightly served with this

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* Section 313 (1) of the Edinburgh Municipal and Police Act, 1879 (being section 398 of the General Police Act, 1862), enacts,—"Where under this Act any notice is required or falls to be given to the owner or occupier of any premises in reference to the police purposes of the Act, such notice, addressed to the owner or occupier thereof, as the case may require, may be served on the occupier of such premises, or left with some inmate of his abode, or if there be no occupier, may be put upon some conspicuous part of such premises; and it shall not be necessary in any such notice to name the occupier or owner of such premises; provided always that when the owner of any such premises and his residence are known to the commissioners, it shall be the duty of the commissioners, if such owner be resident within the burgh, to cause every notice required to be given to the owner to be served on such owner, or left with some inmate of his abode; and if such owner be not resident within the burgh, they shall send every such notice by post, addressed to the residence of such owner."

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complaint, and that he is answerable to the authorities for obedience to the provisions of the statute.

Lord Young.—I had doubts upon the question as it was presented to us on the case, but as the facts are now presented at the bar I confess I have none.

I have difficulty in seeing why such a question should have been raised under the circumstances which occurred here. It seems such an obvious and simple course that the owner of property resident in Edinburgh—the single owner of the tenement in which this common stair is—neglecting to have a light in the stair, and to maintain it, should be proceeded against so as to be punished for failure to perform his duty in the past, and compelled to discharge his duty in the future. There could have been no question whatever had the proceedings been against him. Except, therefore, to raise a legal question before us, it does not occur to my mind why the proceedings were not taken against the owner resident in the town, and why a preference was indicated for a rent-collector or factor.

The purpose of the case, so far as the magistrates are concerned, is to get our judgment upon the interpretation of the section upon which we have heard so much argument. That is the object as it was explained to us by the Dean of Faculty the other day. Now, I think that clause presents not one difficult question merely, but a variety of difficult questions. I think there is room for construction in every one of the expressions used in the clause in question. The clause is prefaced in the usual way by the phrase "unless there be something in the subject or context repugnant to such construction," and declares that "the word 'owner' shall include the factor, agent, or commissioner of such persons" (that is, owners in the strict sense), "or any of them, or any other person who shall intromit with or draw the rents." Now, take the very common case that may occur of the owner of a house being obliged to pave the part of the street opposite the property of which he is the owner, and to keep the foot-pavement in order, and his liability to be prosecuted for a penalty if he fails, and also his liability to be sued for the expense of doing it by the magistrates in consequence of his failure. The owner of premises in a private court is bound to keep the court in good order, and liable in a daily penalty if he fails. He is also liable to pave it, and so on. Again, if the house is in a dangerous condition, the owner is bound to take it down, and is liable in a penalty if he fails, after a notice has been sent to him to that effect. Then an owner is bound to have proper means of ventilation in his property, and is liable in a penalty if he has them not. Now, I should not be prepared to hold, on the interpretation of this clause, that a factor or rent-collector, merely because he is included in this clause, is bound to take down the tenement if it is in a ruinous state. In every case you must consider whether it is sensible and rational to hold that the provision with which we may be immediately dealing can be enforced through the medium of a rent-collector. I should not myself be of opinion, with great deference to anyone holding a contrary opinion, that the mere fact of anyone having collected rents is enough to subject him in this kind of liability in all cases—in liability to pull down a tenement for instance if it happens to be dangerous. I could not so regard him as an offender, if he said, "There is the owner of the tenement in the next street, go against him for this purpose." Nor could I say to him that, according to my interpretation of this statute, the mere fact that he has collected the rents of the property gave the magistrates the right to go against him for penalties and the cost of the operations.

But to confine one's attention to the case which we have in hand—that of lighting a common stair—I should think that by the mere fact of having collected the rents the collector was guilty of no offence if he said to the inspector of streets and cleaning, "I cannot do this; I have collected the rents, no doubt, but I have handed them to the proprietor. I am in no default, I have not a shilling in my pocket, and if I had I should not apply it in any way except to hand it to the person for whom I have collected it. I am not manager for an absent owner, or anything of that kind." Therefore, upon the case as it was stated here, I should not merely have doubted whether a rent-collector in such circumstances could not be prosecuted, but I should have solved that doubt by finding that the rent-collector could not be prosecuted. What he is charged with is an offence against the statute in not having the stair lighted. How long is his obligation to continue?—as long as the rents are in his pockets? But as soon as he hands them to the owner the stair goes into darkness, and the question comes up, who is answerable for the delinquency? It is now explained to us that this rent-collector holds the office of factor—that he takes the management of the property in lieu of the owner. Well, applying that judgment which I indicated would require to be applied in each individual case, and having regard to the facts on which I have just remarked, I think this rent-collector may be an offender, and may be proceeded against as an offending owner for having neglected the particular duty here in question. I doubt if he can be proceeded against for not pulling down a tenement, or not supplying water-closets, or not providing ventilation, and so on; but in this matter of lighting this common stair, so long as he remains the factor in the management of the property in lieu of the true owner, I think that he must comply with the police regulations in that respect, and having got notice to light the stair, and having failed to do so, I am inclined to think he is an offender, and may be fined 5s. I do not know that upon the view I take the judgment will be of much value to anybody, and I rather think that where we have a contumacious owner who will not consent to be at the expense of lighting a common stair, it would be better to proceed against him directly instead of raising questions as to whether the interpretation clause will or will not in a particular case bring in a rent-collector as being equally responsible with the owner.

LORD CRAIGHILL.—I concur in the conclusion at which both your Lordships have arrived. I confess that for one I should have been sorry if the Court had been under the necessity of coming to a different conclusion. Upon the facts as they are presented to us I have no difficulty whatever. The statute appears to me to be perfectly plain with regard to the owners and with regard to the offenders who may be prosecuted for penalty. The obligation created by the section of the statute which has been under the notice of the Court is the failure to light the stair of the property which belongs to the appellant's constituent. It is not said that the appellant was not in the management of the property, and I do not think it can be contended that, if there has been a failure to do what the statute imposes, he may not be prosecuted for the penalty provided for in the Act of 1882. The contention is that the wrong party has been brought here—that the appellant whom we have here is only the factor of the property,—and that taking the different clauses referred to by Mr Orr into con-

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sideration, we must hold the factor to be out of the definition clause, and that looking to the circumstances of the case, the plain words of the clause defining the word "owner" are to be overridden by the others. Well, if that had been established, there would have been no option but to adopt that construction, and hold that to a person in the position of the appellant the clause had no application, and that the word "owner" meant the person who had a property right to the subject where the failure to light had occurred.

But we must turn to the definition and other clauses of this statute to find out its true meaning—to see who may be owners in the sense of the Act of Parliament. We have a whole series of them—a whole series of persons included in the term "owner." One of these is the person in receipt of the rents, another is the person who collects the rents, and there are a number of others who may be each and all of them owners in the sense of this Act of Parliament. I think the provision is a wise one with reference to persons in the situation of the appellant. The great thing in the view of the magistrates is to have the lighting of common stairs readily, easily, and speedily carried out. The person who most naturally would attend to this duty is the person in the management of the property, the person into whose hands come the receipts of the property. I must say I do not think there can be the least difficulty with reference to a provision of this kind, when we see how wide the definition is. I am not going into any speculation to what we would do if the appellant were only rent-collector for a proprietor of a court or anything of that kind. But with reference to the case before us, which we have to decide without any regard to such speculations, I do not think there can be the least difficulty. The appellant is an owner in one of the most obvious senses of the word. The Magistrate it seems to me is quite right. The appellant received notice to light this stair, and he failed to do so, although he had money in his hands. No doubt his justification is, "It is quite true that I am the manager of this property, but you have got the true owner—the owner in the ordinary sense of the word, why don't you go to him?" Now, that is an intelligible position to take up, perhaps, but we cannot in my view give it effect. I do not seek to be wiser than the Act of Parliament, nor do I desire to give an Act of Parliament the go-by. But giving the Act a not too literal but a natural explanation, I have no difficulty whatever in applying that construction for which the respondent contends.

LORD RUTHERFURD CLARK.—It was admitted at the bar, and I think properly admitted, that the appellant is the manager of the property, and the factor of it. I should have inferred that from the facts presented to us, and in that state of the facts I have no difficulty in agreeing with your Lordship.

LORD TRAYNER.—I concur. As this case may be held as ruling the construction of the word "owner" in the interpretation clause, and as affording a guide to the authorities in enforcing the statute, I venture to add that, in my opinion, the question submitted to us for decision is not open to any real difficulty. The statute provides that certain things are to be done by the "owner," and that unless he does them he shall be subject to a penalty. Now, what is the meaning of the word "owner" as here used? The interpretation clause in the statute affords the answer to this question, and its terms are clear and distinct. By it the word "owner" is said to include "factor." The appellant is admittedly "factor" of the property in question. He is therefore, so far as this

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statute is concerned, the "owner," and responsible for the performance of the statutory duties imposed upon the owner. The appellant pleads,—"I am not the owner; the real owner lives within the burgh." I think that is absolutely no defence. A doubt has been suggested whether a mere rent-collector, as distinguished from a factor, or one who had the whole management of the property, would have been liable to be punished as owner for failure to comply with the police regulations under this statute. So far as I am concerned, I think there is no room for such doubt. The statute enumerates among the persons who shall be regarded as "owner" anyone "who shall intromit with or draw the rents." That, I think, plainly covers a mere collector of rents, and it is right that anyone accepting such a position should know that by collecting the rents on behalf of the owner he thereby renders himself liable for the performance of the duties which the statute provides shall be performed by the "owner."

The Court answered the question in the affirmative, dismissed the appeal, and affirmed the determination of the inferior Judge, with five guineas of expenses.

David Forsyth, S.S.C.—Millar, Robson, & Innes, S.S.C.—Agents.

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Nov. 10, 1887.
Linton v. Clark.

Thomas Linton (Procurator-Fiscal of Edinburgh Police Court), Appellant.—*Boyd.*
Mary Clark and Others, Respondents.—*Lyell.*

"Frequenting" with intent to commit a crime—Edinburgh Municipal and Police Act, 1879 (42 *and* 43 *Vict. cap. cxxxii.*), *sec.* 272.—Section 272 of the Edinburgh Municipal and Police Act, 1879, enacts that every suspected person, or reputed thief, who is found "frequenting any street with intent to commit a crime" shall be deemed a rogue and a vagabond, and liable to be imprisoned for sixty days. *Held* (*diss.* Lord Craighill, and the Lord Justice-Clerk giving no opinion) that proof that a known thief had been on the street libelled with intent to steal on a single occasion was not sufficient to satisfy the charge of frequenting the street with such intent.

High Court.
Lord Justice-Clerk.
Lord Young.
Ld. Craighill.
Lord Rutherfurd Clark.
Lord Trayner.
Justiciary Clerk.

On 16th September 1887 Mary Clark, designed as a prisoner in the police cells of Edinburgh, Francis Kane, designed as residing in Newcastle-on-Tyne, and Edward M'Donald, designed as residing in Glasgow, were charged in the Police Court, Edinburgh, at the instance of the Procurator-fiscal, with a contravention of the Edinburgh Municipal and Police Act, 1879, section 272,* "in so far as, upon the 14th day of Sep-

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* The Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.), sec. 272, enacts:—"Every suspected person, or known or reputed thief, who is found in any house or building, or part of a house or building, or other enclosed place, or who is found frequenting any street, court, house, or building, or place adjacent, with intent to commit any crime, or who is in possession of any picklock, key, crow, jack, bit, or other implement usually employed in housebreaking, or who is found in possession of any money or article without being able to give a satisfactory account of his possession thereof, shall be deemed a rogue and vagabond, and may be apprehended and committed to prison for any term not exceeding sixty days; and it shall not be necessary, in proving the intent to commit a crime, to shew that the person suspected, or known, or reputed as aforesaid, was guilty of any particular act or acts tending to shew his purpose or intent, and he may be convicted if, from the circumstances of the case, and from his known character as proved to the

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tember 1887 years, or about that time, the said accused, being all know thieves, were all, and each, or one or more of them, found frequentin Princes Street, South Saint Andrew Street, and Meuse Lane, or one more of said places, all in Edinburgh, with intent to commit theft."

The Sheriff-substitute (Sym) acquitted the accused.

The Procurator-fiscal obtained a case. The case bore:—"It wa proved by evidence adduced, that upon the date libelled, about 10.3 P.M., the police observed the respondent Clark at the West End Princes Street, Edinburgh; she was then going eastward along Prince Street; near the University Club, between Charlotte Street and Castl Street, she accosted a man who was coming westward, turned, an walked a few steps with him. He left her, and she then stood a fe minutes in Castle Street, then again went eastward, and accosted anothe man, and then stood a minute or two near the Mound, then moved o again, and accosted a man a little to the east of the Mound, and the again proceeded eastward, and accosted another man near Saint Andre Street, and presently went with him up the street and into Meuse Lane She had, in her progress along the street, accosted either four or fiv men.

"The respondents Kane and M'Donald were during her whole progress along Princes Street seen passing along the other side of that street keeping watch upon her, stopping when she stopped, and moving when she moved, and when she went with the last-mentioned man towards Meuse Lane, they crossed Princes Street, and followed her and the man into Meuse Lane. The police then followed, and between 11.0 and 11.5 P.M. arrested all the three respondents.

"It was proved that the respondent Clark had been convicted of theft in Edinburgh in 1879, and that the respondent Kane had been convicted of theft in Glasgow in 1879, and of a contravention of section 272 of the Edinburgh Municipal and Police Act, 1879, in Edinburgh in 1882. Both Clark and Kane were known as thieves to Edinburgh and Glasgow detective officers, who were examined, and it was proved that they had been, immediately previous to the date of this prosecution, cohabiting in Glasgow. It was proved that M'Donald was known as a thief and the associate of thieves. No conviction was proved against him.

"No evidence was led to shew that the accused, or any of them, were in Princes Street, Saint Andrew Street, or Meuse Lane at any other hour of the day libelled, or on any prior day.

"I held in point of fact, that the respondents were all known thieves, and were found in Princes Street, Saint Andrew Street, and Meuse Lane, with intent to steal, on the day libelled.

"On the reasoning, however, which was applied to the construction of a similar statutory provision, in *Regina* v. *Clark*,[1] I held that proof that the prisoners had once in the period of about half an hour, to which the evidence related, passed along the streets already named with intent, if opportunity offered, to commit the crime of theft, was insufficient for a conviction on a charge of being found frequenting those streets with that intent."

The question of law was:—"Whether the facts proved constitute an offence against section 272 of the Edinburgh Municipal and Police Act, 1879?"

Judge of police, it appears to such Judge of police that his intention was to commit a crime. For the purpose of this section the word 'crime' shall mean any description of theft, robbery, housebreaking, reset of theft, and any similar offence involving dishonesty. . . ."

[1] Regina v. Clark, Dec. 1, 1884, L. R., 14 Q. B. Div. 92.

Argued for the appellant;—All that *Clark's* case decided was that one who, on a single occasion, made use of a public street as a place of passage was not guilty of a contravention of the statute merely because he had the intent to commit crime. The facts here were of a totally different complexion from those in *Clark's* case, and warranted a conviction. The statute, by using the word "frequent," struck at loitering in a street with a criminal intent.

Argued for the respondents;—"Frequent" in the dictionaries was always defined so as to include the idea of "often," and being once in a place was not being often there, and consequently was not frequenting the place. If the Legislature had meant "loiter" it would have said so; if it had meant merely being "in" the street it would have said so likewise, as it did in the immediately following clause of the section with reference to houses. How many times were necessary to come up to a case of frequenting was a question difficult to solve in the abstract, and not necessary to be solved here.

Lord Young.—I sympathise with the Police Magistrate in assenting to the prosecutor's motion that a case should be stated for the opinion of this Court as to the meaning of the word "frequenting" as used in the statute. No doubt the Police Magistrates will have to determine its application to the facts of each individual case, but I think it is possible for us to state generally our opinion as to the import and meaning of the term with a view to its application to individual cases, leaving the Judges of police in these individual cases to determine whether the facts which they present satisfy or do not satisfy that meaning, so as to enable them to affirm or deny "frequenting" in the individual cases. Now, I have to observe that the statute here makes that a punishable offence which is not a crime at common law, for it is certainly not a crime at common law to be on a street, or to be anywhere else, with an intent to steal. That may be a defect in the law, although I rather think that any other law would interfere very much with the liberty of the subject, and would expose perfectly honest persons to great risk and annoyance, through the possibility of error on the part of Magistrates and others engaged in the administration of the law. But be that as it may, the rule of the common law is, that a man shall not be punished for being on a street or in any other place where he lawfully may be merely because of any intent which may have been in his mind. The Legislature in interfering with that rule of the common law in the case of public streets uses the word "frequent," and declares that he shall be regarded as guilty of a crime who is "found frequenting" any street with intent to commit a crime. The Legislature has declined to make it a crime merely to be in a street with the intent to commit a crime when that intent has led to nothing criminal being done or attempted to be done; but the Legislature thought that, with reasonable safety to honest people, the intent to commit crime might be made punishable, provided that before a conviction can be sustained it must be shewn that the accused "frequented" the street with this criminal intent. No one who is making use of a public street is to be exposed to the risk of miscarriage which would be involved in permitting Magistrates to convict when they think that on one occasion, or on two, the accused was on the street with the criminal intent in his mind. But if the number of times is such as to satisfy the word "frequent," then there is no reasonable risk of miscarriage. There is no reasonable risk of miscarriage in convicting when the accused is found in a house, or other private place, with an illegal intent, although he is found there only once. The public street is another matter; he is entitled to be there; and the statute recognises this distinction by omitting the word "frequent" in the case of houses, and requiring proof of "frequenting" where the place is public. I am not going to suggest the number of times which I think would be sufficient to satisfy the word "frequent." I could easily give a very large number which would certainly be sufficient, but the minimum is another thing. The act must be often done—not once, certainly, or even twice, but if the Magistrate is satisfied that the act has been done often, and with the full intent to commit crime, then I think he may reasonably convict; otherwise there is the intent only, against which there is the rule of the common law that no man shall be punished for a criminal intent which he did not—perhaps because he could not—carry into execution.

Lord Craighill.—I am of a different opinion from that which has been expressed by Lord Young. I think that the facts proved constitute an offence against section 272 of the Edinburgh Municipal and Police Act of 1879. There are several elements necessary for the constitution of that offence, and one only is said to be wanting. The absent element is the want of proof that the persons taken into custody had ever been in Princes Street before the occasion libelled. For the want of such proof the Magistrate refused to convict. The procurator-fiscal appealed, and the question before us is, whether in the circumstances proved, and despite the want of proof desiderated, there ought not to have been a conviction. If the matter be doubtful, much more if the words "found frequenting" have a fixed meaning, involving the idea of previous presence, the judgment is right; but if there be no fixed meaning attached to the expression "found frequenting," and if the meaning of that expression, as used in the statute, cannot reasonably be held to be subject to the limitation by which in this case it is sought to be circumscribed, then the deliverance now complained of by the fiscal ought to be reversed. The cardinal inquiry in a case like the present is the meaning of the words as used in the Act libelled. If that be demonstrated by the words themselves,—that is to say, if the meaning ascribed to them by the Magistrate is the only one which can be put upon the words, the thing is settled. But that is not a result which can here be predicated. There are few words of which a larger number of definitions have been given than the word "frequent"; and this is true of the word as used in English as of the word as it occurs in Latin. No doubt many of these imply that the thing said or done occurred more than once, but all of them do not involve such an implication. To see this, all that is necessary is reference to a dictionary. In dealing with the question, however, it must be borne in mind that "frequenting" does not stand alone. "Found frequenting" is what must be proved. For that there is no dictionary nor any other accepted definition. These things being so, the expression is open to construction, and necessarily introduces as the question for decision, whether the limited meaning adopted by the Magistrate is that in which the expression is used in the Act of Parliament, according to any reasonable interpretation. Of course there must be a use of the street different from that which is taken by a mere passenger; otherwise the thing struck at could not be charged as an offence; use in furtherance of the forbidden purpose is the gravamen of the charge. If there be that, there occurs all that can reasonably be required. Here the three accused were in company, though not walking together. They were on the same errand, though the men were on the one side of the street and the woman on the other. They spent half-an-hour between the west end of Princes Street and St Andrew Street. The men regulated their motions by the proceedings of their female companion, and what were these? She walked, she watched, she waited, she accosted, she turned, she returned, and at length, near the end of their course, she inveigled, near the corner of St Andrew Street, the fourth or fifth of the men, whom she accosted, into the meuse lane behind, where she was joined by her associates, who had all along been on the watch. In considering whether all this was "frequenting" it is not immaterial to bear in mind that there were three concerned in the operation, numbers being an element in some of the definitions of "frequent"; and moreover that the party were five times off Princes Street on their way east. They crossed on their way the streets by which the several sections of Princes Street are separated from one another. This last circumstance might of itself be enough to satisfy the definition which was made by the Magistrate his ground of judgment. But apart from this, were the other facts not proved a statutory offence? They were using Princes Street at the time libelled not as a street or thoroughfare, but simply as a field of operations for the commission of crime, and their presence on the street being for that purpose, and seeing the time that was occupied, and that three persons were engaged, the facts disclose all that I think is required to fill up the meaning of "frequenting" as used in the statute. This much I say in support of the general interpretation of the expression. Against the more limited interpretation these considerations may be urged. In the first place, if the latter be accepted, not one policeman out of a hundred, though there are the most manifest signs that an offence is intended, will be entitled to lay hold of the person suspected, for want of knowledge that they have been at the place before. In the next place, we should have to sanction the construction that all who visit Princes Street or any other street as a field of criminal operations, however plainly their purpose be exhibited, must have leave or license for one at least, if not for several, opportunities before the clause of the statute can be brought into operation against them. Such a result appears to me to be repugnant to the true reading of the clause, and therefore I am for quashing the judgment of the Magistrate.

LORD RUTHERFURD CLARK.—I think this case has been very properly stated by the Police Magistrate for the decision of this Court, and I think we may give our opinion upon the question stated to us, and on that question only. The question is,—"Whether the facts proved constitute an offence against section 272 of the Edinburgh Municipal and Police Act, 1879?" That may be stated in other words, whether a person who on one occasion loiters in a public street during the space of half-an-hour, and with intent to steal, is a person who "frequents" the street within the meaning of the statute. We must keep in view that we know nothing more of the history of these persons than that they loitered for one half hour, and on one occasion only, in Princes Street. Is that frequenting?

The statute makes a strong distinction between being found "in" a building and found "frequenting" a public place. In the one case mere presence may be an offence. In the other there is no offence unless there is "frequenting." I do not think we can read that word as equivalent to loitering. If the Legislature had intended that loitering should be an offence, the word loitering would have been used. The word "frequent" implies the habit of being in a place, and a person being once in a place, although loitering in it, cannot be held to be

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"frequenting" it. I therefore think that the decision of the Magistrate is right.

Lord Trayner.—I agree with Lord Young and Lord Rutherfurd Clark in thinking that this was a proper question to state for the opinion of the High Court, and I am not without hope that the judgment now to be pronounced may be of some practical service. I entertain no doubt that the judgment of the Magistrate is right, and that the question now put to us should be answered in the negative. The reasoning upon which I proceed has been shortly stated by Lord Rutherfurd Clark, and also by the learned Judges in the case of *The Queen* v. *Clark.* It occurs to me only to observe that if there had been any ambiguity in the terms of the Act, our leaning in interpreting that ambiguity ought rather to be in favour of the accused than otherwise. But I think there is no ambiguity. The statute says the accused must be found "frequenting." I think the Legislature could not have employed a more inappropriate word than "frequenting," if it meant that being once in a place was to constitute the offence. I am not going to discuss the various definitions given in the dictionaries which have been cited. Both etymologically and in common parlance, the word "frequenting" involves the idea of "often." How often is a different question, and one we are not called upon to answer. But it would not be giving the word its proper meaning to read it as implying "loitering," or being in a place on one occasion only.

Lord Justice-Clerk.—I could have wished that this question had arisen in a case in which our judgment would have had some practical effect. As it is, the parties are simply consulting the Court, and we are asked to lay down a general rule, as a guide for future cases, in answer to the question whether the facts here proved constituted an offence against the statute. The views which your Lordships have expressed will have different effects in different circumstances. All will depend on the circumstances of the particular case. I have no vote, and I desire to express no further opinion. Your Lordships answer the question put in the negative.

The Court answered the question in the negative, dismissed the appeal, and affirmed the determination of the inferior Judge.

W. White Millar, S.S.C.—R. H. Macdonald, Solicitor—Agents.

No. 9.

Nov. 21, 1887.
Her Majesty's Advocate v. A B.

Her Majesty's Advocate.—*Lord-Adv. Macdonald—Blair, A.-D.*
A B.—*Darling.*

Sentence—Culpable Homicide.—Circumstances in which a person who had pleaded guilty to a charge of culpable homicide by shooting a fellow clerk with a revolver, was *dismissed* (*per* the Lord Justice-Clerk) without a sentence.

High Court.
Lord Justice-Clerk.
Justiciary Clerk.

On 21st November 1887, A B (who had been admitted to bail), clerk in an accountant's office, was indicted in the High Court, before the Lord Justice-Clerk on the following charge, viz.:—"That on 17th October 1887, within the office in St Andrew's Square, Edinburgh, occupied by, &c., you did discharge a chamber of a revolver pistol loaded with powder and a bullet in the direction of C D, clerk, whereby the said C D was mortally wounded and died on 17th October, and you did thus kill the said C D."

A B pleaded guilty.

The *Lord Advocate* moved for sentence.

Darling, for the panel, in mitigation of sentence, stated:—

The fact that the panel had pleaded guilty precluded him from saying that he was entirely free from blame. But he hoped to satisfy the Court that the blame was of the slightest and most venial kind that fell within the cognisance of the law. In the morning of the day on which the occurrence took place the revolver in question was brought out, and was handed about among the young men in the office. Its locks were examined and a cartridge was inserted. Some hours afterwards there was some conversation about the sighting of the weapon, and it was again produced. It was then that the panel, in entire ignorance or forgetfulness that there was a cartridge in one of the chambers, put the revolver in the direction of the deceased man, and the weapon went off with the result known. There was in this case nothing of the nature of evil intent on the part of the accused. He was on the most friendly terms with his fellow-clerks.

The *Lord Advocate* said that he was able to confirm in every particular what Mr Darling had said regarding the accused.

The LORD JUSTICE-CLERK adjourned the diet.

At a later hour of the same day—

LORD JUSTICE-CLERK.—I think it necessary to explain the grounds for the course which I intend to pursue in this case, which is not quite in the usual course of procedure.

The charge which is made in the indictment is that of discharging a pistol, loaded with powder and ball, in the direction of the person named in the indictment, whereby he was mortally wounded, and died on the 17th October following. The prisoner pleaded guilty to that charge, and accordingly I must assume that it amounts to a relevant charge of culpable homicide. But, according to the present form of indictment, I could not have discovered from the indictment the circumstances under which this crime was committed. It gives me no information, and I could only assume from the nature of the facts set out that it was a charge of culpable homicide—that is, of culpably and recklessly having killed the man in question. It was said by a predecessor of mine in the position that I occupy, that the crime of culpable homicide varied from a merely nominal crime to the very confines of murder,[1] and that therefore it became essential that the Judge, to give effect to the plea of guilty recorded on the part of the prisoner, should have some information to guide him in knowing in what stage of culpable homicide the crime was properly to be reckoned. I have had a very full statement on the part of the prisoner to-day, and I have also had on the part of the Lord Advocate a full and equally complete assent to the statement of facts so put before the Court. And the result is, that this unfortunate and unhappy occurrence was caused by the prisoner taking up this revolver—which it was very foolish of him certainly to have in his possession at that time—and, not knowing that it was loaded, presenting it at one of his fellow-clerks in the room. Now, that statement really reduces the act of the prisoner here to a piece of foolish and senseless bravado. He not only did not intend to injure anybody, but he did not suppose at the time that he had the means of injuring anyone, and that places it, I think, within a category which I have not known to be the subject of a criminal sentence. I see in the case I have referred to where Lord Justice-Clerk Hope laid down that doctrine, that he dismissed the prisoner with a fine of 1s., so well convinced was he that there

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[1] See Bruce, Feb. 19, 1855, 2 Irv. 65.

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was no criminal element in it. I mean to follow a similar and perhaps a stronger course. I do not intend to pronounce any sentence at all, but simply to dismiss the prisoner from the bar, in the belief that the memory of this event will follow him to the last day of his life. He will not go unpunished, as far as the reckless display by him has been followed by results that must undoubtedly tinge all his reflections. I shall not say a word to aggravate them. I am not inclined to make a nominal sentence where I really do not intend to pronounce any sentence at all. I think the more straightforward and the more becoming course is not to inflict punishment when I think there was no criminal intent in the case, and therefore the prisoner is now at liberty to go.

THE COURT dismissed the panel from the bar.

CROWN AGENT—MACPHERSON & MACKAY, W.S.—Agents.

No. 10.

Dec. 5, 1887.
Her Majesty's Advocate v. A E.

HER MAJESTY'S ADVOCATE.—*Blair, A.-D.*
A E.—*Patrick Smith.*

Indictment—Latitude in time—Incest.—Question whether an indictment charging the panel with having committed incest on several occasions during a period of seven years was relevant.

Proof—Witnesses—Particeps criminis—Incest.—Where a father was charged with incest committed with his daughter, *held* (*per* Lord Young) that the daughter was not competent as a witness for the Crown, she being of full age and not having been herself charged with the crime.

HIGH COURT.
Lord Young.
Justiciary Clerk.

ON 5th December 1887 A E was indicted in the High Court, the charge against him being (1) that on several occasions between 1st January 1880 and 18th October 1887, in the dwelling-houses (named) occupied by him, he did have incestuous connection with B E, his daughter, then residing with him; and (2) that on several occasions between 24th December 1885 and 18th October 1887, places above libelled, he did have incestuous connection with C E, his daughter, then residing with him there, all contrary to the Act James VI. and the 18th chapter of Leviticus therein referred to.

On the case being called,

LORD YOUNG observed that he was not satisfied with the relevancy of the libel, in so far as it charged the panel with committing the crime on several occasions during a period of seven years.

Blair, A.-D., accordingly craved leave to amend the libel by restricting the time in both charges to the period between Whitsunday 1887 and the 18th October following.

LORD YOUNG allowed the amendment, and the amendment having been made, found the libel relevant.

A jury having been empanelled,

Blair, A.-D., called B E, named in the indictment, as the first witness for the Crown.

Patrick Smith, for the panel, objected to the examination of this witness, and argued;—She was twenty-two years old, and was consequently liable to be charged with the crime as well as her father. As a *particeps criminis*, therefore, she could not be examined unless as Queen's evidence, but this was not the footing on which it was proposed to examine her. The same objection applied to the examination of the other daughter, who was twenty years of age.

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Blair, A.-D., replied;—The daughters were admissible as witnesses. Without their evidence the case could not be made out. They might have been charged as *participes criminis*, but in all cases it was in the discretion of the public prosecutor, when he thought the interests of justice required it, to take a *particeps criminis* as a witness. This was frequently done in other cases, and the procedure was specially proper in a case like the present, where, from the character of the crime, it was almost impossible to bring it home to the accused without such evidence. It was not necessary that the accomplice should first have been formally charged with the crime. Such a witness by giving evidence obtained protection from prosecution. The evidence of the accomplice by itself might not be sufficient to prove the charge, and might require corroboration by other witnesses. Such corroboration would be given in this case.[1]

LORD YOUNG.—I am of opinion that the daughters are not admissible as witnesses. The case of *Simpson*, 1 Coup. 437, which has been referred to, is not in point, because in that case no crime was or could be imputed to the daughters, who were children of seven and eight years of age. The same crime is here imputed to the daughters, and could have been charged against them, as is charged against their father, but they are not charged, and have not been charged, so that it is not a case in which they are treated as co-delinquents, and are taken as Queen's evidence. That is a matter of compact which the person may or may not enter into, but if he agrees to give, and gives, evidence, he is freed from prosecution. Here no charge has been made against them, and they have not been told that if they would give evidence there would be no charge made against them. I confess I should greatly regret having to allow a daughter to give evidence as to a crime committed by her father and herself, and if there is no evidence but this to prove it I think it had better be left alone. In point of law I determine that the daughter is not admissible as a witness.

Blair, A.-D., then stated that he did not propose to call any other witnesses.

LORD YOUNG thereupon directed the jury to return a verdict of not guilty, which was accordingly done.

THE panel was discharged.*

CROWN AGENT—J. ERSKINE GUILD, W.S.—Agents.

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Jan. 18, 1888.
Her Majesty's Advocate v. Macrae.

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Robertson*—*Rankine, A.-D.*
DONALD MACRAE AND ANOTHER.—*Shaw*—*Macphail.*
MURDO MACDONALD AND OTHERS.—*Strachan*— *W. K. Dickson.*
JOHN MATHESON.—*Watt.*

Mobbing and Rioting—Day Poaching.—In a trial for the crime of mobbing and rioting the evidence for the Crown was that the accused were part of a

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[1] Simpson, June 13, 1870, 1 Coup. 437, per Lord Justice-General Inglis.

* At the Circuit Court, Aberdeen, 5th October 1858, before Lord Justice-Clerk Inglis and Lord Ivory, A. A. was indicted on a charge of incest, habitually committed with his twin daughters, aged twenty-one, during a period of seven years. After a trial, in which the daughters were examined as witnesses, the accused was convicted, and sentenced to penal servitude for life. The daughters were not charged as *participes criminis*. [ED.]

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crowd exceeding a hundred persons who in the day-time entered upon an extensive deer forest and openly marched across it, shooting the deer thereon as they went; that they were seen by the keepers of the forest, who were unable to interfere with them on account of their numbers, and that they continued so acting for two days. The Lord Justice-Clerk *directed* the jury that such conduct, if proved, amounted to the crime of mobbing and rioting.

HIGH COURT.
Lord Justice-Clerk.
Ld. M'Laren.
Lord Lee.
Justiciary Clerk.

DONALD MACRAE, Roderick Mackenzie, Murdo Macdonald, John Matheson, Malcolm Mackenzie, and Donald Macmillan, all belonging to the parish of Lochs, Ross-shire, were indicted before the High Court of Justiciary under the Criminal Procedure Scotland Act, 1887. The indictment set forth that "the charge against you is that you Donald Macrae, Roderick Mackenzie, and John Matheson and others having formed a scheme that the persons living in the neighbourhood of the Forest of Park in said parish, occupied by Joseph Arthur Platt, residing at Eishken Lodge in the said parish, should in large numbers and armed with guns trespass in the said forest and destroy deer therein; and you the said Donald Macrae, Roderick Mackenzie, and John Matheson having at a meeting held on 11th November 1887 at Balallan (in said parish) instigated and incited the said Murdo Macdonald, Malcolm Mackenzie, Donald Macmillan, and other persons there assembled to form part of a riotous mob for the purpose of carrying out the said scheme, a riotous mob, armed with firearms and other weapons, and acting of common purpose, did, in pursuance of said scheme, and instigated and incited thereto by you Donald Macrae, Roderick Mackenzie, and John Matheson, on 22d and 23d November 1887, trespass on said forest, and did intimidate those who were employed by the said Joseph Arthur Platt to protect the deer therein against unlawful destruction from so protecting them, and fire at and kill or wound a number of said deer; and you Murdo Macdonald, John Matheson, Malcolm Mackenzie, and Donald Macmillan did form part of and were actively engaged with the said riotous mob in its acts aforesaid; and you Donald Macrae and Roderick Mackenzie were art and part with the said riotous mob in its acts foresaid."

The prisoners pleaded not guilty.

The evidence shewed that the deer forest of Park, which was believed to contain about 500 or 600 deer, extended to about 30,000 acres. It was partly surrounded by water, and where it marched with other land was enclosed by a fence.

On 22d November several keepers and gillies were on duty watching the forest about 9 A.M. when a crowd of about 120 to 130 persons approached from a village near the boundary of the forest. A number of the men carried guns. They were joined by another crowd of persons from the village of Balallan, many of whom had guns. The crowds having joined, extended in open order, and marched across the forest firing at intervals at the deer. The crowd remained out all night, and next day, 23d November, acted in a similar manner. In the afternoon of that day the Sheriff-substitute of the district arrived and addressed the crowd, calling upon them to disperse and quit the forest, which they did.

The keepers were aware from report that a meeting had been held in the district a few days before the 22d November at which it had been decided that such a "raid" should take place, the object of which was to call attention to certain alleged grievances in connection with the land laws, and prevent the land being let as a deer forest. There was evidence that those of the prisoners who were accused of having incited the others to assemble and take part in the raid were at the meeting and advised that the "raid" should take place. The keepers did not, owing to the number of the crowd, endeavour to stop them from carrying out their intention, but went on before them endeavouring to drive away the deer so that they might not be shot by the armed men in the crowd.

The prisoners' counsel argued that if the panels were guilty of any crime, it was of the contravention of the Day Trespass Act, 1832 (2 and 3 Will. IV. c. 68), and not of mobbing and rioting as charged.

The LORD JUSTICE-CLERK charged the jury as follows:—

The LORD JUSTICE-CLERK.—This is a case of importance in more aspects than one. In the first place, it is substantially the first important case that has arisen under the statute passed in the last session of Parliament, which made considerable alterations on some of the forms and some of the rules of this Court. In the second place, it is unquestionably of importance to the prisoners, who no doubt do not belong to the ordinary criminal class, and were till this occurrence apparently well-behaved peasants. I think it also proper, at the outset of my remarks, to say that a theme has been introduced into the case upon which you cannot legitimately express any opinion. The only question which you have to consider is whether the prisoners are guilty of the crime charged—that is to say, whether they are proved to your satisfaction to be guilty. The pleadings have without doubt been very able. I hope I do not go too far when I say that perhaps the eloquence was sometimes a little perfervid, and that it would not have lost any force or effect, and might have gained in dignity, had the colouring been a little more subdued. This is not a political meeting, but a Court of law. What you have to try is entirely a question of fact. You will pay no heed to the criticisms you have heard on the public prosecutor. It is to be assumed that he has brought this case in the discharge of a public duty, and no one who has heard the evidence to-day can doubt the propriety of his having done so. I know very well—I have had some experience of it myself—that the public prosecutor is considered a fair target for rhetorical javelins, and within proper limits there is nothing wrong in that. But, as I have already hinted to you, we are not here to try any question of political economy, still less one of politics, but a question of fact, upon which I shall make to you a few observations. The first question is, what is the charge against the prisoners? An indictment in the old form was a syllogism, and it was necessary to set out the category of crime of which the accused was said to be guilty, and then to state facts which logically led to that conclusion. Under the new forms that is not necessary, but it is sufficient that the indictment should set out facts which in law amount to an indictable offence. It is my duty now to call your attention to what this indictment says about these prisoners, and to tell you in point of law how far the alleged facts, if proved, lead to the inference that they have been guilty of an indictable offence.

The facts set out in the indictment are that a number of the persons at the bar concerted together a scheme for making a raid in the deer forest of Park, and that they then instigated and incited others, some of whom are prisoners here, to make the raid which had so been arranged. The indictment says that Donald Macrae, Roderick Mackenzie, and John Matheson, and others, instigated and incited Murdo Macdonald, Malcolm Mackenzie, Donald Macmillan, and others, to "form part of a riotous mob, for the purpose of carrying out the said scheme," and that they, "armed with firearms and other weapons, and acting of common purpose, did trespass," &c. Now, it has been said for the prisoners that this was only a poaching expedition, and that a prosecution for a contravention of the Day Trespass Act would have been the proper charge to bring against them, and by some not very lucid reasoning it was attempted to shew that a charge, upon the facts as libelled, of mobbing and rioting was excluded. That is an entire and absolute mistake, as I shall explain to you. Deer are not private property while running wild. Neither are grouse nor any other wild animal. But a proprietor is entitled to prevent strangers coming on his ground. That is his right, and persons who come upon his ground must shew their legal right to be there, otherwise he is entitled to exclude them. Trespass constitutes in the general case a civil wrong and not a criminal act, and the proprietor's remedy is by civil writ or action of damages. The Day Trespass Act was passed for the purpose of rendering the state of the law more stringent, and made it a criminal offence for anyone, without the leave of the proprietor, to go upon land for the purpose of destroying game. But that has nothing to do with this prosecution. The charge in the indictment is that of mobbing and rioting, not one of poaching. The prisoners assembled in those numbers for the avowed purpose of overpowering opposition, and intimidating the watchers. If they did so, their purpose was illegal. Even if it had been a legal act to go for the purpose of shooting deer, which it clearly was not, if they did it in a riotous manner, so as to interfere with those who had a right to prevent trespass, that would amount to the crime of mobbing and rioting. Here it has not been suggested that they were performing any legal act whatever, and there is no doubt in law that for a number of people to enter upon lands in the numbers spoken to by the witnesses for the purpose of overpowering and intimidating the servants of the owner in the discharge of their duty constitutes the crime of mobbing and rioting. I think I shall best discharge my duty by reading to you part of the charge of the Lord Justice-Clerk Hope in the case of *Gordon Robertson* in the year 1842 (Broun, vol. i. p. 192),—"I have to state to you in point of law that an illegal mob is an assembly of people acting together for a common and illegal purpose, effecting or attempting to effect its purpose either by violence or demonstration of force, or numbers, or by any species of intimidation, impediment, or obstruction calculated to effect their object, and to impede, obstruct, and defeat others employed in discharge of duty"; and further on he says,—"The essence of mobbing and rioting is (taking terms applicable to this case) the exhibition, demonstration, and use of the power of numbers to overcome, obstruct, impede, and defeat those employed in the discharge of duty entrusted to them." Such is the nature of the crime of mobbing and rioting, and thus even in a legal act there might be an attempt to enforce it in an illegal manner. The abstract legality of the object in hand therefore will not defend the parties if they attempt to enforce what they think are their rights in an illegal manner. But here there is no pretence or colour of right for what was done. The people who entered the forest of Park had no legal right to be there, and were not performing any legal act, and it is not suggested that they were there for any lawful purpose. The pursuit of the deer is not the principal element of the crime in this case; it is the pursuing by a large assembly of about from 120 to 150 people, a number of them being armed with guns and rifles, and the members of which could not be resisted by those whose duty it was to protect the deer forest. That was an exhibition, demonstration, or use of the power of numbers to obstruct and impede those employed in the discharge of duty entrusted to them in the sense of the Lord Justice-Clerk Hope's opinion, and amounted in law to mobbing and rioting, and the question is, has this charge been

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proved? (His Lordship then referred to the evidence, and pointed out that no one had denied that there was an assembly of people in the forest on the days mentioned in the indictment, and that Murdo Macdonald, John Matheson, Malcolm Mackenzie, and Donald Macmillan were clearly identified as having been present.) Donald Macrae and Roderick Mackenzie were not at the actual raid, but were present at a meeting at Balallan held for the purpose of collecting money to enable the crofters to get an agent to appear for them before the Crofters Commission, but at which the raid upon the forest was freely talked about, and I am of opinion that it was the duty of Macrae and Roderick Mackenzie, when they heard it referred to, to say "I am no party to this," if they disapproved of it. This they did not do. Macrae, Roderick Mackenzie, and John Matheson were charged with instigating and inciting others to make this raid, and you will have to consider the evidence on this point, as there certainly is a contradiction as to their conduct. Macrae and Roderick Mackenzie, if you believe the witnesses for the prosecution, though not actually present in the raid, are in law guilty of mobbing and rioting if the raid, which was actually carried out, was part of the common object which they, along with the others, concerted, and which, in pursuance of this concerted action, was carried out.

THE JURY returned a verdict of "not guilty as libelled," in respect of which verdict the panels were assoilzied *simpliciter*, and dismissed from the bar.

CROWN AGENT—ANDREW URQUHART, S.S.C.—Agents.

No. 12.

Feb. 10, 1888.
Miller v. Linton.

PETER MILLER, Appellant.—*R. V. Campbell*—*Baxter*.
THOMAS LINTON (Procurator-Fiscal in the Edinburgh City Police Court), Respondent.—*D.-F. Mackintosh*—*Boyd*.

Public-house—*Certificate*—*Transfer*—*Act* 9 *Geo. IV. cap.* 58, *sec.* 19.—Sec. 19 of the Act (9 Geo. IV. cap. 58) enacts,—"That if any person duly authorised to keep a common inn, alehouse, or victualling-house . . . shall remove from or yield up the possession of the house and premises for which such certificate shall have been granted, it shall be lawful for two or more Justices of the Peace or magistrates respectively as aforesaid, sitting publicly in their ordinary place of meeting, to grant to any new tenant or occupier of such house and premises upon such removal, a transfer of the certificate to keep such house and premises, as a common inn, alehouse, or victualling-house as before such removal, until the next general or district meeting to be held under the authority of this Act."

Held that such removal and transfer absolutely divests the original holder of all right of trafficking in exciseable liquors under the certificate.

A transfer of a public-house certificate running from May 1887 till May 1888 was granted in July 1887, but was not confirmed at the ensuing Quarter Sessions in October, the transferee having been guilty of a breach of the certificate. The original holder then resumed possession of the premises, and proceeded to traffic therein in exciseable liquors without obtaining a new certificate. *Held* that he had been rightly convicted of trafficking in exciseable liquors without a certificate.

HIGH COURT.
Lord Justice-Clerk.
Ld. Craighill.
Lord Rutherfurd Clark.
Justiciary Clerk.

PETER MILLER was charged in the City Police Court, Edinburgh, at the instance of the Procurator-fiscal, with having on 1st and 3d December 1887 trafficked in exciseable liquors in premises occupied or used by him in Canongate, Edinburgh, without having obtained a certificate in that behalf in terms of the Public-Houses Amendment (Scotland) Act, 1862 (25 and 26 Vict. cap. 35).

He pleaded not guilty, but was convicted by the Sheriff-substitute (Rutherfurd), and fined £1, 5s.

He obtained a case. The facts stated were,—On 12th April 1887

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Miller obtained from the Magistrates of Edinburgh, at their general half-yearly meeting for granting publicans' certificates, a renewal of his then existing certificate for premises in Canongate, said renewed certificate to be in force from 15th May 1887 until 15th May 1888.

On 16th July 1887 Charles Rattray, by arrangement with Miller, applied for and obtained from two of the Magistrates of Edinburgh, in virtue of the powers contained in section 19 of 9 Geo. IV., cap. 58,* a transfer of Miller's certificate for the premises in Canongate aforesaid, the said transfer bearing "to be of force only until 18th October 1887, being the next general meeting to be held for granting such certificates." Rattray, immediately upon the transfer having been granted, entered into possession of the premises, which was ceded to him by Miller.

On 8th August 1887 Rattray was convicted in the Edinburgh Police Court of a breach of his said public-house certificate by selling and supplying exciseable liquor to a man who was in a state of intoxication.

On 18th October 1887 Rattray applied to the Magistrates of Edinburgh, at their general half-yearly meeting for granting publicans' certificates, for a renewal of the certificate transferred to him from Miller, which renewal was refused by the Magistrates, to whom the aforesaid conviction had been intimated. On the 29th day of October 1887 Rattray appealed to Quarter Sessions against this refusal, but his appeal was dismissed.

Miller did not thereafter apply for or obtain a new certificate in his favour; but on 28th November 1887 he applied for and obtained from the town-clerk a duplicate of his said certificate from the register of licences, which duplicate was produced and proved to be correct. The register of licences kept by the town-clerk, in accordance with the Public-Houses Acts, bore that on 12th April 1887 Miller was granted a renewal of his existing public-house certificate from 15th May 1887 until 15th May 1888, and the register contained no entry cancelling said certificate.

Then followed a statement of facts inferring the trafficking libelled.

The questions of law were,—"Was the appellant, in view of the facts stated, the holder, within the meaning of the said Public-Houses Acts, of a certificate for the said premises on the dates libelled in the complaint? or was the appellant, by the transfer of his certificate in favour of the said Charles Rattray, divested of any right thenceforth to traffick in exciseable liquors under the said certificate?"

Argued for the appellant;—The transfer of a public-house certificate under section 19 of the Act 9 Geo. IV. cap. 58, was not complete until confirmed by a full bench at the half-yearly meeting. The original holder himself had no power to transfer,[1] and all that the two magistrates could do was to grant a temporary and conditional permission. Rattray's breach of certificate probably caused him to forfeit his temporary permission, but however that might be, as the temporary permission was never confirmed by a full bench, there was no effectual transfer from Miller. Miller therefore was entitled to trade in virtue of his radical right, the

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* The Act 9 Geo. IV. c. 58, sec. 19, enacts,—"That if any person duly authorised to keep a common inn, alehouse, or victualling-house . . . shall remove from or yield up the possession of the house and premises for which such certificate shall have been granted, it shall be lawful for two or more Justices of the Peace or magistrates respectively as aforesaid, sitting publicly in their ordinary place of meeting, to grant to any new tenant or occupier of such house and premises, upon such removal, a transfer of the certificate to keep such house and premises as a common inn, alehouse, or victualling-house as before such removal, until the next general or district meeting to be held under the authority of this Act."

[1] Clift v. Portobello Pier Company, Feb. 10, 1877, 4 R. 462.

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temporary burden of the permission granted to Rattray having been removed. Miller was not responsible for any fault Rattray might have committed.

The respondent was not called on.

LORD JUSTICE-CLERK.—I have in vain endeavoured to find any ground in support of this appeal. Divested of its surrounding circumstances the case is very simple. The appellant upon the 12th of April 1887 obtained a certificate from the Magistrates of Edinburgh for the sale of exciseable liquors for certain premises in the Canongate, and upon the 16th of July one Rattray, by arrangement with the appellant, applied for and obtained a transfer of this certificate till the 18th October, when it would in ordinary course have to be confirmed. Rattray immediately entered into possession of the business premises previously occupied by Miller. Unfortunately Rattray was convicted of a breach of his certificate upon the 8th of August, and on the 18th of October when he applied to have his certificate completed and renewed it was refused, for the reason I suppose just indicated. Upon the 29th of October he appealed to Quarter Sessions to have this decision reversed, but his appeal was dismissed. The result of these proceedings, in my opinion, is that the certificate transferred by Miller to Rattray ceased to be available to Miller. He, however, did not apply again to the magistrates, and without obtaining a new certificate began to sell exciseable liquors in his old premises on the strength of a duplicate of the original certificate. I think that the Sheriff-substitute was perfectly right in holding that Miller's certificate was at an end, and that he had no authority to trade on it.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

THE COURT pronounced this interlocutor:—"Dismiss the appeal: Affirm the determination of the inferior Judge, and decern: Find the respondent entitled to expenses, which modify," &c.

WYLIE & ROBERTSON, W.S.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

PATRICK BANAGHAN, Complainer.—*Wilson.*
HER MAJESTY'S ADVOCATE, Respondent.—*M'Kechnie, A.-D.*

No. 13.
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Banaghan v. Her Majesty's Advocate.

Proof—Competency—Evidence of accused in previous civil action.—Opinions that in a criminal trial statements made by the accused as a witness in a previous civil action, relating to the same subject-matter, may be used as evidence against him.

Question, whether it is a competent ground of suspension that a Sheriff's charge to the jury at a criminal trial was erroneous in law.

HIGH COURT.
Lord Justice-Clerk.
Ld. Craighill.
Lord Rutherfurd Clark.
Justiciary Clerk.

ON 13th December 1887, Patrick Banaghan was tried before the Sheriff-substitute (Speirs) and a jury at Jedburgh, on an indictment charging him with having sent a threatening letter to the Rev. Father O'Kane, Roman Catholic clergyman at Jedburgh.

Banaghan was convicted and sentenced to one month's imprisonment. He brought a suspension.

The grounds of suspension as stated in the bill were,—"(1) That the whole proceedings were irregular and oppressive. (2) That competent evidence was rejected. (3) That the verdict was truly one of acquittal."

In consequence of the course which the case took at the hearing it is unnecessary to state the specific averments on which these pleas were based. The material questions (which were not raised in the bill) came

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to be (1) Whether the evidence of Banaghan given at a previous civil tri to which he was not a party, but relating to the letter in question, w competent evidence at the criminal trial? In this evidence, which w proved at the criminal trial by the short-hand writer speaking to tl accuracy of his notes, Banaghan admitted that he was the writer of tl letter. (2) Whether, if competent, this evidence was sufficient corrob ration of Banaghan's declaration (in which he also admitted writing tl letter) there being, according to the statement made for him at the ba no other evidence corroborative of the declaration?

Banaghan maintained;—(1) That the evidence in question was incon petent, and (2) that if competent it was insufficient corroboration of tl declaration.

The respondent maintained;—(1) That the evidence was competent and (2) that whether there was sufficient corroboration of the declaratio or not, the soundness of the Sheriff's charge in law on that point coul not be raised in a suspension.[1]

Lord Justice-Clerk.—The point as to the verdict of the jury in this case i somewhat unusual in its character. While the declaration of a prisoner is no sufficient of itself to warrant a verdict of guilty, yet it is competent evidence and if it is supported and corroborated by other competent evidence, it may b sufficient. It is alleged here that the complainer had given evidence as to th same threatening letter on a former occasion, in a civil action in which the sam parties were implicated, and had admitted the writing and sending of th threatening letter with which he was charged in the criminal prosecution, and of which he was convicted. We are also told that this admission by him was proved in the criminal trial by the oath of the short-hand writer and his notes.

This, it is said, was the whole evidence upon which the jury decided against him.

Now, there is no such statement in the bill of suspension. It is not stated in the bill that there was no other evidence led except the deposition of the suspender in the civil case and his declaration, yet that is the objection to the proceedings now insisted on.

I think it is enough for the decision of this case to say that no such ground is stated in the bill of suspension. The contention before us has been that to admit the evidence given by a witness in a civil cause as against him in a criminal trial is incompetent. I am of opinion that this evidence is competent. If the ground of suspension had been that the evidence was not sufficient to go to the jury, that would have raised a different question, and we should have had to go more minutely into the principles applicable to such a case, but there is no such allegation. We do not know what evidence the witnesses gave, nor are we in a position to say what amount of corroboration there was, but we are bound to believe that the Sheriff-substitute in charging the jury stated to them that the evidence laid before them was sufficient to entitle them to convict the prisoner if they believed it.

In these circumstances I do not think it necessary to go into the more difficult questions raised in the argument. I think it is competent to use as evidence in

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[1] *Authorities cited.*—Maciver and Maccallum, July 1784, reported by Hume, ii. 326; H. M. Advocate v. Ross, Sep. 3, 1836, 1 Swin. 297; H. M. Advocate v. Humphreys, April 29 to May 3, 1839, 2 Swin. 356; Little v. Smith, Dec. 9, 1845, 8 D. 265; H. M. Advocate v. Edmiston, Jan. 15, 1866, 5 Irv. 219; Hume, ii. 324-6; Alison, ii. 577, 581; Macdonald, 511.

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a criminal prosecution a statement made in a former civil process, and that therefore there was no irregularity in this trial. According to the case of *Little* v. *Smith*, Dec. 9, 1845, 8 D. 265, it is entirely different when it is proposed to use as evidence in a civil action a declaration emitted in a previous criminal prosecution. But we have nothing of that kind here.

Lord Craighill.—I am of the same opinion. The complainer in this appeal was tried for sending a threatening letter. There is no doubt that he sent the letter, for when he was apprehended he was examined in the usual way and emitted a declaration in which he admitted writing and sending the letter. If therefore such an admission be sufficient, he was properly convicted. An admission in a declaration however is not of itself sufficient evidence upon which to convict a prisoner, but if further evidence is offered to corroborate this declaration the questions arise, first, whether that corroborative evidence is in itself competent, and secondly, whether it is, along with the declaration, sufficient evidence upon which to convict. In this case, the farther evidence which was offered consisted of the report of a deposition by the complainer in a civil process, in which he in so many words stated that he wrote and sent the letter which he was afterwards charged in the criminal complaint with writing and sending. He made a full confession, exculpating the man who in that case was charged with writing and sending the letter. Whether in thus acting he came forward as a volunteer, or was adduced in the usual way as a witness, we do not know; all we know is that he on that occasion fully confessed that he was the guilty person. Armed with this deposition the prosecutor called the short-hand writer to swear to the accuracy of his report, and in this way the complainer's admission in the civil case was made evidence in the criminal proceeding. The question is whether that evidence so given was competent. I agree with your Lordships that upon the authorities it beyond all doubt was competent evidence, but while this question was very fully argued to us, it is not made a ground of suspension in the bill, and I therefore agree with your Lordships that the suspension should be dismissed, no ground of suspension upon which we can interfere having been stated.

Lord Rutherfurd Clark.—I also agree. There are three grounds of suspension stated in the bill. The first is, that the whole proceedings were irregular. That means nothing, and may be dismissed at once. The second is, that competent evidence was rejected. It does not appear from the bill what the competent evidence was which was rejected, nor have we been informed from the bar. We must therefore reject that plea. The third ground of suspension is, that the verdict was truly one of acquittal. I am of opinion that that plea also is not well founded.

These are the only grounds of suspension stated in the bill, but in the course of the discussion some entirely different questions were argued. One of these was whether an admission by the accused made by him as a witness in a civil cause may competently be used against him when tried upon a criminal charge. I am disposed to think that the Sheriff did quite right in admitting that evidence, but I do not express a final opinion, for as I have said, the objection is not one of the grounds of suspension. Another objection which was argued to us was whether the evidence was sufficient to warrant the jury convicting the accused. If the evidence was not sufficient, the Sheriff-substitute ought to have

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directed the jury to that effect; if he did not do so, there was a bad charge, but no question about the charge being a bad charge is raised in the bill here, and if such an objection had been raised I doubt whether it would have been sustained. I doubt whether it is a good ground of suspension that the Sheriff's charge was erroneous in law. I think that was settled in the case of *Quarns* v. *Hart*, June 4, 1866, 5 Irv. 251.

THE COURT refused the bill, and granted warrant to re-imprison.

THOMAS M'NAUGHT, S.S.C.—CROWN AGENT—Agents.

No. 14. — Feb. 10, 1888. Niven v. Renton.

ROBERT NIVEN, Appellant.—*Kennedy*.
ROBERT WEMYSS RENTON (Procurator-Fiscal of Fifeshire at Cupar), Respondent.—*Jameson*.

Poaching—Day Trespass Act, 1832 (2 *and* 3 *Will. IV. cap.* 68)—*Ground Game Act*, 1880 (43 *and* 44 *Vict. cap.* 47), *sec.* 1.—*Held* that a person who had been found on a farm shooting ground game with the written permission of the occupier of the farm, but who was not one of the persons specified in sec. 1, subsec. 1 (*b*) of the Ground Game Act, 1880,* had been rightly convicted of a contravention of the Day Trespass Act, 1832.

HIGH COURT. Lord Justice-Clerk. Ld. Craighill. Lord Rutherfurd Clark. Justiciary Clerk.

ON 17th December 1887 Robert Niven, butcher, and Andrew Nicholson, a labourer or flesher, both residing in St Andrews, and Peter Paton, residing at Downfield, Dundee, were charged in the Sheriff Court at Cupar on a complaint at the instance of the Procurator-fiscal under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, setting forth that they did on the 13th October 1887 commit a trespass by unlawfully entering or being in the day time,—that is, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset,—upon the farm and lands of Drumcarro, tenanted by David Horn, farmer there, in the parish of Cameron, and county of Fife, belonging to James Home Rigg, Esq. of Tarvit and Drumcarro, without leave of the said James Home Rigg, in search or pursuit of game, &c. contrary to the Act 2 and 3 Will. IV. cap. 68, sec. 1.

Niven and Nicholson pleaded not guilty. Paton did not appear, having gone abroad some time prior to the date of the trial, and the case was deserted *pro loco et tempore* as regarded him. After evidence had been led the charge against Nicholson was withdrawn, but Niven was convicted by the Sheriff-substitute (Henderson) and fined 5s. with the alternative of fifteen days' imprisonment.

Niven obtained a case. The case stated,—"At the trial of the cause it was proved that on the afternoon of the day in question, between one and

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* The Ground Game Act, 1880 (43 and 44 Vict. c. 47), sec. 1, enacts,—"Every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land: Provided that the right conferred on the occupier by this section shall be subject to the following limitations:—(1) The occupier shall kill and take ground game only by himself, or by persons duly authorised by him in writing; (*a*) the occupier himself, and one other person authorised in writing by such occupier, shall be the only persons entitled under this Act to kill ground game with firearms; (*b*) no person shall be authorised by the occupier to kill or take ground game except members of his household resident on the land in his occupation, persons in his ordinary service on such land, and any one other person *bona fide* employed by him for reward in the taking and destruction of ground game . . . ."

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three o'clock, Andrew Leitch, gamekeeper to James Home Rigg, Esq. of Tarvit and Drumcarro, heard three shots fired on the lands referred to. He proceeded to the place where the shots had been fired, and found the appellant, who has been a master butcher in St Andrews for a considerable number of years, along with the respondents, Andrew Nicholson and Peter Paton, beating a turnip field. They had a pointer dog with them. The appellant and Paton had guns, and Nicholson was carrying a hare and a rabbit which had been shot by the appellant on the lands in question. The appellant was not over two hours on said land. Mr Leitch asked appellant if he had written permission from Mr Horn to shoot, and the appellant stated that he had.

"Leitch went with the appellant and the two other parties to Mr Horn, who stated that he had given the appellant leave to shoot ground game on his farm on the day in question.

"At the trial written authority to the appellant to shoot ground game on said lands, dated 3d October 1887, and signed by Mr Horn, was produced, and Horn deponed that it had been granted of the date it bore, and that the appellant was on the day in question availing himself of that permission, which is in the following terms, viz.:—'Drumcarro Farm, St Andrews, Oct. 3d, 1887.—I hereby give Mr R. Niven liberty for a day's shooting on Drumcarro Farm to kill hares and rabbits.—DAVID HORN.' It was admitted and proved that the appellant held a licence to kill game, which was produced at the trial, which licence is dated 24th August 1887, and expires on 31st July 1888.

"The appellant at the time in question was not a member of Horn's household, resident on the land in his occupation, nor a person in Horn's ordinary service on said land, nor *bona fide* employed by Horn for reward in the taking and destruction of ground game, all as defined in subsection (b) of subsection (1) of the Ground Game Act, 1880.[*] The Sheriff-substitute held that the appellant was thus not in a position to plead that Act in defence to the trespass libelled, and accordingly convicted him of the contravention of the Act 2d and 3d William IV. cap. 68, sec, 1, libelled."

The questions of law stated were,—"1. Whether the appellant, not being one of the persons defined in subsection (*b*) of subsection (1) of section 1 of the Ground Game Act, 1880, could be authorised by the tenant to kill ground game? and 2. Whether the appellant in the circumstances stated committed a trespass within the meaning of the Act 2d and 3d William IV. cap. 68, sec. 1?"

Argued for the appellant;—Subsec. (1) (*a*) of sec. 1 of the Ground Game Act, 1880, was independent of and not limited by the limitations of subsec. (1) (*b*). The former dealt with killing game with firearms, the latter with killing game otherwise. The sole limitation on the former was that one person only might be authorised, the limitations on the latter were the three therein stated. The written permission, therefore, which the appellant had was within the terms of the Act. The case was within the principle of *Stuart* v. *Murray*,[1] for if a friend from a distance coming to stay for the night might lawfully be authorised, surely a friend from the neighbourhood might equally be so, although he did not happen to stay all night. At all events, the appellant having acted *in bona fide*, ought not to have been convicted.[2]

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[*] See *supra*, p. 42, note.

[1] Stuart v. Murray, Nov. 13, 1884, 12 R. (Just. Cases) 9.

[2] Calder v. Robertson, Nov. 6, 1878, 6 R. (Just. Cases) 3; Higgins v. Earl of Moray, Sept. 9, 1884, 12 R. (Just. Cases) 1; Thom v. Caledonian Railway Company, Nov. 12, 1886, 14 R. (Just. Cases) 5.

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The respondent was not called on.

LORD CRAIGHILL.—This appears to me to be a very clear case. The appellant was on the ground in question, part of the farm of Drumcarro occupied by Mr Horn, the tenant, for the purpose of shooting ground game. He had obtained the authority of Mr Horn for a day's shooting on Drumcarro farm, authority to "kill hares and rabbits," and his defence to the complaint which was brought against him in the Sheriff Court of Cupar was that this written authority was sufficient to exclude the charge of day trespass in pursuit of game which was afterwards raised against him by the procurator-fiscal. It has been found by the Sheriff that the appellant was not a member of Mr Horn's household; that he was not resident on the land in Horn's occupation, nor a person in Mr Horn's ordinary service on the land, nor *bona fide* employed for reward in the taking and destruction of ground game, all as defined in subsec. (*b*) of subsec. (1) of sec. 1 of the Ground Game Act, 1880, and that this leave granted by Mr Horn was not an authority by which the alleged trespass was justified.

The appellant's counsel contended that the Act must receive a liberal interpretation for the purpose of extending its operation. What is liberal is not easily defined, but it appears to me that there can be no liberal interpretation which is equivalent to a nullifying of a material portion of the statute. Words in such a statute as the Ground Game Act, as well as in other Acts, must receive their ordinary and natural interpretation, and it will never do to put a construction upon an enactment which is equivalent not to an interpretation but to a repeal of the clause which has come to be in controversy.

The appellant further contended that subsec. (*a*) and subsec. (*b*) are independent enactments, and that accordingly we must read the former as if the latter never had been enacted. The effect of that of course would be to render the authority given by Mr Horn to the appellant as operative as it would have been if the appellant had been a member of one of the classes specified in subsec. (*b*). But this plainly would be not a reading, but a misreading, of the statute. The conditions in subsec. (*b*) qualify what has gone before, and this being so, Mr Horn was not competent to give, and the appellant was not competent to receive, a permission to kill ground game which would exclude the commission of trespass.

It was also contended for the appellant that as he had leave to come upon the land he ought to be held to be a member of Mr Horn's household resident on the land in his occupation. But this was a ludicrous contention. The appellant had never been in Mr Horn's house, and any purpose that he had in going to the farm was to kill ground game. He had no invitation to the farm, he had only a permission. So far as appears he had never been on the farm except on the occasion of the day in question, nor had he been nearer the house on the farm than the field in which he was walking for sport. The most liberal interpretation, to say nothing of the natural and ordinary interpretation, of the words would be far within the interpretation which has been suggested on behalf of the appellant. Better repeal the clause at once, or deal with it as blotted out of the Act, than force from the words of the clause that for which the appellant's counsel so earnestly contended. These being my views, I think the answer to the first question must be in the negative. The answer to the second question ought to be in the affirmative. The authority granted by Mr Horn not being valid, the appellant's presence on the farm for the purpose

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of killing game could not thereby be excused. He might or might not believe that what he had received was sufficient authority, and this perhaps not unreasonably might be taken into consideration in determining the punishment with which the trespass should be visited, but there was a trespass all the same, and therefore the Sheriff did right in convicting the appellant and in imposing a fine, for the recovery of which warrant was granted by the sentence passed upon the appellant.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor:—"Dismiss the appeal: Affirm the determination of the inferior Judge, and decern," with modified expenses.

MACPHERSON & MACKAY, W.S.—W. J. LEWIS, S.S.C.—Agents.

No. 15.

Feb. 10, 1888.
Bewglass v. Blair.

FREDERICK BEWGLASS AND OTHERS, Appellants.—*C. S. Dickson.*
ROBERT BLAIR (Procurator-Fiscal of the Lower Ward of Renfrewshire), Respondent.—*Wallace, A.-D.*

Breach of the Peace—Relevancy—Specification—Criminal Procedure (Scotland) Act, 1887 (50 *and* 51 *Vict. c.* 35), *sec.* 5.—*Held* that a summary complaint setting forth that, time and place libelled, certain persons, duly designed, did "form part of a disorderly crowd of persons, and behave in a disorderly manner, and annoy and disturb the lieges, and commit a breach of the public peace," was a relevant complaint under the above Act.

HIGH COURT.
Lord Justice-Clerk.
Ld. Craighill.
Lord Rutherfurd Clark.
Justiciary Clerk.

ON 17th January 1888 Frederick Bewglass, Samuel Brown, and Peter M'Millan were charged before the Sheriff-substitute (Nicolson) at Greenock, on a summary criminal libel under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and Criminal Procedure (Scotland) Act, 1887, at the instance of the procurator-fiscal, setting forth that the accused "did on 5th December 1887, in or at New Highlanders Academy, situated in Dempster, Mount Pleasant, and Holmscroft Streets, Greenock, form part of a disorderly crowd of persons, and behave in a disorderly manner, and annoy and disturb the lieges, and commit a breach of the public peace."

The relevancy of the libel was objected to for the accused in respect of insufficient specification of the crime alleged, and in particular in respect that the libel did not "set forth facts relevant and sufficient to constitute an indictable crime as required by section 5 of said Criminal Procedure (Scotland) Act, 1887."*

The objection was repelled, and the accused having pleaded not guilty, the case went to trial. The accused were convicted and fined.

They obtained a case. The case stated;—"It was held proved that the accused had taken a prominent part in the proceedings of the crowd libelled; that they had forced their way into the building mentioned, and encouraged others to do so; that many of those who so entered behaved themselves in a disorderly manner—did damage to the premises, annoyed and disturbed the proper occupants, and committed a breach of the public peace."

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* The Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), sec. 5, enacts that "it shall not be necessary in any indictment to specify by any nomen juris the crime which is charged, but it shall be sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime."

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The question of law was,—"Was the crime of which the accused were convicted relevantly libelled, and were they legally convicted?"

Argued for the appellants;—The new Act dispensed with the *nomen juris*, it did not dispense with a specification of facts sufficient to infer a crime. Here in point of fact the *nomen juris* was given, but there was an entire want of specification of the *modus*. Section 2 of the Act it was true permitted the forms in schedule A of the Act to be used, but schedule A contained no form for breach of the peace, which consequently must be libelled according to the old practice, and judging by the old practice this libel could not stand.[1]

Argued for the respondent;—The libel was relevant looking to the terms of the new Act. Its object was to dispense with specification as far as possible. There was no form for breach of the peace in schedule A, but the forms given, particularly that for the cognate offence of mobbing and rioting, shewed that all that was now necessary was to give the accused fair notice of the nature of the crime, when committed, where, and on whom.[2]

Lord Justice-Clerk.—Our ideas of relevancy have been very much altered by recent legislation, and we cannot now apply the same strict rules to indictments as we were accustomed to do before the Act of last session was passed. It appears to me that on the face of this indictment there is a sufficient disclosure on the part of the prosecutor of what he intends to prove against the appellant, and that if what is disclosed be proved the facts amount to a criminal offence. He means to prove that the accused formed part of a disorderly crowd which went to this school and committed a breach of the peace, behaving in a disorderly manner. We have in the case a condensed account of the evidence, and assuming its accuracy, it is perfectly clear that the averment of the indictment was proved, and that a breach of the peace was committed. I cannot say that the indictment is a model of logical sequence, but it appears to me that under the statute so much is allowed to be implied or supplied that we cannot interfere.

Lord Craighill.—I confess that it is difficult for an old Justiciary hand, accustomed to the old forms of procedure, to approve of this complaint, but we are now under the new Act, and it appears to me that there is on the face of this complaint a sufficiently specific statement to entitle us, looking to the forms provided by that Act, to hold the complaint to be relevant.

Lord Rutherfurd Clark.—As an old Justiciary hand, I rather think that under the old forms this indictment would have required a somewhat more specific statement, but all that has been changed, and I think we are bound to work the new Act fairly. I think the meaning of that statute is that specification is to be avoided as far as possible, and looking to the forms provided in schedule A for other crimes, I am of opinion that what is set forth in this indictment is sufficient notice to the accused of what he is charged with.

The Court pronounced this interlocutor:—"Dismiss the appeal: Affirm the determination of the inferior Judge, and decern."

Cumming & Duff, S.S.C.—Crown Agent—Agents.

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[1] Ritchie v. M'Phee, Oct. 25, 1882, 10 R. (Just. Cases) 9.

[2] Sleigh and Russell v. Moxey, June 12, 1850, John Shaw, 369.

HER MAJESTY'S ADVOCATE.—*D. Robertson, A.-D.*
CHARLES M'DONALD.—*J. C. Thomson—Deas.*

No. 16.

Feb. 29, 1888.
Her Majesty's Advocate v. M'Donald.

Indictment—Modus—Specification—Reset.—An indictment bore—"The charge against you is that, on several occasions, between 1st October 1886 and 15th January 1888, at your premises in Saracen Street, &c. aforesaid, you did reset 100 tons of pig-iron, the same having been dishonestly appropriated by theft." *Held* that it was irrelevant for want of specification.

WEST CIRCUIT (GLASGOW).
Lord Trayner.
Justiciary Clerk.

CHARLES M'DONALD, broker, Saracen Street, Possilpark, Glasgow, was indicted at the Glasgow Circuit Court held in February 1888, the indictment bearing—"The charge against you is that between 1st October 1886 and 15th January 1888, at your premises in Saracen Street aforesaid, you did reset 100 tons of pig-iron, the same having been dishonestly appropriated by theft."

It was objected (1) that the latitude of time taken in the indictment was too great, and (2) that the indictment was irrelevant in respect of not giving fair notice to the accused of the charge he had to meet.

The Advocate-Depute obtained leave to amend the indictment by inserting in it before the words libelling the time the words "on several occasions," so as to make it read "on several occasions between 1st October 1886 and 15th January 1888."

LORD TRAYNER.—This indictment, as now amended, charges the prisoner with having resetted, "on several occasions between 1st October 1886 and 15th January 1888," 100 tons of pig-iron; and it is objected that the latitude of time taken is too great, and that there is such a want of specification in the indictment that the prisoner is not bound to go to trial upon it; that without something more precise being stated than is given, the prisoner is not in a position to defend himself. I think the objection, so far as regards the latitude of time taken, must be repelled. In cases of reset—especially where continuous acts of reset are averred—very considerable latitude is allowed, and for the latitude here taken I think precedent might be found.

The other objection stated I sustain. It is said by the Advocate-Depute that what he proposes to prove is that the prisoner, within the dates specified, resetted various quantities of pig-iron, amounting in all to 100 tons. This is not what the indictment says; for the indictment may be read as amounting to a charge that the prisoner resetted several parcels of pig-iron of 100 tons each, some time within the dates libelled. This, however, is not the most important aspect of the objection, for this might be remedied by amendment, which I would allow. The important matter is that under this indictment the prisoner is not afforded any information concerning his alleged offence, such as would enable him to answer the charge, if he has an answer to it. To illustrate what I mean: Suppose that at the time of the prisoner's apprehension there was found on his premises a bar of pig-iron which is in the course of the evidence shewn to have been stolen. The prisoner must account for its possession so as to avoid the pains of reset. But how can he do so under an indictment like the present? The bar of pig-iron is part of the 100 tons libelled; but without any notice that it is so, until the proof has been led by the prosecutor, the prisoner is unable then to offer evidence that he acquired that particular bar of pig-iron innocently. Even if his evidence was at hand, not having given in a list of witnesses as required by law, the prosecutor might object to the examination of any witnesses the prisoner proposed to call. The want of such list of

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witnesses, and consequent loss of evidence in defence, could not be said to be matter for which the prisoner was responsible. Having no information from the indictment as to any particular charge, or part of the general charge, which he would be required to meet, he cannot be blamed if he is not ready to meet it. Such an indictment as the present puts a burden on the prisoner which he is not bound to bear. I think it would be unfair to the prisoner to go to trial on this indictment, and I accordingly sustain the objection.

THE diet was deserted *pro loco et tempore.*

PROCURATOR-FISCAL FOR LANARKSHIRE—J. M. & J. H. ROBERTSON, Writers—Agents.

No. 17.

Feb. 29, 1888.
Her Majesty's Advocate v. Livingstone.

HER MAJESTY'S ADVOCATE.—*Wallace, A.-D.—A. O. M. Mackenzie.*
JOHN LIVINGSTONE.—*R. L. Orr.*

Fraud—Bankruptcy—Credit obtained by undischarged bankrupt—Bankruptcy, Frauds, and Disabilities Act, 1884 (47 *and* 48 *Vict. c.* 16), *sec.* 4.—Circumstances in which an undischarged bankrupt, who had obtained credit to a considerable extent without disclosing that he was an undischarged bankrupt, was proved to have so acted with intent to defraud, and convicted of an offence under the Bankruptcy, Frauds, and Disabilities Act, 1884, sec. 4.

WEST CIRCUIT (GLASGOW).
Lord Fraser.
Justiciary Clerk.

JOHN LIVINGSTONE was indicted before the Court of Justiciary at Glasgow, under an indictment setting forth that being an undischarged bankrupt within the meaning of the Act, first hereinafter mentioned, "you did in your premises in Buchanan Street, North Frederick Street, Glasgow, with intent to defraud (1) between 28th May and 2d July 1887, obtain credit to the amount of £148, 16s. 2d. from the firm of H. W. Caslon & Company, typefounders, Chipwell Street, London; (2) between 20th May and 16th June 1887 obtain credit to the extent of £151 from the firm of Payne & Sons, printers' engineers, Atlas Works, Otley; and (3d) between 19th June and 5th August 1887 obtain credit to the extent of £27, 17s. 6d. from the firm of C. T. Jefferies & Sons, wholesale stationers, Blackhall, Bristol, without informing any of the said firms that you were an undischarged bankrupt, contrary to the Acts 47 and 48 Vict. cap. 16, sec. 4,* and 43 and 44 Vict. cap. 34 (Debtors Scotland Act, 1880)."

It was objected for the panel that the reference to the Debtors (Scotland) Act, 1880, was too general, and that the indictment was therefore irrelevant.[1]

The Advocate-Depute moved for leave to amend the indictment by making the reference to the Debtors Act, 1880, read as follows:—"And you have thereby incurred the penalties provided by 43 and 44 Vict. c. 34, sec. 13."†

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* The 4th section of the Bankruptcy, Frauds, and Disabilities Act, 1884, provides that "where an undischarged bankrupt obtains credit to the extent of £20 or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a crime and offence, and may be dealt with and punished as if he had been guilty of a crime and offence under the Debtors (Scotland) Act, 1880, and the provisions of that Act shall apply to proceedings under this section."

[1] Duncan v. Cooper, Feb. 3, 1886, 13 R. (Just. Cases) 36; Small v. Hart, March 12, 1886, 13 R. (Just. Cases) 45.

† Section 13 provides,—"The debtor in a process of sequestration or *cessio* shall be deemed guilty of a crime and offence, and on conviction before the Court of Justiciary . . . shall be liable to be imprisoned for any time not exceeding two years . . in each of the cases following . . ." Then follow subsections specifying various offences.

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Lord Fraser allowed the proposed amendment, and sustained the relevancy of the indictment as amended. His Lordship, however, expressed the opinion that the indictment, as originally framed, was relevant since intent to defraud was libelled, and the Debtors Act, 1880, was merely referred to for the purpose of ascertaining the penalty.

The prisoner pleaded not guilty.

Evidence was led for the prosecution. It was proved that on 29th June 1886 the prisoner was, on a creditor's petition, ordained to execute a disposition *omnium bonorum* in favour of a trustee. In September 1886 the trustee resigned his appointment as there was no estate to administer, but the prisoner was never legally discharged. Thereafter in the summer of 1887 the prisoner obtained credit—(1) to the amount of £148, 6s. 2d. from Messrs H. W. Caslon & Company, typefounders, London; (2) to the amount of £151 from Messrs Payne & Sons, printers' engineers, Atlas Works, Otley; (3) to the amount of £27, 17s. 6d. from Messrs C. T. Jefferies & Sons, wholesale stationers, Blackhall, Bristol. He did not inform any of these firms that he was an undischarged bankrupt. He had written to Caslon & Company for an estimate, and they instructed their traveller to call for an order. In reply to questions put by the traveller he mentioned that he had had correspondence previously with the firm, and that "it was all right." In dealing with Payne & Sons, he stated that Caslon & Company were supplying him with type, and when asked for a reference he gave the name of the manager of a branch bank in which he had had an account. To C. T. Jefferies & Sons he stated that he was being supplied with goods by Messrs Payne & Sons and Caslon & Company. The firms in supplying the goods were largely influenced by these statements, which were correct in point of fact. In August panel sold about 300 lbs. of the type which he had purchased from Caslon & Company to James M'Lay, general dealer, Glasgow, for £15, 10s. to whose niece he was married. It was proved that his bank account had always been of very small dimensions, and that there had been no operations upon it since December 1886, when the account was closed. His business was of a very limited character. The prisoner was sequestrated on 7th November 1887, and in the state of affairs his liabilities were set down at £1116 and his assets at £317, but the trustee had only been able to recover £124, 5s. 2d. of the latter, including a sum obtained for the machinery supplied by Payne & Sons.

For the defence evidence was led to the effect that the panel was preparing to issue a monthly time table and diary, and that the type and other material supplied to the prisoner were got for the purpose of publishing the diary.

The Advocate-Depute argued that he had succeeded in establishing the three necessary elements of the offence charged, viz.:—(1) that when the goods were ordered the panel was an undischarged bankrupt; (2) that he did not inform the firms from whom he ordered the goods that he was an undischarged bankrupt; and (3) that in so ordering the goods he was guilty of an intent to defraud. It was not necessary to prove false representations on the part of the prisoner, but the intent to defraud might be gathered from all the surrounding circumstances. As Lord Young had pointed out in *Duncan* v. *Cooper*, 13 R. (Just. Cases) 36, direct evidence of such intention was not necessary, fraudulent intent might be inferred, and the circumstances of this case warranted such an inference.

Counsel for the prisoner argued that fraudulent intent on the part of the prisoner was not proved. The *cessio* had practically come to an end in September 1886 when the trustee resigned, and though the prisoner had not been legally discharged, it might reasonably be supposed that he

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fancied himself a free man. Further, his object in obtaining the goods was a perfectly honest one—namely, to bring out a time table and diary, which he expected would be a very profitable piece of business, and enable him to meet all his obligations.

Lord Fraser, in charging the jury,—In recent years great alterations have been made in the law of debtor and creditor. The powerful means of enforcing payment of debt, which imprisonment allowed a creditor, are gone, and now in giving credit one must trust very much to the representations of the intending customer. But the Act of Parliament imposing penalties upon an undischarged bankrupt who goes to a tradesman and orders goods without disclosing that he is an undischarged bankrupt was intended somewhat to give protection to traders in the place of that which was abolished. The Act is quite explicit that a bankrupt must have a discharge from a competent Court before he can trade in the customary way. It is of no moment in the present case that the trustee had resigned. Another might be appointed on the application of any creditor; and until the bankrupt is discharged by a Court of law he remains an undischarged bankrupt. There is no doubt in fact that the panel is an undischarged bankrupt, and there is also no doubt that he succeeded in getting goods to an amount considerably above £20 in value without disclosing that fact. The question is, *quo animo?* In the Act of 1884 the clause under which the case is brought does not contain one word about intent to defraud. Section 13 of the Debtors (Scotland) Act, 1880, with regard to some other offences, lays the *onus* on the panel to shew that he had no intent to defraud; and the punishment to follow on conviction in such cases as the present is regulated by that section. And by a decision of two of the Judges of the Justiciary Court, a third dissenting—*Small* v. *Hart*, March 12, 1886, 13 R. (Just. Cases) 45—it has been held that intent to defraud is of the essence of the crime. For my part I cannot follow the reasoning on which the learned Judges arrived at that conclusion. In this case, however, the prosecutor has libelled intent to defraud, and he must therefore prove it. It is quite impossible to give a precise definition of what is fraud. But this may be said, that it may be any deception by which one man makes another believe, to the latter's injury, something that really does not exist. It may be done either by direct assertion or by a suggestion, not amounting to direct assertion, of something which was untrue. What did the prisoner do in this case? He went to various people and ordered goods without saying one word about his being an undischarged bankrupt. He referred one of them to his banker, as if he was a man of means, but his banker, had he been applied to, could have given only a pitiful account of his affairs. He played off one person against another in a very astute manner. To Payne & Sons he stated that Caslon & Company were supplying him with type; to Jefferies & Sons he said that he was a customer of Payne & Sons. There was no assertion certainly that he was not an undischarged bankrupt, but, on the other hand, he kept back the important fact that he was an undischarged bankrupt. He knew perfectly well that if he had told that fact he would not have got credit for a single sixpence. It has been said that he had incurred the credit from good motives; that he wished to publish a diary, the profits of which would have enabled him to clear his feet and pay off his debts, which he looked forward to doing. The object of getting the type and machinery was to make his fortune. But, alas! that was no excuse. A man who obtains goods

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from another, even if it were to keep his wife and family from starvation, or to enable him to pay 20s. in the pound, does wrong if he knows he has not the means of paying for them. The panel had set out on a speculation for publishing a railway guide, which in these days of travelling might have succeeded, or might have ended, as it did, in disaster. In August of 1887 he sold a large portion of the unpaid for type—the type by which he was to make his fortune—to his wife's uncle for £15, 10s. That certainly does not look a very nice transaction. It is said that the object of selling the type was to get money to pay his workmen. There was no proof of how the £15, 10s. had been spent. It may have been laid out in wages or it may not. There is no means of knowing. It is for you to consider whether all these things taken together shew intent to defraud on the part of the prisoner.

THE JURY unanimously found the panel guilty as libelled, and he was sentenced to four months' imprisonment.

PROCURATOR-FISCAL FOR LANARKSHIRE—A. S. & J. DRUMMOND—Agents.

No. 18.

Mar. 16, 1888.
Gairns v. Main.

THOMAS GAIRNS, Appellant.—*John Wilson.*
ALEXANDER MAIN (Procurator-Fiscal of Leith Police Court), Respondent.
—*Balfour*—*C. S. Dickson.*

Police—Burgh—Hackney carriage—Bye-law—Driver licensed by another burgh—General Police and Improvement (Scotland) Act, 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 308.—*Held* that the bye-laws made by the magistrates of a burgh under sec. 308 of the General Police Act, 1862, for the regulation of hackney carriages "plying for hire within" the burgh, do not apply to all hackney carriages passing through its streets, but only to those licensed by the magistrates of the burgh.

HIGH COURT.
Lord Justice-Clerk.
Ld. Craighill.
Lord Rutherfurd Clark.
Justiciary Clerk.

ON 17th November 1887 Thomas Gairns, hackney carriage driver, Leopold Place, Edinburgh, was charged in the Leith Police Court on a complaint at the instance of the Procurator-fiscal, which set forth that the accused, "between the hours of eleven and twelve of the clock on the forenoon of Sunday 13th November 1887, in Commercial Street, Leith, did, while passing the place of public worship known as Free Saint Ninian's Church, and while divine service was being conducted in said church, fail to drive a horse and hackney carriage under his care at a walking pace, and did drive said horse and hackney carriage at the rate of eight miles an hour, contrary to section 8 of the Amended Bye-Laws for regulating Hackney Carriages, made in terms of 'The General Police and Improvement (Scotland) Act, 1862,' by the Magistrates of Leith," whereby he became liable in a penalty.*

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* The bye-law libelled was in the following terms:—"Every driver shall, during the hours of divine service on Sundays, or other days set apart for public worship by lawful authority, drive at a walking pace while passing any place of public worship."

The following provisions of the General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), were referred to at the hearing:—

Sec. 278.—"The magistrates may from time to time license to ply for hire within five miles from the principal post-office of the burgh such number of hackney coaches or carriages, of any kind or description, adapted to the carriage of persons, as they shall think fit."

Sec. 279.—"Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within such prescribed distance, and every carriage standing upon any street, public or private, within

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Gaiins v. Main.

The accused pleaded not guilty, but was convicted and fined 10s., with the alternative of five days' imprisonment.

He obtained a case. The facts stated were,—"(1) That the appellant was an Edinburgh hackney carriage driver, licensed by the Magistrates of Edinburgh, and that the hackney carriage which he was driving was also licensed by the Magistrates of Edinburgh; (2) that neither the appellant nor the hackney carriage he was driving was licensed by the Magistrates of Leith; (3) that on the forenoon of Sunday, 13th November 1887, being the occasion referred to in the complaint, the appellant's carriage was hired, as a hackney carriage, at a stance in Union Place, Edinburgh, to carry, and did convey, certain persons to the docks at Leith, for which the appellant was paid the usual fare from that stance to the docks; (4) that the appellant on the said occasion, in the course of fulfilling that engagement, drove at the rate of about eight miles an hour past Free Saint Ninian's Church (near the docks) in Commercial Street, Leith, when divine service was being conducted in that church at the time libelled; (5) that the bye-law libelled was in the following terms,— . . . (6) that a constable, seeing the appellant was driving what he (the constable) took from the hackney carriage name-plate on the vehicle to be a hackney carriage, and was not acting upon the bye-law, held up his hands, and called to the appellant to go at a walking pace, but the appellant drove on at the rate libelled; (7) that the congregation in said church were disturbed in consequence."

The questions of law were, *inter alia*, the following:—"(2) Does the bye-law libelled apply to the appellant although he was not licensed by the Magistrates of Leith? (3) Was the carriage driven by the appellant a hackney carriage within the meaning of 'The General Police and Improvement (Scotland) Act, 1862,' and of the said bye-law?"

Argued for the appellant;—The bye-law here founded on was a condition of a Leith hackney carriage licence, not a rule for the regulation of public traffic in the streets of Leith. That was plain from section 308 of the Act. The bye-law did not apply to private carriages, and hackney carriages from Edinburgh were in the same position in this respect as private carriages, provided they did not "ply for hire" in the sense of section 308 and of section 279, which defined "hackney carriage"; but a hackney carriage did not ply for hire unless it was held out as open to hire by any member of the public who chose to take it.[1] The appellant's cab was not in this sense plying for hire in Leith on the occasion libelled; it had been hired in Edinburgh. It therefore was not a hackney carriage which the magistrates were entitled to require to be licensed under section 278 of the Act, and if not then its driver could not be guilty of a breach of the bye-law.

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such prescribed distance, having thereon any numbered plate required by this Act to be fixed upon a hackney carriage, or having any plate thereon resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of the Act." The section then went on to except stage-coaches duly licensed from the definition of hackney carriage.

Sec. 308.—"The magistrates may from time to time (subject to the restrictions of this Act) make bye-laws for all or any of the purposes following—that is to say, for regulating the conduct of the proprietors and drivers of hackney carriages plying within such prescribed distance in their several employments, and determining whether such drivers shall wear any and what badges, and for regulating the days and hours within which they may exercise their calling. . . ."

[1] Bateson v. Oddy, May 27, 1874, 43 Law Jour. Mags. Cases, 131.

Argued for the respondent;—This was undoubtedly a hackney carriage; it was plying for hire in Leith, and consequently was within the bye-law. The case was not put so high as to say that all Edinburgh cabs coming into Leith on hire must take out a Leith licence, but they must, when in Leith, do as the Leith cabs were obliged to do.

Lord Rutherfurd Clark.—The appellant, notwithstanding a warning from a policeman to the contrary, drove his cab at more than a walking pace past a church in Leith during divine service. He was charged before the Magistrate with having committed a breach of the bye-law made by the Magistrates of Leith in the following terms:—"Every driver shall, during the hours of divine service on Sundays, or other days set apart for public worship by lawful authority, drive at a walking pace while passing any place of public worship." The Magistrate convicted, and hence the appeal.

There are several questions raised in the case. But the most important is the second.

The bye-laws in question were made by the magistrates under the 308th section of the Police Act of 1862, which provides:—"The magistrates may from time to time (subject to the restrictions of this Act) make bye-laws for all or any of the purposes following—that is to say, for regulating the conduct of the proprietors and drivers of hackney carriages plying within such prescribed distance in their several employments, and determining whether such drivers shall wear any and what badges, and for regulating the days and hours within which they may exercise their calling."

The appellant is a licensed cab-driver. But his licence was not obtained from the Magistrates of Leith, but from the Magistrates of Edinburgh. The question is whether the bye-law which I have quoted is applicable to the appellant.

I am of opinion that it is not. I think that it is clear that the bye-laws apply only to the licences of the Magistrates of Leith. The Act enables the magistrates to make bye-laws to regulate the conduct of the proprietors and drivers of hackney carriages plying within the limits fixed by the Act, and for determining the badges the drivers shall wear. This is just a part of the system of licensing established by the Act in each burgh, and the breach of the bye-laws is nothing more than a breach of the licence granted by the magistrates. It cannot therefore apply to the appellant.

The Lord Justice-Clerk and Lord Craighill, who had also heard the case, were absent at advising, but Lord Rutherfurd Clark intimated that they concurred in his opinion.

The Court pronounced this interlocutor:—"Sustain the appeal: Reverse the determination of the inferior Judge, and decern," with seven guineas of expenses.

Turner & Marshall, Solicitors—Irons, Roberts, & Lewis, S.S.C.—Agents.

No. 19.

Mar. 16, 1888.
Smith v. Lamb.

CHARLES SMITH, Appellant.—*Kennedy.*
ROBERT LAMB (Procurator-Fiscal of Aberdeen Police Court), Respondent.
—*J. C. Thomson—Harvey.*

Proof—Competency—Statement by prisoner volunteered to policeman.—Held that a statement voluntarily made by an accused person while out on bail to the policeman who had apprehended him regarding the crime with which he was charged was competent evidence against the accused, although the policeman had not cautioned the accused.

HIGH COURT.
Lord Young.
Ld. M'Laren.
Lord Rutherfurd Clark.
Justiciary Clerk.

CHARLES SMITH was convicted of assault in the Police Court at Aberdeen on 1st February 1888. He obtained a case. The Magistrate in the case stated, *inter alia,*—"When the witness constable Alexander Finlay [who had apprehended the accused, as appeared from the previous part of the case] was under examination by the procurator-fiscal, he related a statement with reference to the case volunteered to him by the appellant, who accosted him on the street on the evening of the day upon which he, the appellant, had been liberated on bail. The law-agent of the appellant objected, on the ground that the constable had not cautioned the appellant; but I repelled the objection, on the ground that it was volunteered by the appellant when he was not in custody."

The question of law stated with reference to these facts was,—"(3) Whether the statement volunteered to the constable by the appellant after liberation on bail should have been admitted in evidence?"

Argued for the appellant;—The statement made to the constable ought not to have been admitted in evidence. The law was very jealous of statements by accused persons to officers in authority.[1] If an accused person insisted on making a statement, the officer ought to caution him before listening.

The respondent was not called on.

LORD YOUNG.—I am of opinion that this appeal should be dismissed. The case is too clear for argument. (After dealing with grounds of appeal which need not be reported)—It was further stated for the appellant that the magistrate ought to have rejected the evidence of the policeman as to a statement volunteered to him by accused while out on bail. It was argued that the constable ought to have warned him—that he ought to have said, "Take care, don't make any statement to me, for I shall remember it, and it will be used against you."

In my opinion there is no rule of our law requiring a constable, under ordinary circumstances, to give any such warning, and it seems to me ridiculous to say that a constable by not giving warning failed in his duty. I desire to say with regard to the authorities cited that there is no such rule in my opinion. It is a matter of everyday practice to ask a policeman, "What did the prisoner say when you charged him?" It never crossed my mind, nor I should think the mind of any other Judge, to object to the question. A Glasgow Circuit never passes but such statements are made by constables as "He said he wasn't there"—"He admitted the theft, and gave me the purse"—and so on. The idea of rejecting such evidence because no warning was given appears to me extravagant. No doubt when a man is in durance, in jail, the law is jealous of conversations between him and his warders. It is not the business of a jailer

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[1] Beaton, Sept. 20, 1856, 2 Irv. 457; Grant, April 18, 1862, 4 Irv. 183; Proudfoot, March 28, 1882, 9 R. (J. C.) 19, 4 Coup. 590.

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or a turnkey to go into the cells and converse with the prisoners about the crimes with which they are charged. The law guards a prisoner against confessions or statements induced by promises made to him by his jailers, and the Court will inquire into confessions and statements made by persons in custody in order to see that no undue advantage is taken over such persons by reason of the opportunities possessed by their custodiers. The natural incidents of an apprehension or statements made by accused persons when not in custody are a totally different affair. In the present case I see nothing to suggest that any undue advantage was taken of the accused. Being thus of opinion that this last ground of appeal is also a bad one, I think the appeal should be dismissed.

Lord M'Laren.—I concur. (After adverting to the other points)—On general principles it is evident that the rules as to admissibility of evidence of voluntary statements by accused persons apply to the evidence of police-officers as well as of members of the public. There are cases where the relation between the witness and the accused constitutes an objection, as where the witness is in a position of authority and has the opportunity of using pressure from which the accused requires protection. No such case is presented here. The appellant went up to the constable and spoke about his case. It is no part of the duty of a police-constable to warn every person who casually addresses him not to say anything in case it may be used in evidence against him. I think the evidence was properly admitted, and that the appeal should be refused.

Lord Rutherfurd Clark.—I agree. On the question of the competency of the evidence it is sufficient for me that the statement was in the fullest sense volunteered. I do not think it doubtful that in such circumstances the evidence is competent.

The Court dismissed the appeal.

Thomas Carmichael, S.S.C.—Alex. Morison, S.S.C.—Agents.

No. 20.

Mar. 20, 1888.
Campbell v. M'Lennan.

John Campbell, Appellant.—*J. P. Grant.*
Joshua M'Lennan (Procurator-Fiscal of Inverness-shire at Portree), Respondent.—*Rankine.*

Theft—*Held* (*diss.* Lord Rutherfurd Clark) that a summary complaint in which the charge against the accused was that having, time and place libelled, "found in money one pound, he did deny having found the same, and did appropriate and thus steal the same," was not a relevant complaint, in respect that the facts stated did not necessarily infer the crime of theft.

High Court.
Lord Young.
Lord M'Laren.
Lord Rutherfurd Clark.
Justiciary Clerk.

On 9th December 1887, John Campbell was charged in the Sheriff Court at Portree, before the Sheriff-substitute (Glegg) on a summary complaint at the instance of the Procurator-fiscal, the charge against him being that "having on the 14th November 1887, within the inn at Dunvegan, found in money £1, he did deny having found the same, and did appropriate and thus steal the same."

The accused pleaded not guilty, but after evidence had been led, was found guilty of the crime of theft as libelled, and sentenced to fourteen days' imprisonment.

Campbell obtained a case.

The Sheriff-substitute in the case stated that no objection had been taken to the relevancy of the complaint, and that he had found the following facts proved, viz.,—"That John Campbell, shoemaker, Hamuraviren, Glendale, had lost a £1 note on 14th November, which was a

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public market day, in or about the hotel at Dunvegan; that on the same day the appellant found a £1 note in one of the public drinking rooms of said hotel in which the said John Campbell, with others, had previously been; that the finding of the £1 note had been witnessed by several persons, one of whom asked the appellant to report his having found the note; that on 17th November the appellant denied to the said John Campbell having found a £1 note in said hotel on said day; that on the 18th November the appellant denied to one of the witnesses present at the finding that he had found a £1 note on said occasion; that prior to this, on said 18th November, the appellant's brother Murdo Campbell had told the said John Campbell that the appellant had found the money; that the appellant never returned a £1 note to Campbell; that on the last-mentioned date the appellant's brother Donald Campbell, on hearing that the police were making inquiries into the matter, sent a £1 note by the appellant's son to the said John Campbell."

The question of law was,—"Whether the facts above stated amounted to the crime of theft?"

At advising,—

Lord M'Laren.—This is an appeal on a case stated under the Summary Prosecutions Appeals Act, 1875, and the question which we are asked to consider is whether the charge, upon which a conviction has followed, is a relevant charge. The complaint charges the accused with the theft of a £1 note. Under the recent statute it is perfectly clear that a case of this description might have been tried on a complaint which simply set forth that the accused did steal a £1 note without stating that the note was the property of anyone. But it appears to me, on a fair reading of the charge, that the Procurator-fiscal has not availed himself of the abridged forms provided by the new statute, and that in framing this charge he has undertaken to set forth a circumstantial case of theft, defining the charge by circumstances of time and place, such as are essential to a relevant charge under the old form. The charge stated that the accused "having, on 14th November 1887, within the Inn at Dunvegan, found in money one pound, he did deny having found the same, and did appropriate and thus steal the same." Now, in my opinion, that is not a relevant charge of theft, because everything set out might be true, and yet the accused might not be guilty of theft. I am not prepared to affirm that the mere finding of a £1 note coupled with a denial of having found it is tantamount to felonious appropriation. One would like to know who the owner of the note was, and whether the person to whom the accused is said to have denied having found it had a right to ask the question. The circumstances set out are only these two—that the accused found a £1 note, and that he denied having found it. Now, it may be morally wrong to deny having found a £1 note; on the other hand, such a denial, if addressed to a person who had no business to put the question, does not raise a presumption of theft.

In the result my opinion is that the Procurator-fiscal having undertaken by the form of the charge to set out such particulars as would amount to a charge of theft has failed to do so. He has, in the terms of the charge, given an argumentative statement of circumstances which he considers amount to theft, but which are also consistent with a possible case of innocence.

As the conviction proceeds on a charge which is not relevantly stated, it follows, in my opinion, that it ought to be quashed.

Lord Rutherfurd Clark.—I am sorry to be obliged to differ, but I differ entirely. We have here nothing to consider but whether this complaint is or is not relevant. The complaint states merely these two facts—that the accused found a £1 note, and that he appropriated it to his own use. Under the new Act "appropriate" is to be read as "feloniously appropriate," but that is really of no importance, for if a person finds a £1 note, and appropriates it to his own use, I think that is plainly theft, and nothing else.

LORD YOUNG.—Your Lordships have differed in opinion, and that, according to the constitution of this Court, gives me a vote.

I ventured to point out in the course of the discussion that the charge here is an argumentative charge, and that it is against the rule of our law to state charges argumentatively. It sets out that the accused found a £1 note, that he denied having found it, and that he appropriated it, and the argumentative conclusion from these facts is that he did steal the same. Now, I agree with Lord M'Laren that this conclusion does not necessarily follow from the facts on which it bears to proceed. A man may find a £1 note, and finding it, may deny having done so, and may appropriate it, and yet not be a thief. He may be a thief no doubt, but on the other hand, he may not—the conclusion of theft is not the necessary inference. There must be circumstances entitling a jury to attribute to the accused the *animus furandi*. A man of large property may find money in the street, and may give it in the way of alms to the next beggar: that is undoubtedly appropriation. Yet who would call it theft, even if the finder had denied having found it? His denial may be a very important circumstance, and if the whole other circumstances point to the conclusion of theft, then he may be rightly convicted. Another important circumstance is that the finder knew who the true owner was, but in this indictment it is not suggested to whom the £1 note belonged, or even that the prosecutor knew to whom it belonged. That is all the more inexcusable here, since according to our law—our common law, and apart from the recent statute—the *modus* of theft does not require to be set out in the indictment. All that our law requires is that the indictment should bear that accused "did steal" the article mentioned. But the particular circumstances being here set out, but insufficiently set out to warrant the inference of theft, there is or is not an act of theft according to the evidence. I am not prepared therefore to sustain this indictment, and I am the more disposed to take this strict course—if indeed it be a strict course—because I have grave doubts whether this case should ever have been prosecuted.

THE COURT sustained the appeal and quashed the conviction, with five guineas expenses.

ALEXANDER MACDONALD, Solicitor, Portree—CROWN AGENT—Agents.

No. 21.

May 25, 1888.
Gunn v. Cadenhead.

ROBERT GUNN, Appellant.—*C. S. Dickson.*
GEORGE CADENHEAD (Procurator-Fiscal of Police Court of Aberdeen), Respondent.—*J. C. Thomson*—*Harvey.*

Public Health—Public Health Act, 1867 (30 *and* 31 *Vict. c.* 101), *sec.* 68—*Common lodging-house—Right of officer of Local Authority to inspect.*—The Public Health (Scotland) Act, 1867, provides, by sec. 68, that "the keeper of a common lodging-house shall at all times when required by any officer of Local Authority, give him free access to such house, and every part thereof." The

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keeper of a common lodging-house, on access to his house being demanded b two officers of the Local Authority, refused access (1) to a room which opene off a licensed room, and could only be entered through it—(this room had n been observed when the premises were inspected with a view to licence bein granted, and was not itself licensed); (2) to two rooms which were licensed, b which he had shut off entirely from the rest of the house, which had a separat access to the street, and which, after giving notice to the Local Authority that h had ceased to use them as part of the lodging-house, he had let to a monthl tenant. *Held* that in refusing access to the first-mentioned room he had contr vened the statute.

Opinions, that in refusing access to the other two rooms he had not contra vened the statute, but that his conduct in doing so would have justified th magistrates in cancelling the licence.

High Court. Lord Young. Lord M'Laren. Lord Rutherfurd Clark. Justiciary Clerk.

Robert Gunn, keeper of a common lodging-house at 12 Burnett' Close, Aberdeen, was charged in the Police Court of Aberdeen with havin "refused free access to part of his house" to two officers of the Loca Authority "on 30th September 1887 when required by them to give suc access, contrary to sec. 68 of the Public Health (Scotland) Act, 1867."*

Gunn pleaded not guilty, but was convicted. He took a case fo appeal.

The facts stated by the Magistrate were,—"A plan was produced by the complainer shewing two rooms, 2 and 2A on the ground floor, with a door of communication between them, and a door of communication between room 2 and the interior of the main house, and an outside door to Burnett's Close. The lodging-house register was produced, and it was proved that in May 1887 the appellant had fourteen rooms registered as each capable of accommodating lodgers, and that the above-mentioned two rooms were amongst that number. It was proved that upstairs, in the main house, was a room which was not in the register, and it was proved that at the registration of the house the said room had not been disclosed or shewn to the inspector. The only access to this room was from one of the registered rooms.

"It was proved that in August 1887 the tickets pertaining to rooms 2 and 2A, indicating the number of lodgers they were licensed for, had been returned by the appellant to the inspector, and that the appellant had then stated to the inspector that said two rooms were let to a monthly tenant, but that the inspector had refused to take the tickets.

"It was proved that the appellant's wife was in use to take the actual management of the lodging-house, and had at times the sole control of it in the absence of her husband.

"It was proved that between one and two o'clock in the morning of the date libelled two officers of the Local Authority called at the appellant's house for the purpose of inspecting it. On entering, they saw the appellant's wife, who, in answer to their inquiry for her husband, told them he was ill in bed. The officers explained to Mrs Gunn the object of their visit, and required her to give them access to rooms 2 and 2A. They found the door of communication between No. 2 and the main house locked, and Mrs Gunn refused to give access there, as she said these two rooms were let to tenants. One of the officers, on being cross-questioned, said that he believed said door was nailed up.

"The officers then proceeded upstairs, and required Mrs Gunn to give them access to the above-mentioned room there which was not in the register, and in the keyhole of the door of which they saw the stem of a key, shewing that the key was inside. Mrs Gunn answered that she could not give them access to that room, as the key was lost, and they did not get access to it.

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* Sec. 68 of the Public Health (Scotland) Act, 1867, 30 and 31 Vict. c. 101, provides that "the keeper of a common lodging-house shall at all times when required by any officer of Local Authority give him free access to such house and every part thereof."

"The officers admitted that in their previous visits to the house they had never asked access to said room, because they had not been aware of its existence. As to this room, it was proved in exculpation that some articles of lumber were kept in it, or had been seen in it by the witnesses.

"During the time the officers were insisting for access to said last-mentioned room, the appellant appeared. The officers did not ask him directly for access, but I held it as proved that he knew of their demand, and that he did not satisfy it.

"In exculpation it was proved by Robert Matthew and another that the former had occupied rooms 2 and 2A, as a tenant of the appellant, at a monthly rent since August; that the inner door of communication was locked and nailed up; that Matthew entered to these two rooms by the outside door from Burnett's Close; and that so long as the inner door of communication was nailed up access could not be had through the common lodging-house to said two rooms; but one of them admitted that he had only heard that it was nailed up."

It was further stated at the bar that the appellant applied in April 1887 to have his house, described as consisting of fourteen rooms of specified dimensions, licensed as a common lodging-house. In May the licence was granted, and an entry of the licence being granted was made in a book kept by the Local Authority, while the appellant had delivered to him a ticket for each room specifying its dimensions and the number of persons who were to be allowed to sleep in it.

The Magistrate held that the room on the first floor and the rooms 2 and 2A were parts of the licensed lodging-house. He convicted the appellant of "the contravention charged, viz., a contravention of the 68th section of the Public Health (Scotland) Act, 1887," and fined him 40s.

Argued for appellant;—The officers had a right of access only to the lodging-house, *i.e.*, to the part of the building licensed as such. The definition of a common lodging-house in the Public Health Act, 1867, shewed that the lodging-house might be only part of the premises.* The statute could not be construed so as to give the officers right to enter the private dwelling-house of the keeper of a common lodging-house, if within the same building, at any hour of the night, and here the visit was after midnight. The lumber-room on the first floor was not separately licensed, nor was it part of the licensed rooms, and the refusal, or rather inability, to open it was not unreasonable even if the officers had a right to seek admission to it. As to the rooms 2 and 2A, the demand to enter them was a demand to enter the premises of the appellant's tenant, to whom he had let them after giving notice to the officers. The tenant might have prevented such access, and the appellant had no right to demand it. By having a licence as a common lodging-house keeper a

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* Section 3 provides,—"The expression 'common lodging-house' shall signify a house or part thereof where lodgers are housed at an amount not exceeding fourpence per night for each person, whether the same be payable nightly or weekly, or at any period not longer than a fortnight, or where the house is licensed to lodge more than twelve persons.

"The expression 'keeper of a common lodging-house' shall include any person being or acting in the care and management of a common lodging-house."

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man was not disabled from letting part of his house for a long perio though it might be that the magistrates might regard that as a reaso for not renewing the licence. Besides, the thing demanded was physi cally impossible. The door of communication had been nailed up. Th Magistrate had been satisfied of the *bona fides* both of the letting t a tenant and the completeness of the closing up the door of communi cation.

Argued for respondent;—(1) As to the room on the first floor, n reason could be given for the refusal of access to this room. It was jus part of the room which formed the only access to it, and was licensed (2) As to rooms 2 and 2A, a licence was given for a house after inspection of it as a whole, because it was thought suitable as a whole for the purpose. It did not appear that the magistrates would have licensed the house with these two rooms cut off it. A man could not get a licence for a house with many rooms, and then cut off a number and leave it a licensed house with few rooms. He must, if he wished to do that, come back and get a new licence for the diminished common lodging-house. If the appellant's contention were allowed, a man could easily overcrowd his licensed house, and if any fear of a visit of the officers arose, remove a number of guests to the unlicensed part of the house. One great object of the inspection would thus be defeated. The statute gave the officers free access to every part of the house. These words gave them right to inspect both 2 and 2A, and the room on the first floor.

LORD YOUNG.—This is a case of some interest, and one not unfitting to be brought to this Court by appeal. The appellant is a common lodging-house keeper, who holds a licence from the magistrates, obtained in May 1887. In the preceding month he had applied for a licence for his house 12 Burnett's Close, Aberdeen, and he obtained it in May, after inspection of the house, which is described as consisting of fourteen rooms. The dimensions of each room are specified. We are informed in the case that two rooms, distinguished as 2 and 2A, have a separate entrance from the close, and that in August after the licence was granted the appellant let these two rooms to a man named Matthew, as a monthly tenant, and that Matthew entered into occupation of them and continued to occupy them in September, when the inspectors visited the premises and desired access with a view to inspecting them. They were refused access to these rooms, on the ground that they were let to Matthew and he was in occupation of them, and the door of communication was nailed up. It was said that access could not be given in these circumstances.

On the same occasion the inspectors discovered another room which was not mentioned in the licence, but was obviously part of the same house. It was locked from the inside, as it appeared, for they saw a key in the lock which had been turned from the inside. They could not get into it, and admission was refused. Thereupon a prosecution was raised under section 68 of the Public Health Act for the offence of refusing admission to the officers of the Local Authority. The defence as to the two rooms was what I have already stated as the reason given to the inspectors for their not obtaining admission at the time, along with the other fact that in August, when the two rooms were let to Matthew, the appellant had returned to the inspector the tickets belonging to these rooms, stating that he had let them, and was not to use them in future as a part of the lodgings. The inspector refused to receive the tickets, or to regard the two rooms as other than part of the lodging-house.

The defence as to the other room was, that it was never included in the lodging-house, and was not one of the rooms specified in the licence.

The important question is as to the former rooms, No. 2 and No. 2A. It is, whether the keeper of a lodging-house, after having got a licence for his house, is entitled to cut off two rooms, shutting up the communicating door and leaving them to be entered from the close by the separate access. For my own part, I incline to think he was not, consistently with retaining the licence which he held. While it is not necessary to decide the point, that is the inclination of my opinion. I think so, because when the magistrates gave the licence they licensed the whole premises, so far as appears, and they might not have been willing to license the premises at all with these rooms cut off and separately occupied. I think the appellant was not at liberty to cut some rooms off and hold the licence as applicable to the rest.

But another question of interest arises. Did the licence disable the appellant from entering into the contract of lease with another party? I incline, on this question, to the opinion that it did not, and that (assuming the *bona fides* of the contract, which the Magistrate says nothing against) the appellant was at liberty to contract with Matthew. That being so, and the rooms having been cut off, and Matthew occupying them, I think the appellant was, in a question with Matthew, not only not bound, but not entitled to give the inspectors access. Matthew could have prevented the access being given, and a Court would give an interdict at his instance to prevent it. A third question arises connected with the others, on which also I shall only state the impression I have formed. What was the effect of letting the rooms to Matthew upon the licence? My impression is that the magistrates, when the appellant intimated what he had done, were entitled to cancel the licence as one the terms of which had been broken, for I think it was a violation of the implied understanding on which the licence was granted that several rooms were cut off from the house. If it had been then intimated to the appellant that if these rooms were cut off the rest could not be regarded as licensed, that would have founded another prosecution.

I have thought it right to indicate these views, impressions though they are, because the case has been argued to us and the questions are of public interest. But it is sufficient for my judgment that it is clear that the upper room was part of the house, and that there was no disability to give the access to it which the inspectors required, and which it was the appellant's duty to give. I am of opinion, without deciding as to the two rooms, that we ought to hold the evidence as to the upper room to be sufficient to warrant the charge and the conviction.

LORD M'LAREN.—I concur. As to the room which was never licensed I need say nothing, except that when such a room is not specified in the application for licence it is treated as an unoccupied room, and every unoccupied room is to be open to the inspection of the authorities.

As to the rooms described as 2 and 2A I have had some difficulty. On the whole I am of opinion that the statutory offence was not committed by refusal of access to these two rooms. If the keeper of the lodging-house simply let any other two rooms, which had no separate access to the street, to a monthly tenant, and intimated that he claimed to withdraw them from the licence, such would, I think, have been no good intimation at all. The rooms in the case supposed

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would be *de facto* part of the lodging-house, and could not be let except so to be under inspection. But here the case is different. The two rooms had separate access and the door of communication was nailed up. I think we mu read the case as if it had been built up with brick, for there is no suggestio that the nailing up was a sham. In these circumstances, the appellant was n longer in a position to give the access demanded. It was physically impossibl to do so without breaking into his tenant's house.

On the other questions I am inclined to agree with your Lordship. I thin it clear that the keeper of a common lodging-house cannot alter the condition of his licence by using a part of the house as was done here.

Lord Rutherfurd Clark.—On the point as to the upper room I see no difficulty. I think that unoccupied room was part of the licensed room with whic alone it had any communication, as much as if it had been a press off that room, and was to be treated as one and the same with it.

On the other points argued I prefer to say nothing.

The Court refused the appeal.

Thomas Carmichael, S.S.C.—W. R. Weir, S.S.C.—Agents.

No. 22.
May 26, 1888.
Soutar v.
Stirling.

David Soutar and Others, Complainers.—*Rhind.*
James Stirling (Procurator-Fiscal of Forfar Police Court) and Another, Respondent.—*Kennedy.*

Prevarication—Summary punishment—Public-Houses Amendment (Scotland) Act, 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 27.—The Public-Houses Amendment (Scotland) Act, 1862, sec. 27, gives Magistrates trying complaints under the Act power to adjudge witnesses, who should "prevaricate or wilfully conceal the truth," to be imprisoned for a period not exceeding sixty days, without formal complaint, and in a summary manner, and provides that "the sentence awarding such punishment shall set forth shortly the nature of the offence." *Held* that under this enactment the particulars of the offence must be specified in the sentence, and that a sentence which merely found the witness "guilty while under examination on oath of prevarication and wilfully concealing the truth," fell to be quashed.

High Court.
Lord Young.
Lord M'Laren.
Lord Rutherfurd Clark.
Justiciary Clerk.

On 2d April 1888, after the trial of a complaint under the Public Houses Act in the Police Court at Forfar (which complaint, after seven witnesses had been examined for the prosecution and three in exculpation, was found not proven), Bailie Ferguson, the presiding magistrate, on the motion of the Procurator-fiscal, pronounced this sentence on David Soutar, mason, Nursery Feus, Forfar, and William Brown, factory worker, Wellbraehead, Forfar, who had been examined in support of the prosecutor:—"Forfar, 2d April 1888.—The Magistrate, in respect the witnesses David Soutar and William Brown, before designed, have been guilty, while under examination on oath, of prevarication and wilfully concealing the truth, adjudges them to be imprisoned in the prison of Forfar for ten days each from this date, for which purpose grants warrant to officers of Court and all concerned." *

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* The Public-Houses Act Amendment (Scotland) Act, 1862 (25 and 26 Vict. c. 35), sec. 27, enacts,—" . . . Any person summoned as a witness or as a haver to appear before any Sheriff, Justice, or Justices of the Peace or Magistrate, touching any matter arising out of the recited Acts or this Act, either on the part of the complainer or of the person complained against, or of any person interested in such matter, who shall neglect or refuse to appear at the time and

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Soutar and Brown presented a bill of suspension and liberation against the Procurator-fiscal and the Magistrate.

They stated that the offence for which the Procurator-fiscal had asked that they should be punished, and for which the Magistrate had sentenced them, was perjury; that the conviction and sentence were wholly unwarranted; that they had not committed perjury; that they had told nothing but the truth; that the Magistrate had given effect to their evidence by dismissing the complaint; that no notes were taken of their evidence; that no complaint was brought against them charging them with perjury; that they were not asked to plead to such a charge; that no opportunity was afforded them of defending themselves; that no evidence was brought against them; and that the whole procedure was grossly irregular and illegal, and the sentence null and void.

The complainers pleaded, *inter alia;*—(1) The complainers having been convicted and sentenced for having committed perjury when there was no complaint before the magistrate charging them with such a crime, suspension and liberation should be granted as craved. (2) The said sentence having been pronounced incompetently, suspension and liberation should be granted as craved.

Argued for the complainers;—The offence which the magistrate really had in view in pronouncing this sentence was perjury, not prevarication,* and under the 27th section of the Public-Houses Amendment Act of 1862 he had no power to sentence a witness summarily for perjury, nor had he such a power at common law, for perjury was a crime which could be punished only after trial on an indictment.[1] Further, the 27th section of the statute required that the nature of the offence should be set forth in the sentence. The "nature" of the offence could not possibly be merely its name. The particulars of the individual act of prevarication, as these appeared to the magistrate, were to be set forth. It would be impossible to set forth the name "shortly." The intention of the Legislature was to ensure that the magistrate when exercising this power of summary punishment for prevarication should let the Court have the means of judging whether what he regarded as an act of prevarication

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place for that purpose appointed, and who shall not make reasonable excuse for such neglect or refusal as shall be admitted and allowed by such Sheriff, Justice or Justices, and Magistrates, may, when it shall be proved on oath that he has been duly summoned at least twenty-four hours before the meeting of the diet of the Court, be apprehended and committed to prison under the warrant of the said Sheriff, Justice or Justices, or Magistrate, till he finds security to appear and give evidence; and any person who shall so neglect and refuse to appear, or who appearing shall refuse to be examined on oath or solemn affirmation, shall thereby be guilty of an offence, and on being convicted shall forfeit and pay any sum not exceeding £5, and in default of immediate payment shall be imprisoned for a period not exceeding thirty days; and if any person under examination on oath or solemn affirmation before any Sheriff, Justice or Justices, or Magistrate, in any matter arising under the provisions of the said recited Acts or this Act, shall prevaricate or wilfully conceal the truth, it shall be lawful to such Sheriff, Justice or Justices, or Magistrate, in open Court, without any formal complaint, and in a summary manner, to adjudge the person so offending to be imprisoned for any period not exceeding sixty days, or to forfeit and pay a penalty not exceeding five pounds, and in default of immediate payment to be imprisoned for a period not exceeding thirty days, and the sentence awarding such punishment shall set forth shortly the nature of the offence."

* Counsel for the suspenders read extracts from a report of the trial in a local newspaper, and maintained that these shewed that the magistrate had confused perjury with prevarication.

[1] Alison, vol. i. p. 485.

really was so, and of giving the witness redress if it was not. In *Lawrie* v. *Roberts*[1] the Court had so judged and given redress, which they would have been unable to do had the sentence been as bare of specification as it was here. In the case of *Baxter*[2] the deposition of the witness was ordered to be recorded at length, although that was a sentence by the High Court, from whose judgment there was no appeal. Whether *Macleod* v. *Speirs*[3] was rightly decided or not, it was a case at common law, and not under this statute.

Argued for the respondent;—The Magistrate had jurisdiction under the statute to sentence a witness for prevarication and wilful concealment of the truth, and the sentence here, which alone the Court could consider, bore to be for that crime. It was out of the question to maintain that the Magistrate meant perjury when he said prevarication. It was contended, however, that the sentence was invalid because it did not set forth "the nature of the offence" as required by the statute. But "nature" of the offence meant the "class" of offence to which the particular act belonged and not the details which constituted that particular act. The 27th section gave the Magistrate power to sentence not merely for prevarication but for other offences. To require him to specify the details of the particular act of prevarication would result in most, if not all, of such offences going unpunished. For prevarication was an offence the proof of which largely depended on the impression made on the mind of the Judge by the conduct of the witnesses, and that usually did not admit of exact specification in words. In *Macleod* v. *Speirs* the sentence was sustained although no particulars were given.

Lord Young.—In this suspension it appears that the magistrate, proceeding under clause 27 of the Public-Houses Amendment Act of 1862, after trying a complaint under the Public-Houses Acts, sentenced two men, who had been examined as witnesses in the case, to be imprisoned for ten days for prevarication and wilful concealment of the truth. It is not doubtful that the statute does give magistrates trying such cases power to sentence witnesses to be imprisoned for a period not exceeding sixty days for this offence, but I should hope that it is a power which is rarely exercised. This Court, as the Supreme Court, has the power at common law to punish witnesses summarily for the wilful concealment of truth or prevarication, and this power has been exercised, in more remote times, not infrequently. Baron Hume refers to such punishments for the offence of prevarication as slitting the ears and nose, sentence to the pillory, and whipping, as well as sending to jail. In later times—but still somewhat remote from the present—the sentence has never exceeded a short term of imprisonment—an improvement in that respect; but so rare has been the exercise of this power in modern times that in my whole experience—now amounting to nearly half a century—I have never once seen it exercised. I remember being present in this Court when the learned Judge who presided was inclined to pronounce such a sentence, but the other two learned Judges who were sitting along with him dissented, and I have reason to know that their reason for dissenting was that they took a different view from the presiding Judge of the conduct of the witness. While he thought the witness had prevaricated, they thought he had not. That illustrates the danger of proceeding in a short-

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[1] Lawrie v. Roberts, May 26, 1882, 4 Coup. 606, 9 R. (J. C.) 22.

[2] H. M. Advocate v. Baxter, March 4, 1867, 5 Irv. 351.

[3] Macleod v. Speirs, March 18, 1884, 5 Coup. 387, 11 R. (J. C.) 26.

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hand way to pronounce a sentence involving serious punishment. There was a case some twenty years ago—the case of *Baxter*, March 4, 1867, 5 Irv. 351—where a witness was sentenced to fourteen days' imprisonment for prevarication, but in that case the Court thought so ill of the witness that they stopped the ordinary course of procedure and directed the deposition of the witness to be taken down by the Clerk of Court, which was done, and it was signed on each page by the witness and by the presiding Judge. That shews that it is an unusual kind of proceeding, requiring unusual caution, but I cannot help thinking, at the close of half a century's experience, that it would have been well if that sentence had not been pronounced.

The only instance recorded of a Sheriff punishing a witness by imprisonment for prevarication on oath is the case of *Macleod* v. *Speirs* (5 Coup. 387); therefore of common or customary law giving such a power to inferior Judges, there can be none. Here, however, undoubtedly the power is given by statute. But the statute which gives the power requires that not only the name of the offence, which is prevarication or concealment of the truth, but also its nature, shall be set forth shortly in the sentence awarding punishment. It is said that this requirement of the statute may act as a serious check upon the magistrate exercising this power of summary punishment. I should not be sorry if it did so operate, for if the magistrate cannot make clear the nature of the offence in his own mind, and formulate it in language, he should abstain from whipping, or that which now takes its place, imprisonment. Now, when the statute says that the nature of the offence shall be set forth shortly, that does not mean that the name of the offence merely shall be given. It clearly means that the magistrate is to set forth the facts, shortly but intelligently, which go to constitute the particular offence which in his opinion was committed. How do you set forth "shortly" the name of an offence consisting of one word? The language may not be happy, but I cannot read "nature" as equivalent to "name."

Now, if that is the true construction of the statute, the nature of the offence has certainly not been here set forth. It is at least possible that the magistrate may have misunderstood the nature of the offence referred to in the statute, and confused prevarication with perjury. If a witness denies anything on oath, but the magistrate, looking to the evidence of other witnesses, does not believe him, that is perjury, if the magistrate is right, but it is not prevarication, and it is admitted that it would have been incompetent under the statute for the magistrate to sentence for perjury, so that if the magistrate had set forth shortly the nature of the offence here it might have appeared that the case was not within the power given to him by the statute. When the counsel who appeared for the magistrate and for the procurator-fiscal, upon whose motion the magistrate proceeded, was invited by the Court to state what the offence was which the magistrate had as a fact before his mind, he declined to do so, which, combined with the newspaper report, which was read to us, confirms strongly the suggestion put forward by the appellant's counsel, that what the magistrate had in his mind was not prevarication but perjury. It is not a light matter to send a witness from the witness-box to jail on the impression of a bailie. It is a very serious interference with the liberty of the subject, and may destroy a man for life. It is not sending him to prison after trial, in which, having had due notice, he may bring forward evidence in support of his defence; it is a summary proceeding without trial aud without evidence beyond the mere impression of a magistrate.

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I am therefore of opinion that this sentence is illegal, and must be set aside, with expenses.

Lord M'Laren.—I concur in the judgment proposed, and on the same grounds. It appears to me that when the statute prescribes that the sentence shall set forth shortly the "nature" of the offence of which the accused has been convicted, something more is meant than that the sentence should merely state the name of the crime. It may be a little difficult perhaps to do this shortly, but if the magistrate in the exercise of his powers does set forth to the best of his ability the particulars of the prevarication, the Court will not be disposed to set aside the sentence merely on technical grounds. On the other hand, the Court must be able to understand the nature of the false evidence upon which the magistrate proceeded, and which he thought intrinsically incredible. If the evidence did not bear out the sentence there would then be an opportunity of giving redress. The magistrate may have difficulty in setting forth shortly the particulars of the prevarication of which the accused was convicted, but while this is true, the answer is that the statute does not contemplate that every case of prevariation should be followed by a conviction and sentence. Indeed it is not desirable that such sentences should be pronounced except in very clear cases. If it is a clear case, then I cannot see why there should be a difficulty in setting forth what the witness said which was considered to be contradictory or untrue. Here the sentence gives no information. It has been stated that the actual offence was perjury (though this is contradicted), and that the magistrate misunderstood the nature of the offence with which he was dealing. I do not assume that the magistrate did anything of the kind. It is a sufficient ground for setting aside the sentence that the statutory requirement as to setting forth the nature of the offence has not been complied with.

Lord Rutherfurd Clark.—The case of *Speirs* has been cited to us. I do not wish to make any observation upon it. It does not bear upon this case. The point here is the construction of the statute; for it is plain that if the construction which your Lordships put on the statute is sound, the magistrate did not comply with the requirements of the statute. I am disposed to think that that construction is sound, and I therefore agree in your Lordships' judgment.

The Court passed the bill, and suspended the conviction and sentence complained of, with five guineas of modified expenses.

William Officer, S.S.C.—Gordon, Pringle, Dallas, & Co., W.S.—Agents.

No. 23.

May 26, 1888.*
Her Majesty's Advocate v. Lyon.

Her Majesty's Advocate.—*Wallace, A.-D.—Harvey.*
Robert Lyon.—*Younger.*

Procedure—Withdrawal of plea—Criminal Procedure Act, 1887 (50 *and* 51 *Vict. c.* 35), *secs.* 31 *and* 41.—Where a person accused of a crime has, under the 31st section of the Criminal Procedure Act, 1887, intimated his intention of pleading guilty, and has been brought before the Sheriff and pleaded guilty, and has been remitted to the High Court for sentence, he cannot on being brought up for sentence withdraw his plea, sec. 41 of the Criminal Procedure Act not being applicable to such a case.

High Court (Glasgow).
Lord M'Laren.
Justiciary Clerk.

Robert Lyon having been apprehended on a charge of theft by housebreaking gave written notice through his agent of his intention to plead

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* Decided Dec. 26, 1887.

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guilty.* He was indicted and served with a notice, conform to schedule L of the Criminal Procedure Act, 1887. Thereafter he was brought before the Sheriff and pleaded guilty. The Sheriff remitted him to the High Court for sentence.

Lyon was brought before the High Court for sentence at a sitting thereof held at Glasgow on 26th December 1887. It was then stated to the presiding Judge that he desired to withdraw his plea given before the Sheriff, and to plead not guilty.

Argued for Lyon;—An accused who had pleaded guilty and been remitted to the High Court for sentence, under the 31st section of the Criminal Procedure Act, 1887, was *in pari casu* with an accused who had been cited to that Court for a second diet under the 41st section of that Act. The course followed should be the same. The Court had power to review what took place before the Sheriff. That the Sheriff had only remitted for a specific purpose—the passing of sentence—could not limit the power of the Court.†

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[*] Section 31 of the Criminal Procedure (Scotland) Act, 1887, provides,—"Where a person accused shall give written notice to the crown agent through his own procurator that he desires to have his case at once disposed of, and declares his intention to plead guilty, it shall be lawful to serve such person with an indictment and a notice conform to Schedule L to appear at a diet not less than four clear days after such notice before the Sheriff before whom under this Act he would be cited to a first diet, and it shall not be necessary to lodge or give notice of any list of witnesses or productions, other than productions to prove previous convictions, and at such diet the Sheriff, if any plea of guilty is tendered which shall be accepted by the procurator-fiscal, shall deal with the case in like manner as cases are required to be dealt with under this Act where a person accused pleads guilty at a first diet: Provided always, that if the case is one suitable for punishment in the Sheriff Court, he shall forthwith pronounce sentence, and if the case is such as can only be tried in the High Court of Justiciary, or is of such an aggravated nature that the Sheriff shall hold that the question of punishment should be disposed of by that Court, the Sheriff shall by an interlocutor written on the record copy of the indictment conform to Schedule M appended to this Act, remit the accused to that Court for sentence, and such remit shall be a sufficient warrant to bring the accused person, without any further notice, before the High Court of Justiciary for sentence at any sitting at any place that may be convenient, as the Lord Advocate may order, and the original warrant of commitment of such person till liberated in due course of law shall remain in force until he is brought before the High Court of Justiciary for sentence, and if the person accused when brought before the Sheriff on such indictment shall plead not guilty to the charge or plead guilty to any part thereof only, and the procurator-fiscal shall decline to accept such restricted plea, then the diet shall be deserted *pro loco et tempore*, and thereafter the procedure against the person accused may be according to the other provisions of this Act."

Schedule L is in these terms—"*A B*, Take notice that the crown agent has received intimation that you intend to plead guilty to the charge on which you have been committed for trial, and that you will have to compear before the Sheriff of Lanarkshire within the Court-house at Glasgow upon the of 188 to answer to the indictment to which this notice is attached."

Schedule M is as follows—"The Sheriff remits the said *A B* to the High Court of Justiciary for sentence on the foregoing plea of guilty."

[†] Section 41 of the Act provides,—"Where a person accused is cited to the High Court of Justiciary for the second diet, the said Court shall have power to review the proceedings at the first diet, and where the person accused has pleaded guilty to the whole or any part of the charge at the first diet, the Court at such second diet, if it shall be shewn that such plea was taken to an irrelevant or incompetent charge, or has been taken under substantial error or misconception, or under

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The Advocate-Depute argued that sec. 41 applied only where the accused was cited to a second diet, and not to cases in which he had been remitted for sentence.

Lord M'Laren.—When this case was called the prisoner stated that he desired to withdraw his plea of guilty. If the accused has the right of withdrawing his plea it must be under the 41st section of the statute; no other section gives this power, and the question is whether the 41st section applies to summary proceedings initiated at the desire of the prisoner himself in the statutory form.

The ordinary procedure under the statute is commenced by indictment, which originates in the Sheriff Court, but unless followed by a plea of guilty is carried at once into the High Court of Justiciary. It is not necessary that any remit should be made by the Sheriff for this purpose. On the contrary, it rather appears that in certain cases the case is predetermined from the beginning to be a High Court case. The details of this procedure are to be found in sections 25 to 30 of the Criminal Procedure Act, and in a subsequent part of the Act we are told how the case is to be dealt with when it comes into the High Court.

The present action, however, was instituted under section 31, the procedure under which appears to have been intended as a distinct form of summary conviction. The section begins—"Where a person accused shall give written notice to the crown agent through his own procurator that he desires to have his case at once disposed of, and declares his intention to plead guilty, it shall be lawful to serve such person with an indictment and a notice conform to Schedule L to appear at a diet not less than four clear days after such notice before the Sheriff before whom under this Act he would be cited to a first diet." This kind of procedure can only be instituted by consent of the prisoner, and in pursuance of his declared intention to plead guilty. The form prescribed by the statute is one which does not contain any provision for going to trial under the charge. Thus it is provided that "it shall not be necessary to lodge or give notice of any list of witnesses or productions, other than productions to prov previous convictions." But what makes the matter clear beyond doubt is tha in the case of the prisoner changing his mind when brought before the Sherif then "the diet shall be deserted *pro loco et tempore*, and thereafter the procedur against the person accused may be according to the other provisions of this Act. If it had been in the contemplation of the Legislature that such a thing coul take place as the withdrawal of the plea of guilty after the accused had bee remitted to the High Court for sentence, there would have been some provisio made for the disposal of the case in that event, but there is none. If I were allow this plea to be withdrawn, the case could not go to trial, and I see th greatest objection to a course which lays upon the Advocate-Depute the necessi of deserting the diet at the will of the accused.

Upon these considerations I have come to be clearly of opinion that the pr visions as to withdrawal of a plea under the 41st section have no relation to pr

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circumstances which tended to prejudice the person accused, may allow such pl to be withdrawn or modified, and where such plea is so withdrawn or modified t Court shall, if the prosecutor shall so move, desert the diet *pro loco et tempore*, postpone the trial to a later date, which shall be notified to the person accus in open Court, and where such postponement makes it necessary that the ju for the trial of the case shall be taken from a different list from that of whi notice was given to such accused persou, such list shall be prepared, signed, a kept in the office of the proper Sheriff-clerk as aforesaid, within three clear da of such postponement; in manner hereinbefore provided."

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edings under the 31st section. The case must be treated as one which has een sent here for sentence.

SENTENCE, eighteen months' imprisonment.

PROCURATOR-FISCAL OF LANARKSHIRE—POOR'S AGENT—Agents.

No. 24.

May 26, 1888.
Dingwall v. Her Majesty's Advocate.

JOHN DINGWALL, Suspender.—*C. S. Dickson—M'Lennan.*
HER MAJESTY'S ADVOCATE, Respondent.—*Lord-Adv. Macdonald—Blair, A.-D.*

Indictment—Criminal Procedure (*Scotland*) *Act*, 1887 (50 *and* 51 *Vict. cap.* 35, *secs.* 5 *and* 8.—The Criminal Procedure Act, 1887, sec. 5, enacts that it shall not be necessary in any indictment to specify by any *nomen juris* the crime which is charged, but it shall be sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime.

Sec. 8 enacts that it shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done "wilfully" or "maliciously," or "wickedly and feloniously," or "falsely and fraudulently," or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case in which according to the existing law and practice its insertion would be necessary in order to make the indictment relevant.

A B was convicted before a Sheriff and a jury upon an indictment which bore —"The charge against you is that, on 10th March 1888, you did, in the shop . . . pretend to A S that you had just come from the Royal Bank at Perth, and had been promoted to be teller in the branch of that bank at Leith, and did thus induce the said A S to deliver to you at Elm Row, Edinburgh, on 18th March 1888 a piano, which you appropriated to your own use, without paying or intending to pay therefor."

At the trial it was proved that accused went to a shop, got possession of a piano at a price payable in quarterly instalments extending over three years, and, after paying one of the instalments of the price, sold it. The accused was found guilty as libelled, and sentenced accordingly.

The Court (*diss.* Lord Rutherfurd Clark) *suspended* the sentence, Lord M'Laren holding that falsehood and fraud were facts necessary to support the charge, and that as the indictment did not set forth these it was not relevant,—Lord Young, while concurring with Lord M'Laren, resting his judgment on the ground that the case proved was one of theft, and that the indictment was not fitted for the sole trial of a charge of theft.

HIGH COURT.
Lord Young.
Ld. M'Laren.
Lord Rutherfurd Clark.
Justiciary Clerk.

JOHN MORGAN DINGWALL was on 10th May 1888 tried before the Sheriff of the Lothians and Peebles (Crichton) and a jury upon an indictment, at the instance of the Lord Advocate, in the following terms:—"The charge against you is, that on 10th March 1888 you did, in the shop in George Street, Edinburgh, occupied by the firm of Paterson & Sons, music sellers, pretend to Archibald Miller Dalrymple Sommerville, a partner of said firm, that you had just come from the Royal Bank at Perth, and had been promoted to be teller in the branch of that bank at Leith, and did thus induce the said Archibald Miller Dalrymple Sommerville, or his said firm, to deliver to you, at Elm Row, Edinburgh, on 13th March 1888, a piano, which you appropriated to your own use, without paying or intending to pay therefor."

The jury, by a majority, found the complainer guilty as libelled, and the Sheriff (Crichton) sentenced him to four months' imprisonment.

Dingwall thereupon presented a bill of suspension and liberation, in which he stated,—"The evidence disclosed that the complainer had obtained a piano from Messrs Paterson & Sons, mentioned in the indictment, at a price of £39, payable by quarterly instalments extending over

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a period of three years. He had duly paid the first instalment, and the second had not become due at the date of his trial. Only one witness, namely, Mr Sommerville, mentioned in the indictment, was adduced by the respondent in support of the false representation charged in the indictment. For the complainer evidence was adduced establishing (1) that he had been for many years a clerk in the branch of the Royal Bank at Perth, where he had discharged the duties of teller; and (2) that he had been for about a year prior to and including 10th March 1888, clerk in the branch of that bank at Leith."

These averments were substantially admitted, subject to the explanation that Mr Sommerville's testimony was merely a link in a chain of evidence, and that the accused had given up his situation at Leith on 10th March before going to Paterson's shop, and that there were other facts laid before the jury which plainly shewed the complainer's guilt.

The suspender pleaded;—(1) The charge against the complainer having been one of falsehood, fraud, and wilful imposition, and no sufficient legal evidence having been adduced against him of the false representations libelled in the indictment, he should have been assoilzied *simpliciter* and dismissed from the bar. (2) The complainer having been convicted of the crime charged upon the uncorroborated testimony of a single witness, the conviction should be set aside. (3) The complainer is further entitled to suspension and liberation in respect that, according to the evidence adduced, no crime was committed.

When the case came up for hearing, the question was asked from the bench, whether, apart from the other grounds of suspension, the indictment was relevant.

Argued for the suspender;—(1) The indictment was irrelevant. The recent Act, by section 8,* had made it unnecessary to use qualifying words such as "falsely and fraudulently," but it was only intended that these words should be implied where the words of the indictment of themselves necessarily involved a criminal charge. Section 5 provided that the indictment must set forth facts relevant and sufficient to constitute an indictable crime. It was not a crime by the law of Scotland to order and get goods not intending to pay for them—*Hall*, March 25, 1881, 4 Coup. 438, 8 R. (Just. Ca.) 28. But even if it were, this charge had been disproved, the accused having paid one instalment of the price. The crime charged was falsehood, fraud, and wilful imposition, or it was nothing, and to constitute that offence it was necessary that the representation made should be false, and should be made with intent to defraud. "Pretend" did not necessarily mean "falsely pretend," but was equivalent to "represent." All that the suspender had represented to Sommerville was true, except perhaps that he had just come from Perth. The truth was that he had removed from Perth a year ago. Then in addition it was necessary to set forth that the false statement was made with intent to defraud. The accused might have falsely represented himself to be a teller, but unless he did so with the purpose to defraud there was no crime. This additional fact of fraudulent purpose was not stated. It was absurd to say that a statement of it was implied by the statute. No charge of fraud was made in the indictment. The accused might, without intending to do so, have induced the shopkeeper to give him credit by the false statement, but unless he did so with the purpose to defraud there was no crime. The object of an indictment was to inform the accused of the charge against him, and it was therefore unreasonable to sustain an indictment which did not specify any criminal act. The statute could not be regarded as intended to provide a store of allegations of fact which the prosecutor could import into his indictments when it suited his convenience. The present indictment received no countenance from the form "Norah Omond" given in schedule A. That was a charge of theft. (2) Even if the indictment were held to be relevant, the sentence should be suspended, because the crime lay in the false and fraudulent statement made, and to that statement there was only one witness, Sommerville.

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* The Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), sec. 5, enacts that "it shall not be necessary in any indictment to specify by any *nomen juris* the crime which is charged, but it shall be sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime."

Sec. 8 enacts that "it shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done 'wilfully' or 'maliciously,' or 'wickedly and feloniously,' or 'falsely and fraudulently,' or 'knowingly,' or 'culpably and recklessly,' or 'having good reason to know,' or 'well knowing the same to have been stolen,' or to use any similar words or expressions qualifying any act charged; but such qualifying allegation shall be implied in every case in which according to the existing law and practice its insertion would be necessary in order to make the indictment relevant."

Schedule A gives examples of indictments, and, *inter alia*, the following—"You did pretend to Norah Omond, residing there, that you were a collector of subscriptions for a charitable society, and did thus induce her to deliver to you £1, 1s. of money as a subscription thereto, which you appropriated to your own use."

Argued for the respondent;—(1) The objection to relevancy should have been taken at the first diet.[1] (2) The indictment was not irrelevant. The Act of 1887, by sec. 8, supplied the words "falsely and fraudulently," and it supplied a form in schedule A (against Norah Omond), which precisely applied. (3) It was not the accused's statement to Sommerville which alone went to the jury, but the whole chain of evidence, in which it was only a link. The accused's story was false in several particulars. He had not just left Perth, he was not a teller at Leith, but had left his employment there that day. The jury were the proper judges of the sufficiency of the evidence and of the accused's criminality looking to all the circumstances of the case.

LORD M'LAREN.—This is a bill of suspension of a sentence pronounced by the Sheriff of the Lothians and Peebles on a charge which is fully set forth in the statement of facts. The first question argued was that of the relevancy of the charge, which is or professes to be in the form provided under the Criminal Procedure Act, 1887. It is not unnatural that in the working of a new statute such questions should arise. I shall preface what I have to say with one or two observations on what I conceive to be the scope and object of the provisions of the statute. It has abolished what was the major proposition under the old form, and not only so, but the statute makes it unnecessary that the indictment should set forth the particular denomination of the offence for which the accused is to be tried. For example, it is not necessary to say to the accused as formerly,—"You are accused of the crime of theft." The whole charge is comprised in the statement of the facts which constitute a crime. Now, I must qualify that to this extent, that it appears to me to be part of the plan of the statute that where a crime has a well-known name, that name should in some form be introduced into the charge,—for example, in a charge of theft, it is to be

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[1] Criminal Procedure Act, 1887, sec. 33, and Act of Adjournal, March 17, 1887, ch. v. sec. 3.

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said that the accused did "steal" an article, and I should not support suc charge as relevant without the use of that word. And so with the crimes assault and murder. As to those crimes, however, in charging which it was custom in the old form in describing the offence to use expletive expressi such as wickedly and feloniously, wilfully and maliciously, or falsely and frau lently, it is provided that all such expressions shall be implied. The stat (sec. 8) calls them "qualifying" expressions, and gives the words I have quot and similar expressions, as illustrations of such qualifying expressions. Wh so interpreted, I can hardly doubt that the omission of such expressions is improvement, for it is an improvement to leave out superfluous words. But wh the crime charged consists of acts that might be innocent in themselves, and a case where the question whether or not they are criminal depends on t quality attaching to them, it is a totally different proposition to say that t words describing that quality may be omitted. For example, a person may s fire to property innocently, or wilfully in order to spite someone else or to defra insurers. In the last case the attempt to defraud insurers is a necessary ingredie in the offence, and must be set out according to this statute, for I find in one the examples in schedule A that in such a case the act is to be charged as do "with intent to defraud the Liverpool, London, and Globe Insurance Company

It therefore appears to me to be consistent with the principle of a libel in th new form that where fraud is an ingredient in the description of the offence must be set forth. Now, in this case the crime is what is called in popula terms the obtaining of goods on false pretences. The essence of the offence i the falsity of the representations. It is not an offence to obtain goods on credi on a true representation, even though the person so obtaining them has not th means of paying for them. The crime consists in doing so by falsehood an fraud, and the case is, therefore, like the illustrative case I have mentioned I should therefore think this not a case where the statement of fraud should b omitted, but one in which it was necessary that those representations should b characterised in the charge as false representations. Now, the charge is that in certain premises the accused did "pretend" to a certain person "that you had just come from the Royal Bank at Perth, and had been promoted to be teller in the branch of that bank at Leith, and did thus induce" that person "to deliver to you . . . a piano which you appropriated to your own use without paying or intending to pay therefor." It is said that the word "pretend" is a sufficient intimation that a false pretence is intended to be charged. Unless that contention is well founded I think there is not even the colour of relevancy about the indictment. The argument then is, that "pretend" implies a false pretence, and it is supported by referring to one of the illustrative forms in the schedule which sets forth that ". . . . you did pretend to Norah Omond, residing there, that you were a collector of subscriptions for a charitable society, and did thus induce her to deliver to you one pound one shilling of money as a subscription thereto, which you appropriated to your own use." If this form had been in all respects applicable to the present case I should decide against the objection, for we are bound by the words of the schedule. But when we look more narrowly into the words of the illustrative case in the schedule, it appears uncertain whether the case mentioned in it is meant as a statement of falsehood and fraud, or of dishonest appropriation of property, the new *nomen juris* introduced by the statute. A libel in the form I have read would be sufficient to justify a conviction of theft. But the difficulty here is that while the words "pretend" and "induce" are used, and delivery of goods is set forth, there is nothing criminal in the appropriation of the piano unless it was obtained by false pretences, and therefore there is no relevant charge unless "pretend" is to be read as equivalent to "falsely pretend." We are told that the facts of the case amounted to a theft, that the suspender obtained the piano on hire, and immediately sold it. But that was not the case in the charge.

I have been unable to satisfy myself that it was enough to state that the accused "pretended" what is stated in the libel. In short, I think that the word "false" was necessary to the definition of the crime, and so must appear in this charge, though it be not necessary when the terms used in an indictment necessarily disclose a crime.

I think, therefore, that the indictment was not relevant, and in that view it becomes unnecessary for me to consider the remaining grounds of suspension.

LORD RUTHERFURD CLARK.—I entirely differ from the opinion just delivered by Lord M'Laren. I think the indictment was relevant, and in accordance with the statute. It is remarkable that the relevancy of the indictment was not challenged in the Sheriff Court, or before us, by the suspender's counsel. The suggestion to impeach it came from the bench. The statute has introduced a new form. We have nothing to do with whether it is better or worse. We have simply to administer the law as it now stands, and to sustain the charge if in accordance with the statute.

The statute says in section 2 that an "indictment may be in accordance with the forms contained in schedule A appended to this Act, or as nearly conform thereto as the circumstances permit." As I read that provision, it means that the schedule prescribes forms which the prosecutor may use lawfully, and if the case is described by him as these forms permit he is making a relevant indictment. I think it ludicrous to say that if the forms which the schedule prescribes are exactly followed there is yet no relevant indictment. That is, however, I think, the necessary result if we hold this indictment irrelevant, if it is in the statutory form. Now, I turn to see the form which the prosecutor may use, and I find this form—"You did pretend to Norah Omond that you were a collector of subscriptions for a charitable society, and did thus induce her to deliver to you £1, 1s. of money as a subscription thereto, which you appropriated to your own use." Now, it seems to me that that is what we have, *mutatis mutandis*, in this indictment; for it says, "you did pretend to" Mr Sommerville "that you had just come from the Royal Bank at Perth, and had been promoted to be teller in the branch of that bank at Leith, and did thus induce" him "to deliver to you . . . a piano which you appropriated to your own use without paying or intending to pay therefor." How is it possible to say that that, which is in accordance with the statutory form, is not a relevant indictment? I cannot see it. The pretence, of course, as the statute assumes, is different. The person pretending is not always pretending to be a collector of subscriptions. But I cannot see that there is the smallest deviation from the statutory form, and if there is no deviation from the form which the prosecutor may lawfully use I cannot hold the indictment irrelevant. In judging of that we must not look at facts disclosed at or after the trial, but must treat the case solely as it stood before the trial.

It is suggested that the form I have quoted from the schedule is a form for some new offence called dishonest appropriation. I would have no hesitation said that the accused did "steal" an article, and I should not support such a charge as relevant without the use of that word. And so with the crimes of assault and murder. As to those crimes, however, in charging which it was the custom in the old form in describing the offence to use expletive expressions such as wickedly and feloniously, wilfully and maliciously, or falsely and fraudulently, it is provided that all such expressions shall be implied. The statute (sec. 8) calls them "qualifying" expressions, and gives the words I have quoted, and similar expressions, as illustrations of such qualifying expressions. When so interpreted, I can hardly doubt that the omission of such expressions is an improvement, for it is an improvement to leave out superfluous words. But when the crime charged consists of acts that might be innocent in themselves, and in a case where the question whether or not they are criminal depends on the quality attaching to them, it is a totally different proposition to say that the words describing that quality may be omitted. For example, a person may set fire to property innocently, or wilfully in order to spite someone else or to defraud insurers. In the last case the attempt to defraud insurers is a necessary ingredient in the offence, and must be set out according to this statute, for I find in one of the examples in schedule A that in such a case the act is to be charged as done "with intent to defraud the Liverpool, London, and Globe Insurance Company."

It therefore appears to me to be consistent with the principle of a libel in the new form that where fraud is an ingredient in the description of the offence it must be set forth. Now, in this case the crime is what is called in popular terms the obtaining of goods on false pretences. The essence of the offence is the falsity of the representations. It is not an offence to obtain goods on credit on a true representation, even though the person so obtaining them has not the means of paying for them. The crime consists in doing so by falsehood and fraud, and the case is, therefore, like the illustrative case I have mentioned. I should therefore think this not a case where the statement of fraud should be omitted, but one in which it was necessary that those representations should be characterised in the charge as false representations. Now, the charge is that in certain premises the accused did "pretend" to a certain person "that you had just come from the Royal Bank at Perth, and had been promoted to be teller in the branch of that bank at Leith, and did thus induce" that person "to deliver to you . . . a piano which you appropriated to your own use without paying or intending to pay therefor." It is said that the word "pretend" is a sufficient intimation that a false pretence is intended to be charged. Unless that contention is well founded I think there is not even the colour of relevancy about the indictment. The argument then is, that "pretend" implies a false pretence, and it is supported by referring to one of the illustrative forms in the schedule which sets forth that ". . . . you did pretend to Norah Omond, residing there, that you were a collector of subscriptions for a charitable society, and did thus induce her to deliver to you one pound one shilling of money as a subscription thereto, which you appropriated to your own use." If this form had been in all respects applicable to the present case I should decide against the objection, for we are bound by the words of the schedule. But when we look more narrowly into the words of the illustrative case in the schedule, it appears uncertain whether the case mentioned in it is meant as a statement of falsehood and fraud, or of dishonest appropriation of property, the new *nomen juris* introduced by the statute. A libel in the form I have read would be sufficient to justify a conviction of theft. But the difficulty here is that while

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I have been unable to satisfy myself that it was enough to state that the accused "pretended" what is stated in the libel. In short, I think that the word "false" was necessary to the definition of the crime, and so must appear in this charge, though it be not necessary when the terms used in an indictment necessarily disclose a crime.

I think, therefore, that the indictment was not relevant, and in that view it becomes unnecessary for me to consider the remaining grounds of suspension.

LORD RUTHERFURD CLARK.—I entirely differ from the opinion just delivered by Lord M'Laren. I think the indictment was relevant, and in accordance with the statute. It is remarkable that the relevancy of the indictment was not challenged in the Sheriff Court, or before us, by the suspender's counsel. The suggestion to impeach it came from the bench. The statute has introduced a new form. We have nothing to do with whether it is better or worse. We have simply to administer the law as it now stands, and to sustain the charge if in accordance with the statute.

The statute says in section 2 that an "indictment may be in accordance with the forms contained in schedule A appended to this Act, or as nearly conform thereto as the circumstances permit." As I read that provision, it means that the schedule prescribes forms which the prosecutor may use lawfully, and if the case is described by him as these forms permit he is making a relevant indictment. I think it ludicrous to say that if the forms which the schedule prescribes are exactly followed there is yet no relevant indictment. That is, however, I think, the necessary result if we hold this indictment irrelevant, if it is in the statutory form. Now, I turn to see the form which the prosecutor may use, and I find this form—"You did pretend to Norah Omond that you were a collector of subscriptions for a charitable society, and did thus induce her to deliver to you £1, 1s. of money as a subscription thereto, which you appropriated to your own use." Now, it seems to me that that is what we have, *mutatis mutandis*, in this indictment; for it says, "you did pretend to" Mr Sommerville "that you had just come from the Royal Bank at Perth, and had been promoted to be teller in the branch of that bank at Leith, and did thus induce" him "to deliver to you . . . a piano which you appropriated to your own use without paying or intending to pay therefor." How is it possible to say that that, which is in accordance with the statutory form, is not a relevant indictment? I cannot see it. The pretence, of course, as the statute assumes, is different. The person pretending is not always pretending to be a collector of subscriptions. But I cannot see that there is the smallest deviation from the statutory form, and if there is no deviation from the form which the prosecutor may lawfully use I cannot hold the indictment irrelevant. In judging of that we must not look at facts disclosed at or after the trial, but must treat the case solely as it stood before the trial.

It is suggested that the form I have quoted from the schedule is a form for some new offence called dishonest appropriation. I would have no hesitation in reading it as a new form for the old charge of falsehood, fraud, and wilful imposition, and nothing else. I would read the charge turning it into the language of the former style, as stating that the accused falsely and fraudulently pretended to Norah Omond such and such things, and by these or similar false and fraudulent pretences induced her to deliver to him £1, 1s. The purpose of the new form was to make it unnecessary to insert words which the Legislature thought unnecessary. Though it is said "pretend" does not necessarily mean "falsely pretend," it is plain that that is the sense, and the only sense, in which the word is here used, and that it means a false and fraudulent pretence, successful in its intention of inducing the delivery of the piano to the accused. Now, with that in view, the statute says,—"It shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done 'wilfully' or 'maliciously,' or 'wickedly and feloniously,' or 'falsely and fraudulently,'" and so on. These words are now not to be inserted but implied. That plainly applies to any species of indictment which the prosecutor may use. I must apply it to this indictment. I think I should not be doing my duty if I did not. I think it is a charge of falsehood, fraud, and wilful imposition, and nothing else. It may be an unfounded charge, but with that we have nothing to do. It may be that the true offence committed was theft. But we have to consider simply whether it was a relevant charge of falsehood, fraud, and wilful imposition. I see no shadow of doubt on that point. I think we depart violently from the statute if we decide otherwise, and I protest against such a decision as strongly as I can do.

So much for the ground of suspension which the suspender did not plead. Now for the ground he did plead, on which there is a good deal to be said. The point he maintained was that there was not legal evidence for a conviction, for this case of falsehood, fraud, and wilful imposition consisted in a false story alleged to be told to and to have imposed on Sommerville, and he was not corroborated by any other evidence. I say I think there is a good deal in that argument, for it did not appear that there was any direct confirmation of Sommerville's statement as to the story told to him. I am somewhat puzzled as to the state of the law on the question of the power to raise such a plea in a bill of suspension. I do not think it necessary to say more than that I give no formal opinion one way or the other, for it is not necessary to this case. This indictment contains another important matter of charge against the panel in the words "without paying or intending to pay therefor," which set forth a fraudulent purpose. The jury were satisfied of that. I take it for granted that a number of circumstances connected with the panel must have been proved to the jury to satisfy them of the fraudulent purpose. I must take that for granted. The case did not therefore stand on a mere bare charge of false pretence, but was supplemented by evidence as to the panel's practices in connection with the transaction. I think I must therefore hold that there was evidence to go to a jury, and if the jury were satisfied, that is a ground for sustaining the conviction.

On the first of the two questions, therefore, whether the charge was relevant, I am of opinion that it was; on the second, whether there was any evidence for a conviction, I think the Sheriff acted rightly in letting it go to a jury. The question whether it might have been charged as a different crime is not before us. On both questions which are before us I have a clear opinion in the affirmative.

LORD YOUNG.—This is a suspension and liberation. We are accustomed in such a process to get at the truth of the case as well as we can, and to apply the law to these facts, and ascertain whether the punishment has been well and lawfully applied. We have no record. It is a bill of suspension, and this Court being one of peremptory diets, we always proceed on the bill, and do not consider ourselves bound by the omission of any statement of pleas. With mere technicality we have never greatly concerned ourselves, and I hope we shall not begin now, for that would lead to procedure which we should abstain from, and would end in a record having to be made up. All that, I think, is stated in our text writers.

What we have then to consider is whether this conviction is good or not, having regard to the truth of the case. The Sheriff is required to take and preserve notes, and we might have called for these, but with the Lord Advocate as prosecutor, and appearing personally, there is no difficulty in getting at the true facts. It was explained to us frankly on both sides that the truth of the matter (though details are in controversy), was that the accused went to a shop and hired out a piano on the three years' system, the hire being by quarterly payments, and the undertaking of the owner being that it should become the property of the hirer at the end of the period if the hire was paid, and that the accused having so got the piano on hire, within three days sold it. We are familiar with the case of a thief getting access to property by hiring it. If the accused was a thief like that, hiring the piano to steal it, there was no difficulty in charging that. The Lord Advocate said at the debate that it was so, and that it should have been charged as theft; I think so too. That is the nature of the case. If that then is the truth of the case, and if it ought to have been so tried, it might or might not have been established. The jury might have thought, as Mr M'Lennan suggested, that the suspender was not so much a knave as a fool, that he, to evade a temporary necessity, acted as he did, but that if the three years had gone on, and he had paid up the hire, he would never have been a thief. I do not say that was the truth, but it may have been, and I think it ought to have been tried as a case of that kind, and not as a question of whether he had just come from Perth, or been bill-clerk or teller. I think this indictment was not suited for the satisfactory or reasonably safe trial of the real case. That of itself is sufficient for the interference of the Court in a suspension. If the actual case is not presented and tried that is a reason for our interference.

I am of opinion that taking the indictment as what it is represented to be, viz., a charge of falsehood, fraud, and wilful imposition, it is not relevant. I agree with Lord M'Laren that where falsehood is of the essence of the charge—that is, necessary to the criminality of the fact alleged—it ought to be stated, and that where fraud is of the essence of the crime it ought to be set forth. The statute does not dispense with that. It dispenses with expletive words. But if an act is criminal or not according as it is done falsely or fraudulently or not, then the allegation that it is so done is not epithet or superfluous language, but is essential to the crime. I understand my learned brother to proceed on one of the statutory forms, which is,—"You did pretend to Norah Omond . . . . . that you were a collector of subscriptions for a charitable society, and did thus induce her to deliver to you £1, 1s., as a subscription thereto, which you appropriated to your own use." I understood him to say that that is a charge of falsehood, fraud, and wilful imposition. I do not think so. Let me put the case of its being proved at the

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trial on such a charge that all the accused stated was true, would the charge fall? He got the person to whom he made these true pretences to hand him £1, 1s. as a subscription, and he appropriated it. It would be no answer that that pretence was true. Yet that is supposed to be a specimen charge of falsehood, fraud, and wilful imposition. It would be extravagant to say that if the essence of the crime is unproved in fact, yet the charge could be sustained, and of falsehood, fraud, and wilful imposition the essence is falsehood and fraud. Apply that to this case, and suppose every word of the alleged pretence true, is there crime in that? There is no contract of sale, no contract of anything implying the necessity of immediate payment. I should appeal to the specimen charge as *toto cœlo* different. In the one the truth is no answer, in the other the truth removes every feature of the crime; merely to get a piano without the intention of paying is no crime. If the person has not stolen it or tricked the owner out of it, it is extravagant to say that getting it without intending to pay for it is a crime. Will anyone tell me a good reason for omitting to charge fraud if it is of the essence of the charge? To save unnecessary writing? If so, many words here are unnecessary. The prosecutor's name is unnecessary. That might be implied, for he is always the same, so also "by authority of the Lord Advocate" is unnecessary. There is no excuse for omitting the essence of the charge.

I am content to put my judgment on the first ground I stated, and I prefer it, though I unhesitatingly give my opinion that where fraud is necessary to make an act criminal that ought to be set forth. That seems to me as clear a proposition as any of those that appear so clear to my learned brother. But in this suspension we should attend to the true case, and as that was not put to the jury, the conviction must be set aside.

LORD RUTHERFURD CLARK.—I should like to be allowed to add that if I had thought there was here any case of oppression or of miscarriage of justice I should not have hesitated to give relief. I do not think there was either, According to the facts stated, I think the case was well libelled as a charge of falsehood, fraud, and wilful imposition, and the jury have found it proved.

LORD M'LAREN.—I should only like to add on the first point that every libel must, in my opinion, set forth a crime,—must set forth what conveys the notion of a crime. I think this indictment does not.

THE COURT set aside the conviction.

R. BROATCH, L.A.—CROWN AGENT—Agents.

No. 25.

June 1, 1888.
Dickson v. Linton.

JOHN DICKSON, Appellant.—*Rhind*—*C. S. Dickson.*
THOMAS LINTON, Respondent.—*D.-F. Mackintosh*—*Boyd.*

Procedure—Form of complaint—Edinburgh Municipal and Police Act, 1879 (42 *and* 43 *Vict. cap. cxxxii*).—In summary prosecutions, under the Edinburgh Municipal and Police Act, 1879, it is sufficient that the procedure complies with the provisions of that Act, although it does not satisfy the requirements of the Summary Jurisdiction Acts, 1864 and 1881.

Procedure—Cases on appeal—Form of questions in law—Summary Prosecutions Appeals Act, 1875 (38 *and* 39 *Vict. cap.* 62), *sec.* 3.—Questions of law in appeals on stated cases, in the form "whether in view of the facts found proved the magistrate ought to have convicted" are not absolutely incompetent, but ought to be avoided.

Case in which the Court *declined* to answer such a question.

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June 1, 1888.
Dickson v. Linton.

Public Health—Possession of unsound meat—Edinburgh Municipal and Police Act, 1879 (42 *and* 43 *Vict. cap. cxxxii.*), *sec.* 261.—*Opinions* that to obtain a conviction against the occupier of premises for a contravention of the Edinburgh Police Act, 1879, by being in the possession of unsound meat as or for human food, it is not essential to prove that the accused knew either of the meat being in his premises or of its unsound condition.

High Court.
Lord Young.
Lord M'Laren.
Lord Rutherfurd Clark.
Justiciary Clerk.

On 8th February 1888 John Dickson, residing in Gilmore Place, Edinburgh, was charged in the Edinburgh Police Court on a summary complaint at the instance of the procurator-fiscal, the charge against him being "that contrary to the Edinburgh Municipal and Police Act, 1879, section 261,* upon the 2d of February 1888, he had in his possession, as or for human food, in the premises in Fountainbridge Street, Edinburgh, occupied by the firm of Thomas Dickson & Sons, auctioneers, there, thirty-four pounds weight of butcher meat, *videlicet*, veal of an unsound and unwholesome description, and in a state unfit and unsuitable for human food."

The accused pleaded not guilty, but was convicted, and fined £10.

He obtained a case.

The questions of law were:—"(1) Is the said conviction against the appellant inept, in respect that the procedure was not in terms of the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and that no record was preserved of the witnesses examined; or is it sufficient that the procedure was in terms of the Edinburgh Municipal and Police Act, 1879? (2) Was the appellant, in view of the facts proved, in possession, as or for human food, of the said veal on the date and in the premises libelled?"

The case stated:—"The cause was called in Court upon the 8th day of February 1888. No objections were stated to the relevancy of the complaint, and the appellant having pleaded not guilty, the diet was continued till the 13th February 1888, upon which date the cause went to trial. The appellant's plea of not guilty and the names of the witnesses examined were not entered upon the record, the forms of complaint and subsequent procedure in the cause being similar in all respects to that adopted in cases for offences against the Edinburgh Municipal and Police Act, 1879, and in use in the Edinburgh City Police Court for many years prior to the passing of the said Act." The case then set forth the enactments quoted below.†

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* The Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.), sec. 261, enacts:—"Every person who shall sell or expose to sale, or have in his possession, as or for human food, the carcase, or any part of the carcase, of any animal which shall appear to have died of or been killed in consequence of disease, or any butcher meat, fish, poultry, or other article of provision of an unsound or unwholesome description, or in a state unfit or unsuitable for human food, shall be liable to a penalty not exceeding £20, and the articles shall be forfeited and disposed of as the Judge of police shall direct."

† The Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.), sec. 324, provides—that "the rules, regulations, and forms of procedure at the commencement of this Act shall continue, in so far as is in accordance with the provisions of this Act, to be operative until the same be cancelled, revoked, or altered under authority of this Act."

Sec. 325, enacts,—"No record other than is required by the Summary Prosecutions Appeals (Scotland) Act, 1875, shall be kept of the proceedings except the complaint and the judgment pronounced thereon."

The Summary Jurisdiction (Scotland) Act, 1881 (44 and 45 Vict. cap. 33), sec. 3, provides, *inter alia*, that "where there is a general or local Police Act in force it shall be optional in police prosecutions either to use the forms prescribed by such Act, or the forms provided by the Summary Jurisdiction Acts."

The following enactment was also referred to at the hearing,—Summary Pro-

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The case further stated,—"It was proved by evidence adduced that the appellant is a hide and tallow merchant and dead meat salesman in Fountainbridge Street, Edinburgh, where he carries on business under the firm or designation of Thomas Dickson & Son. That on the day libelled, between one and two o'clock in the afternoon, the inspectors of markets for the city of Edinburgh, while visiting the premises of the appellant in Fountainbridge Street aforesaid, found hanging there the veal libelled.

"That the said veal was the carcase of a calf, dressed in the usual way as or for human food, which had been when killed suffering from some inflammatory disease, and was unmistakably unfit and unsuitable for human food.

"That the said veal had been consigned by Robert Dick, a farmer at Biggar, to the appellant's said firm, at his said premises for the purpose of sale, without previous notice of the said consignment being sent to the said firm, and had been delivered there between seven and eight o'clock on the morning of the 2d February 1888 by the railway company's servants to one of the appellant's employees, who hung it up beside the other meat for sale in the appellant's premises.

"The appellant himself was present in the premises when the veal was seized by the inspectors, and for some hours previously."

Argued for the appellant;—(1) The sentence should be quashed, inasmuch as it failed to comply with the provisions of the Summary Procedure Act of 1864. There was here no list of witnesses. The 3d section of the Summary Jurisdiction Act of 1881 did not make this unnecessary. It only saved "forms," and under the Edinburgh Act of 1879 there were no forms. (2) The conviction was bad in law. The magistrate was not entitled to convict unless the accused knew that the meat was in his premises, and that it was unsound. Here neither element of knowledge was found by the magistrate as matter of fact. The facts stated consequently did not, in law, warrant the conviction.

Lord Young.—We do not think it necessary to call for a reply.

The first question is so simple as this,—Was the conviction inept because the procedure was not in terms of the Summary Jurisdiction Acts, but in terms of the Edinburgh Police Act, 1879? This was a prosecution in the Edinburgh Police Court for a contravention of section 261 of the Edinburgh Police Act, 1879. By section 324 of that Act it is provided that "the rules, regulations, and forms of procedure at the commencement of this Act shall continue, in so far as in accordance with the provisions of this Act, to be operative until the same be cancelled, revoked, or altered under authority of this Act." Now, it is admitted that this prosecution for a contravention of section 261 of the Act was in accordance with the forms prescribed by the Act and in use at its commencement, and that there has been no cancellation, revocation, or alteration of them. I am therefore of opinion that this first objection to the conviction is untenable, and that the first question must be answered in the negative.

The second question is in a form which we have sometimes sustained, but only, I think, in circumstances of a very special character, for it is a form which is generally attended with great inconvenience. The question runs thus:—

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cedure Act, 1864 (27 and 28 Vict. cap. 53), sec. 16,—"It shall not be necessary in any proceeding under the authority of this Act to record or to preserve a note of the evidence adduced, but the record shall set forth in the form of the schedule I. to this Act annexed, the respondent's plea, if any, the names of the witnesses, if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in."

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"Was the appellant, in view of the facts proved, in possession, as or for human food, of the said veal on the date and in the premises libelled?" In short it is put to us as a question of law whether, in view of the facts found proved, the magistrate was entitled to convict. Now, I have had occasion to point out frequently that an appeal on a case stated must be on a question or questions of law, and on questions of law only. It is an appeal, although it is in the form of a case stated, and the statute authorises such an appeal only upon a question or questions of law. The provision of the Statute of 1875, section 3, is as follows:—"On an inferior Judge hearing and determining any cause, either party may, if dissatisfied with the Judge's determination as erroneous in point of law, appeal thereagainst, notwithstanding any provision contained in the Act under which such cause shall have been brought excluding appeals against or review in any manner of way of any determination, judgment, or conviction, or complaint under such Act," and so on. Now, in order to entitle a party to apply for a case under the statute, he must express his dissatisfaction with the determination of the Judge as erroneous in point of law, and state to the Judge the legal error under which he thinks the Judge is labouring, and must ask the Judge to state a case setting forth the facts, as the Judge holds them to have been proved, which bear upon that alleged legal error. If the Judge says,—"I did not take that view of the law, that was not my view when I convicted," then there need be no case stated. But if he says,—"Yes, that is my view of the law," then he will honestly state a case bringing out the facts, so that this Court may affirm his view on the point of law or reverse it. But here I am at a loss to understand in what respect the appellant considers the determination of the magistrate to be erroneous in point of law. I put it to Mr Dickson repeatedly, but the most I could get from him in answer was that it ought to have been found proved that the appellant knew that this meat had been hung up in his premises, and that he knew that it was in a condition which made it unfit for human food, the fact being, so the appellant alleges, that he did not know that the meat was there, and that he was ignorant of its unsound condition; and it is contended that if the magistrate convicted notwithstanding that ignorance he commited an error in point of law. But if that was the appellant's view, it would have been easy for him to have said to the magistrate,—"Your Honour is in error, because it has not been proved that I knew the meat was there or that it was in an unsound condition." That ought in fairness to have been put before the magistrate, and if the magistrate thought that he ought to convict notwithstanding the appellant's ignorance, and did so convict, he would have stated the case and the question of law accordingly. Even then, I rather think that if the magistrate was of opinion, and so informed us, that the meat was exposed in such a way as to lead one to the belief that it was intended for human food, I should not have thought that he had fallen into any legal error merely because no personal knowledge on the part of the appellant, either of the unsound condition of the meat or of its being on his premises, had been proved, but it is enough to say that there is no such case as that stated here. For all that appears here the appellant may have been in perfect knowledge both of the fact of the meat being in his premises and of the state it was in. There is nothing to the contrary stated, and nothing to shew that the magistrate's attention was called to this view of the appellant, if it was his view.

On both grounds therefore,—that the legal error attributed to the magistrate was not brought under his notice, and that there was no legal error on the part

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of the magistrate in convicting, if he was satisfied that the appellant throug his salesman was in possession of the meat for sale as human food,—I thin the appeal must be dismissed. In future the appellant must look after his se vants better.

I propose therefore that we should not answer the second question, and th we should answer the first in the affirmative, and affirm the determination the magistrate.

Lord M'Laren.—On the first question I agree with your Lordship. I appears to me that this was a competent prosecution under the forms provide by the Edinburgh Police Act, and that no objection can be taken to it on th ground that the procedure should have been under a different statute.

On the second question, I concur in your Lordship's opinion that this is a undesirable way in which to raise a question of law. No question of law i expressed in the question. The only point that can be raised under such a question is, whether on the facts stated in the case there is any case for the consideration of the magistrate. Now, the argument that was presented in support o the appeal was, that the facts stated did not entitle the magistrate to convict, because the essence of the crime consists in the accused's knowledge of the carcase being in his premises and of its condition, and it is not stated that he had such knowledge. I am of opinion that it is not necessary to a conviction under this section of the statute that such knowledge on the part of the accused should be proved. I think that the offence is committed if there be actual possession for the purposes of sale, and such possession may be by shopmen. That the diseased meat is being kept for the purpose of sale for human consumption is the thing to be proved. Personal knowledge on the part of the accused is not essential. Looking, therefore, to the merits of the argument that was addressed to us, I think there was a reasonable case for the consideration of the magistrate. But I am quite prepared to accept the view of your Lordship, that the second question should not be answered.

Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—"Answer the first question in the case in the negative: Dismiss the appeal: Affirm the determination of the inferior Judge, and decern," with five guineas of modified expenses.

George M. Wood, S.S.C.—W. White Millar, S.S.C.—Agents.

No. 26.
July 3, 1888.
Her Majesty's
Advocate v.
Rae.

Her Majesty's Advocate.—*Wallace, A.-D.—M'Nair.*
Charles Rae.—*Menzies.*

Proof—Witness—Admissibility of evidence of particeps criminis not charged.—Procuring abortion.—Held that in a trial on a charge of procuring abortion, the evidence of the woman on whom the act was said to have been committed was competent, though she was not charged with the crime.

Proof—Evidence.—In a trial on a charge of procuring abortion *held* competent to lead proof to shew that some months before the act charged the accused had undertaken to procure abortion in the case of another woman.

High Court
(Aberdeen).
Lord Shand.
Justiciary
Clerk.

Charles Rae was indicted before the Court of Justiciary at Aberdeen, on these charges, viz., that he had caused abortion in the case of Christina Reaper, in consequence of which she died, and that he did thus murder her; and that he caused abortion in the case of Jeanie Greig.

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He pleaded not guilty.

The *Advocate-depute* called the Sheriff-substitute of Aberdeenshire to prove a deposition which had been emitted by the deceased woman Reaper shortly before her death.

Menzies, for the prisoner, objected, on the ground that the deposition was inadmissible, in respect that the deceased must, if the charge were true, have been a party to the offence charged. If so, and she had lived, her evidence would have been inadmissible.[1]

The *Advocate-depute* referred to the cases noted below.[2] He argued that the point was settled by the authority of these cases, to which that of *A B*, 15 R. 32, was a solitary exception, and that there was no legal principle for the doctrine that the Crown might not examine a person who had been a party to an offence without first charging that person therewith, and then having his evidence admitted as that of a *socius criminis*.

LORD SHAND.—I regret that I have to decide this point, but having to decide it I repel the objection. I find that there are two cases, one in 1858, in which two daughters, upwards of twenty-one years of age, who, according to the prosecutor's statement, were parties to the crime, were admitted as witnesses against their father on a charge of incest, and one of a similar nature in 1870, where similar evidence was allowed. Again, I find that in the case of *Reid*, which was a very anxious case, and one in which the prisoner was defended by the present Lord Justice-Clerk, the woman who might possibly have been charged as *particeps criminis* died, but certain statements which she made to her mother were admitted in evidence. According to my own recollection of what occurred at the bar in charges not so serious in their nature, it has not been held essential in order to the admission of evidence of this kind that the party himself, or herself, whose statement is given in evidence, should first be charged as a criminal and then freed from the responsibilities of the charge. Looking to the practice, I feel myself bound to act on my own judgment, and to repel the objection. In my opinion it would defeat the ends of justice if I were to shut out this evidence, which might be the only light to be obtained in inquiring into a crime such as is here charged.

The deposition was admitted.

Evidence was further led to shew that the prisoner had operated by means of knitting needles or similar instruments upon the two women named in the indictment, and that a miscarriage had followed in each case.

The *Advocate-depute* proposed to lead evidence to shew that the prisoner had agreed with certain farm-servants in the November prior to the crime charged to procure abortion for a reward in the case of another woman, though. The *Advocate-depute* admitted that the application was made by the farm-servants as a practical joke.

Menzies, for the prisoner, objected that this was an attempt to prove a case not libelled, and entirely unconnected with the crime charged.

LORD SHAND.—I think the evidence has a bearing on the question, and must be admitted. There is much secrecy in the case, and I do not think I could shut out evidence which shews that the prisoner was ready to do something of the same kind as is here charged in another case. If the fact proposed to be

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[1] A B, Dec. 5, 1887, 15 R. (Just. Cases) 32.

[2] A A, Aberdeen, Oct. 5, 1862, reported at 15 R. (Just. Cases) p. 33, *note;* Reid, Nov. 10 and 11, 1858, 3 Irv. 235; Simpson, June 13, 1870, 1 Couper, 437.

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proved had amounted to another act of procuring abortion than is charged, I should certainly have excluded it, but I do not see how the prosecutor could have given any other notice of what is proposed to be proved than that which he has given by placing the names of those persons in the list of witnesses.

The evidence was admitted.

The jury found the prisoner guilty of both charges of procuring abortion, but found the charge of murder not proven.

SENTENCE, seven years' penal servitude.

PROCURATOR-FISCAL, Kincardineshire—WILLIAMSON BOOTH, Solicitor, Stonehaven—Agents.

No. 27.
July 3, 1888.*
Her Majesty's Advocate v. Goodall.

HER MAJESTY'S ADVOCATE.—*Rankine, A.-D.—Dykes.*
WILLIAMINA GOODALL.—*Dean-Leslie.*

Proof—Declaration—Right of accused to have assistance of law-agent—Criminal Law Procedure Act, 1887 (50 *and* 51 *Vict. c.* 35), *sec.* 17.—The declaration of an illiterate woman charged with the crime of murder was not admitted when tendered in evidence, in respect the accused had not been informed before emitting it of her right to have the assistance of a law-agent.

HIGH COURT (ABERDEEN).
Lord M'Laren.
Justiciary Clerk.

WILLIAMINA GOODALL, domestic servant, was charged before the Court of Justiciary at Aberdeen with the murder of her illegitimate child, Jessie Ann Goodall or Gauld, four years of age, by drowning her in the river Deveron, near the Bridge of Marnock, Banffshire.

The *Advocate-depute* proposed to use the prisoner's declaration as part of the evidence for the Crown.

Counsel for the prisoner objected that the declaration could not be read as the prisoner had not been informed of her right to have an interview with a law-agent before emitting a declaration, and to have her agent present during the declaration.†

The Sheriff-substitute before whom the declaration had been emitted was then called by the *Advocate-depute.* He deponed that no law-agent had been present on the prisoner's behalf.

The *Advocate-depute* admitted that no information had been given to the prisoner of the right conferred by the Criminal Law Procedure Act, 1887. He maintained that there was no duty either upon the police or upon the examining magistrate to inform the accused person of the right so conferred—the statute imposed none. It only gave the accused a privilege to apply for legal assistance if he desired it.

Argued for the prisoner;—The statute was passed to remedy a hardship existing under the previous state of the law. It was therefore to be construed favourably to a person apprehended on a criminal charge. He was to be "entitled" to this privilege, and the duty lay with the police or the magistrate to give him information as to his right. A summary conviction had been quashed because the accused had a right to time to prepare his defence but had not been informed of that right.[1]

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* Decided May 3, 1888.

† The Criminal Law Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), provides by sec. 17,—"Where any person has been arrested on any criminal charge, such person shall be entitled, immediately upon such arrest, to have information sent to any properly qualified law-agent that his professional assistance is required by such person, and informing him of the place to which such person is to be taken for examination, and such law-agent shall be entitled to have a private interview with the person accused before he is examined on declaration, and to be present at such examination, which shall be conducted according to the existing practice: Provided always that it shall be in the power of the Sheriff or magistrate to delay such examination for a period not exceeding forty-eight hours from and after the time of such person's arrest, in order to allow time for the attendance of such law-agent."

LORD M'LAREN.—The objection to the declaration is not that the Sheriff before whom it was taken omitted any of the customary precautions that were in use before the passing of the Criminal Procedure Act of last year, but that he omitted to make the prisoner aware of a right which she obtained under the Act—the right to be advised by an agent as to the conduct of her defence—and as to any proceedings whatever before the Sheriff or magistrate. The statute does not in express words enforce upon the magistrate, or upon anyone, the duty of giving the accused person information of this right. It merely states that the accused shall be entitled to obtain the services of an agent from the moment of apprehension, and that any communication to the agent shall be forwarded.

It is contended that this is a remedial statute, and applying the principle of liberal interpretation to the statute it is apparent that the Sheriff ought to have informed the accused in this case that she had such a right. It was observed by Mr Leslie, and I think justly, that the distinction between remedial statutes and other statutes depends upon their subject-matter, and that a statute which introduces some new category in law, or substitutes an entirely new system for the one already in observance, may be construed strictly and literally, and that wherever a statute is passed for the purpose of altering the existing system—and of course presumably improving the system—it is to be regarded as a remedial statute. According to that distinction, in which I agree, every statute altering the rules of procedure in Courts of justice is to be taken as a remedial statute, because every such statute proceeds upon the basis of existing practice which it is desired to simplify or improve. Now, there is also the question, what is meant by the rule of liberal construction? That of course does not mean that you are to import into the statute something that is really not within it, but it means that if a fair question arises, and there are two possible interpretations, and a doubt arises between them, that interpretation shall be preferred which is the more calculated to give effect to the object that the enactment has in view.

This principle of the liberal construction of remedial statutes gives very powerful support to the argument that has been maintained against the declaration, because the argument proceeds upon the view, I think well founded in fact, that there are a great many illiterate persons brought before the Courts who cannot reasonably be supposed to have a knowledge of their rights, and that the statute would be a dead letter unless some means were provided for informing them of their rights. I am not disposed to treat this question entirely in the light of statutory construction. I desire to guard myself against laying down any rule that it is the duty of the Sheriff or of the police to inform the prisoner that he is entitled to the services of an agent. Still less should I support the view that it is the duty of those agents who give their services as agents for the poor in criminal trials to attend and advise prisoners about their declarations. I most emphatically say that no such duty is laid or intended to be laid upon them by statute, so far as my opinion goes. But looking again to the common law regarding declarations, I cannot help thinking that this law has gradually grown up, and has only quite recently received its full maturity, that it is founded on the principle of voluntary declaration only, and that everything necessary to inform the prisoner of his right in the matter of the declaration is to be communicated to him by the magistrate. That would not necessarily apply to a petty case, but it certainly does imply that when a charge of murder is made against an illiterate woman it would be desirable that the magistrate, before taking the declaration, should inform the accused that he or she had the right to confer with an agent, and I imagine that any agent who might be called in, acting on the principles of good feeling and humanity, would have been willing to come and advise the accused. In what I have said I do not wish to attribute the slightest negligence or inattention to the Sheriff. I do not doubt that he had the matter before him, and that he acted in accordance with what he regarded as his legal duty. It is a delicate and somewhat difficult question, and it is quite possible that other Judges may take the same view as the Sheriff has done, but I must in this case act upon my own opinion, especially in a serious criminal charge.

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[1] Pyper v. Walker, July 10, 1885, 12 R. (Just. Cases) 47.

Even if I had more doubt than I entertain, I should act upon the principle of giving the prisoner the benefit of any reasonable doubt in a matter of this kind. I really consider the question doubtful. I think there may be a great deal of doubt as to how far it is the duty of the magistrate to give the information in every case, but I cannot doubt that in a charge of murder it would be the proper thing that the prisoner should be visited by an agent before being examined on declaration. On that ground I am prepared to deal with this question and disallow the declaration, very much in the spirit of those cases where it was held that anything tending to put the accused person at a serious disadvantage, and involving a denial of the rights of accused persons for their protection, is a ground for setting aside the conviction, and of course the same principles would apply in excluding any evidence.

The declaration was rejected.

THE prisoner was convicted of culpable homicide, and sentenced to five years' penal servitude.

CROWN AGENT—J. C. WILLET, Advocate, Aberdeen—Agents.

No. 28.

July 3, 1888.*
Renton v. Wilson.

ROBERT WEMYSS RENTON, Appellant.—*Rankine.*
GEORGE WILSON, Respondent.—*Balfour*—*C. S. Dickson.*

Cruelty to animals—Dishorning cattle—Cruelty to Animals (Scotland) Act, 1850 (13 *and* 14 *Vict. cap.* 92).—In a complaint against a cattle-dealer for a contravention of the Cruelty to Animals Act, 1850, by sawing off the horns of oxen close to the skull, it was proved that the operation caused great pain to the animals operated on, but that it was in common use throughout the counties of Fife, Forfar, and Kincardine, as a means of preventing the cattle doing each other harm by goring one another, or when in railway trucks; and that in other districts operations securing the same result, but painless, were made use of. The Sheriff-substitute acquitted the accused. In an appeal the Court affirmed the judgment, holding that the operation being a customary operation for a legitimate and useful purpose, did not infer a contravention of the Act.

HIGH COURT.
Lord Young.
Lord M'Laren.
Lord Rutherfurd Clark.
Justiciary Clerk.

ON 6th March 1888 George Wilson, cattle-dealer, Cupar, was charged on a summary complaint in the Sheriff Court at Cupar at the instance of the Procurator-fiscal, setting forth that he did on 7th and 23d January 1888, at the farm of Rumgally, near Cupar, "cruelly ill-treat, abuse, or torture, or cause or procure to be cruelly ill-treated, abused, or tortured, thirty-seven or thereby oxen, or several or one or more oxen, all the pro-

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* Decided June 1, 1888.

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perty or in the lawful possession of Donald Robertson, farmer, Mayfield, near Cupar, by, on 7th January 1888, place aforesaid, sawing off, cutting off, or otherwise removing, or causing, or procuring to be sawn off, cut off, or otherwise removed, with a saw or other instrument to the complainer unknown, the horns of nine or thereby oxen, or of several or one or more oxen, close to or within an inch or other similar short distance from their skulls; and on 23d January 1888, and place aforesaid," performing a similar operation on twenty-eight other oxen, whereby the said thirty-seven oxen, or several or one or more of said oxen, "were subjected to great, unnecessary, and cruel pain and suffering, and were thus cruelly ill-treated, abused, and tortured, or caused or procured to be cruelly ill-treated, abused, and tortured, by the said George Wilson, contrary to the Act 13 and 14 Vict. cap. 92, and particularly sec. 1 thereof."

The accused pleaded not guilty, and the Sheriff-substitute (Henderson), after a proof, acquitted him.

The Procurator-fiscal obtained a case. The case stated,—"The cattle referred to in the complaint were dishorned by the respondent, acting on the instructions of Donald Robertson, farmer, Mayfield, near Cupar, the owner of the cattle, with the assistance of four other men at the time and place libelled. Each animal was drawn by a rope up to a pillar in the centre of the cattle court. Its legs were secured by straps connected by a rope, and the animal being cast on its side, its head was tied to its foreleg. The horns were then sawn off close to the skull or head by the respondent, the skin at the base of the horn being first cut with a knife, to permit of the saw getting close to the skull. The operation usually causes, and in the present case caused, profuse bleeding, and the animals appeared to suffer considerable pain during it, as evinced by their bellowing. The sawing through of each horn occupied about a minute.

"On 28th January 1888 the oxen were seen by Principal Walley, of the Royal Veterinary College, Edinburgh, and Mr John E. Grey, V.S., Edinburgh. They furnished a report, setting forth the result of their visit, which was produced and proved at the trial, and which is in the following terms:—

"'Edinburgh, January 30th, 1888.—We certify that, on Saturday the 28th inst., we visited the farm of Rumgally, Nr Cupar, in company with Mr Cuthbert, the inspector of the Scottish Society for the P. C. Animals, and there examined, in presence of Andrew Paterson, the cattleman (who shewed the animals to us), a number of young cattle, 28 in one lot and 9 in another, which presented evidence of having been recently dishorned, the lot of 28 more recently than the lot of 9. In each case the horns had been removed close to the skull, and in one animal, a red bullock of the larger lot, the sinuses of the head had been opened. A considerable quantity of blood and purulent matter had in most cases escaped from the wounds, and had dried on the hair at the sides of the head and face, and several of the animals, a white bullock in particular, were standing with the nose protruded, and shrunken in the flanks, and had the appearance of having suffered from the effects of the operation. The removal of the horns had in some cases been effected so close to the skull as to necessitate cutting through the skin of the head. We are of opinion that the operation must have caused much pain, and been the means of much subsequent suffering, and being performed in the manner described, was a grossly cruel operation, and quite unnecessary for all practical purposes.'

"It was proved that the cells of the horn-core are lined with a delicate membrane, which is extremely sensitive and vascular, particularly at the base of the horn, where it is continuous with the lining of the sinuses of

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the head. Between the core of the horn and the outside horn covering is another delicate sensitive membrane continuous with the true skin of the head, and the most sensitive part of the body of the animal. That intense pain was caused by cutting through these structures, as well as subsequent suffering from inflammation, increased in case of injuries to the horn, by there being no relief from swelling owing to the hard nature of the surrounding substances. That on the cattle in question the sinuses of the head had in each case been laid open, which led to greater risk of inflammation.

"It was further proved that in Roxburghshire, Berwickshire, the greater part of the Lothians, and also in England and Wales, the practice of dishorning was unknown, unless for surgical purposes. That in these places the objects which it was intended to attain were met either by separating the vicious and weak animals, by putting wooden balls or pieces of wood on the horns, or by what is known as 'tipping,' namely, cutting off the tip of the horn just above the quick. That these methods had proved quite satisfactory in these districts, and that thousands of cattle of all breeds so treated came weekly into the Edinburgh Cattle Market. That, in the opinion of gentlemen farming in these districts, and dealing in all kinds of cattle, the operation of dishorning by cutting off the horns close to the head was both cruel and unnecessary. It was proved by one of the witnesses for the prosecution that he had adopted these methods with success in Perthshire and Dumfriesshire, as well as in Midlothian. That the operation of dishorning was very simple when done to calves.

"On the other hand, it was proved for the defence that the dishorning of cattle was regularly practised by farmers and breeders of cattle in Fifeshire, Kinross-shire, Perthshire, Forfarshire, and Kincardineshire. That the objects for which the operation was performed were the safety of the animals of the herd, which frequently suffered painful and serious injuries through goring and butting, and were often prevented from feeding by the stronger cattle, when the horns were allowed to remain, and also for safety in carriage by sea or rail, the horns being a source of great discomfort and danger to other cattle. It was proved to be impossible to feed cattle in open courts, as was the practice in Fife, without taking precautions for their safety, and that the cattle in question, as well as most of the cattle brought into Fife, were of mixed Irish breed, and more inclined to be troublesome than other breeds of cattle. The other methods of dealing with the horns founded on for the prosecution had not been to any extent tried in the above counties, but so far as tried had not been found satisfactory in the opinion of those who had tried them. It was proved that, as a rule, the operation was attended with no permanent bad effects, and that the cattle in question had afterwards thriven well.

"It was further proved that the respondent had considerable experience in dishorning cattle, and was frequently employed by farmers and breeders in the county of Fife to perform this operation; that it was performed skilfully, and in a manner frequently adopted in the county."

The questions of law were,—"(1) Whether the Sheriff-substitute was right in adopting the principle laid down in the case of *Lewis* v. *Fermor*[1] as applicable to the present case? and (2) If not, do the facts above set forth infer a contravention of the Act 13 and 14 Vict. cap. 92?"

Argued for the appellant;—The operation of dishorning was excessively painful. It was also quite unnecessary, as was proved by the fact that except in the counties of Fife, Forfar, and Kincardine it was practically unknown. The case was therefore within the principle of *Murphy*.[2] It

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[1] Lewis v. Fermor, March 2, 1887, 18 Q. B. Div. 532.

[2] Murphy v. Manning, Jan. 19, 1877, 2 Excheq. Div. 307.

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was not necessary to prove wanton cruelty.[1] The rule laid down by Mr Justice Day that cruelty in the sense of the Act "means the infliction of grievous pain without a legitimate object either existing in truth or honestly believed in"[2] would exclude many cases to which the reason of the Act certainly applied, for a man might honestly believe in what was very absurd, and a costermonger driving his donkey, when it was suffering from a sore, had certainly a legitimate object—that of earning his bread —yet convictions under the Act, in such circumstances, were obtained every day. This was said to be a customary operation, but at the best it was a merely local custom, and that was no answer if there was another operation equally efficacious and entirely painless.

Argued for the respondent;—Cruelty in the sense of the Act must be wanton cruelty—either for a cruel purpose and for none other, or if some beneficial end was to be served there must be such gross carelessness as to infer a cruel intention.[3] Here the purpose was legitimate, the operation was customary over a large district, it was performed in a skilful and scientific way, and there was not a suggestion of a cruel intention.

Lord Young.—I am of opinion that the judgment of the Sheriff is right. I need not say that I express no opinion—I do not say whether I have any opinion or not—as to the propriety of what was done. It may be not only a very unnecessary operation, all the ends for which it was used being attainable otherwise, and without pain, or without such pain; it may even be a very bad operation—not merely attaining a good end in an unnecessarily painful way, but in every view a bad operation. It is according to the facts stated to us by the Sheriff, that the farmers in a considerable, and certainly by no means an unimportant district in Scotland are of opinion that their legitimate interests are served by cutting the horns of certain animals, and that is accordingly done, and done to such an extent by people who are sagacious enough to attend to their own interest to the best of their judgment or knowledge; there are professional men who perform the operation; and this prosecution is the prosecution of the professional man who performed such an operation on the employment of the owner of the animals, the farmer, who was acting honestly on the belief that it was a right thing to do. I am of opinion, therefore, without any doubt or hesitation, that that is not a case of cruelty within the meaning of this Act of Parliament; and in order to arrive at that conclusion I do not require the aid of previous decisions whether of this Court or of the English Courts, nor do I think it necessary to give a definition of the cruelty to which the statute applies. It is sufficient for judgment that this is not a case to which the statute applies. It will certainly apply to wanton and vicious cruelty, where to cause suffering to the animal is the purpose for which the thing is done. There are people whose wicked disposition is gratified by the mere infliction of pain, although I hope there are not many such. Then using an animal which is not in a fit state to be used—an animal with sores, so that it cannot be put in harness and used to draw a cart without agony, and often without certain death within a very short period—that is a cruel proceeding, and is,

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[1] Wilson v. Johnston, May 28, 1874, 3 Coup. 8, 1 R. (Just. Cases) 16; Cornelius v. Grant, June 8, 1880, 4 Coup. 327, 7 R. (Just. Cases) 13; Anderson v. Wood, Nov. 29, 1881, 4 Coup. 543, 9 R. (Just. Cases) 6.

[2] Lewis v. Fermor, March 2, 1887, 18 Q. B. Div. 532.

[3] Sharp v. Mitchell, May 22, 1873, 4 Coup. 273; Jack v. Campbell, Oct. 29, 1880, 4 Coup. 351, 8 R. (Just. Cases) 1.

No. 28.

July 3, 1888.
Renton v. Wilson.

I should think, cruelty within the meaning of the Act of Parliament, althoug the motive of the act is not the wanton purpose of gratuitously causing suffe ing; but such operations as were referred to in the course of the argument- castrating horses, spaying swine, making capons for the purpose of having more delicate article of human food, as some people think—all that may be excee ingly wrong and counteracting the claims of nature by a cruel operation. B it is not cruelty within the meaning of the Act of Parliament. I do not kno that it is not a very cruel thing to pursue a fox. It is done merely for spor Is that a necessary proceeding? Many people will call it a cruel one. I d not say I am of the number, and I am far from saying I am not. But it is no in my opinion, a punishable offence under the Act. The statute does n interfere with human conduct to that extent, or with the judgment of those wh are pursuing their own affairs to the best of their judgment, as the farmers c Fife and Forfar are doing here, however much they may be mistaken in th judgment of others. I am of opinion that this appeal ought to be dismissed and with expenses.

Lord M'Laren.—I concur. It is very difficult to give a definition of cruelt to animals which would furnish a complete criterion in all cases like this, and for the purposes of deciding this case it is unnecessary to do so. I will onl say that I am not prepared to accept some of the definitions that are suggested by the reported cases. It is clear enough that it would not be in all circumstances a good defence to a prosecution under the statute to say that the act o alleged cruelty was done for a reasonable purpose, and that it was commonly done, because that would cover cases of over-driving and of driving an animal in an unfit condition. Nor in the case of an operation do I consider it to be quite clear that it would be a sufficient defence that the operation was undertaken for a rational purpose, and in pursuance of a belief, reasonably entertained, that it would accomplish that purpose. For the operation might be an unusual one, and the defence might be founded upon some fancy of the accused for which there was no real foundation. I do not think that in such cases the accused would be able to avoid the penalty merely by saying that he was inflicting pain for such a purpose of his own, which he was unable to justify. But the case here is that of a customary operation—customary as to a considerable district of the country, and performed with a view to a rational purpose, and under the belief that it is necessary for the well-being and control of the animals. A case combining these features cannot be regarded as one of cruelty in the sense of the Act of Parliament. I am accordingly of opinion that the judgment of the Sheriff-substitute is well founded.

Lord Rutherfurd Clark concurred.

The Court dismissed the appeal, and affirmed the determination of the inferior Judge, with seven guineas of modified expenses.

Crown Agent—W. J. Lewis, W.S.—Agents.

CASES

DECIDED IN

THE COURT OF SESSION, &c.,

1887–88.

WINTER SESSION.

No. 1.

Sept. 21, 1887.
Hay v. Hay.

CATHERINE AGNES HALKETT HAY AND JOHN THEOPHILUS HALKETT HAY, Pursuers.—*Hay*.
CHARLES HAY HALKETT HAY, AND ANOTHER, Defenders.

Process—Choosing of Curators—Procedure in vacation—Decree in absence—Court of Session Act, 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 93.—*Held* that the authority given by sec. 93 of the Court of Session Act, 1868, to the Lord Ordinary on the Bills to grant decrees in absence in vacation extends to actions of choosing curators.

VACATION JUDGE.
Lord Fraser.

MISS CATHERINE A. HALKETT HAY and JOHN T. HALKETT HAY, children of the late Charles H. Halkett Hay of Balendoch, Perthshire, who were minors, raised on 5th July 1887 an action of choosing curators, calling as defenders their next of kin on their father's and mother's side respectively. No appearance was made for the next of kin, and the pursuers put into process a deed nominating a Mrs Yeats to be their curator during their minority. On 21st September 1887, on which day the Lord Ordinary on the Bills sat in Court, in virtue of the 93d section of the Court of Session Act, 1868, his Lordship was moved to sustain the deed of nomination by the pursuers.

It was pointed out by the Clerk that in practice in summonses of choosing curators such an order had never been granted, it being the understanding that such a decree as was moved for did not fall within the provisions of section 93.*

The Lord Ordinary (Fraser) sustained the nomination, and in respect of the curator's acceptance of office, and of the failure of the next of kin to compear and concur in making up inventories, nominated a delegate at whose sight inventories in triplicate should be made up, and these being now lodged at the bar approved thereof, and appointed two of them to be lodged with the Clerk, and the remaining one to be given up to the curator along with the act of curatory.

REID & GUILD, W.S.—Agents.

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* Section 93 of the Court of Session Act, 1868, provides that " . . . on the fifth lawful day after each box-day, the Lord Ordinary officiating on the Bills shall sit in Court for the purpose of granting or recalling decrees in absence, and hearing and disposing of motions in any cause in reference to the preparation of the record, or for the granting of commission and diligence for the recovery of writings to lie *in retentis*, or for any other purpose which the Court may specify by any Act of Sederunt which they are empowered by the Act to make."

No. 2.

Oct. 19, 1887.
Dobie's Trustee v. Pritchard.

WILLIAM CAMPBELL M'EWEN (Dobie's Trustee), First Party.—
Sir Charles Pearson—W. Campbell.
ALFRED JOHN PRITCHARD (Miss Hallett's Guardian), Second Party.—
Shaw.
MRS ELIZA M'MILLAN AND OTHERS, Third Parties.—*Sir Charles Pearson —W. Campbell.*
MRS SARAH DODSON, Fourth Party.—*C. J. Guthrie.*

Succession—Conditio si sine liberis testator decesserit.—A lady by antenuptial contract settled certain specific funds on any children who might be born of the marriage, reserving to herself a power of bequeathing the trust-estate by will in the event of there being no child of the marriage who should attain twenty-one years of age (or, if a daughter, should marry). Ten days after the marriage she executed a settlement "pursuant to the power reserved" in the marriage-contract, bequeathing the residue of her property equally between her husband and sister. Two years after the marriage she succeeded to certain heritable estate from a brother. Shortly thereafter she gave birth to a child, one month after whose birth she died. The legatees contended that the marriage-contract and the will were to be read together as one settlement, and that as express provision had been made for children of the marriage the condition *si sine liberis testator decesserit* did not apply to the will. *Held* that the will was subject to the condition *si sine liberis testator decesserit.*

2D DIVISION.
I.

BY antenuptial contract of marriage, dated 11th August 1882, entered into between Herbert E. L. Hallett, of Chapel Street, Park Lane, in the county of Middlesex, of the first part, Jane Dobie, Mr Hallett's future spouse, of the second part, and Samuel M'Millan, of Moffat, agent for the Bank of Scotland, and Madalene Henrietta Dobie, of the third part, it was agreed that the said Samuel M'Millan and Madalene Henrietta Dobie should hold certain stocks, debentures, and funds belonging to the said Jane Dobie in trust as therein mentioned; and it was thereby declared "that in case there shall be no child of the said marriage who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, the trustees shall stand possessed of the said trust-funds, or of so much thereof respectively as shall not have been applied under any of the trusts and power herein contained. Upon the trusts following—that is to say, upon trust to pay the same unto such person or persons as the said Jane Dobie, whether covert or sole, shall by her last will and testament, or any codicil thereto, direct or appoint; and in default of any such direction or appointment, then upon trust to divide and pay the same between and amongst the next of kin of the said Jane Dobie in accordance with the Statute of Limitations in force in England." The trust-funds, it was stated, amounted to about £5000.

Ten days after her marriage Mrs Hallett executed a last will and testament, dated 21st August 1882, in the following terms:—"This is the last will and testament of me Jane Hallett of 43 Oxford Terrace, Hyde Park, in the county of Middlesex, the wife of Herbert Edward Luxmore Hallett of the same place, gentleman, made and executed pursuant to the power reserved by or given to me in and by a certain indenture of settlement bearing date the 11th day of August 1882, executed prior to and in consideration of my then intended marriage with the said H. E. L. Hallett, and of all other powers enabling me in that behalf. I bequeath the following legacy,—that is to say, to my sister Eliza Goodsir M'Millin, the wife of Samuel M'Millin of Moffat, Scotland, the sum of £250. And as to the rest and residue of my estate, whatsoever and wheresoever, I give the same equally between my sister Madalene Henrietta Dobie and my said husband, H. E. L. Hallet, share and share alike."

No. 3.

Oct. 22, 1887.

Trail v. Kelman & Co.

2D DIVISION.

Sheriff of the Lothians.

I.

Circumstances in which the Court *postponed* the decision of the question for the decision of the presiding Judge at the trial.

ON 3d November 1886, John Trail, a workman in the employment of William Kelman & Company, builders, Edinburgh, was killed on the spot by the fall of a wall at which he was working.

In April 1887 Mrs Cecilia Trail, widow of the deceased, and his children, raised an action in the Sheriff Court at Edinburgh against William Kelman & Company, concluding for damages at common law and under the Employers Liability Act, 1880.

No notice of injury was given to the defender under section 4 of the Act.

The defenders pleaded, *inter alia;*—(1) The pursuers having failed to give notice of claim to the defenders in terms of the Employers Liability Act, 1880, are not entitled to maintain the action so far as laid under that Act.

The pursuers, with reference to this plea, stated that "the defender William Kelman was present when the said accident occurred, and was informed of the injuries the deceased sustained."

The Sheriff-substitute (Rutherfurd), on 21st May 1887, pronounced an interlocutor which contained, *inter alia,* this finding:—"Finds that notice, as required by the Employers Liability Act, 1880, was not given to the defenders of the death of the late John Trail within six weeks thereafter, and that there was no reasonable excuse for the want of such notice: Therefore sustains the defenders' first plea in law, and finds that the action is incompetent in so far as laid upon the said Act."* *Quoad ultra* he allowed a proof.

The pursuers appealed to the Court of Session for jury trial, and proposed an issue at common law and under the Act.

The defenders objected to the issue so far as it was laid under the statute, on the ground that no notice had been sent to the defenders in terms thereof. It had been decided[1] that the notice had to be given in writing. If it were held sufficient notice to an employer of an accident that he saw it himself, there was no reason why it should not be deemed sufficient notice if it could be proved that he had heard of it from reliable authority immediately afterwards. The Court had entertained the question of notice at that stage of the case on two occasions at least.[2]

Argued for the pursuers;—It was admitted that no written notice had been sent to the defenders, but whether there was a reasonable excuse for the omission was a question which should under the statute be decided

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* "NOTE.—The only explanation given by the pursuers on record (cond. art. 4 *ad finem*) of their failure to comply with the requirement of the statute of 1880, with regard to notice, is that the defender William Kelman was present when the accident occurred, and was informed of the injuries sustained by the deceased John Trail.

"The Sheriff-substitute is unable to hold that there is, in terms of the 4th section of the Act, a 'reasonable excuse' for the want of the notice. It is not alleged that the pursuers were unable from any cause to give the statutory notice to the defenders, and the Sheriff-substitute thinks that the words 'reasonable excuse' apply only to those cases in which the relatives of the deceased party have been prevented from giving notice by force of circumstances. The Sheriff-substitute has therefore sustained the defenders' first plea in law."

[1] Moyle v. Jenkins, Dec. 6, 1881, L. R., 8 Q. B. D. 116.

[2] M'Donagh v. P. & W. Maclellan, June 18, 1886, 13 R. 1000; M'Govan v. Tancred, Arrol, & Co., June 26, 1886, 13 R. 1033.

No. 2.
Oct. 19, 1887.
Dobie's Trustee v. Pritchard.

be in any sense a true reading of the will, for I think that the will, like the marriage-contract into which she had entered, goes entirely on the contingency of no children being born of the marriage. The whole deed must be read subject to that contingency. But, further, I am of opinion that, on the authorities, a will executed before the birth of a child is revoked by the subsequent birth of a child, if that event was not in the contemplation of the maker of the deed. I think, therefore, this question should be answered in the affirmative.

Lord Young.—I entirely agree. My opinion is that on the doctrine of *si sine liberis decesserit* the will made by Mrs Hallett in 1882 was absolutely revoked by the birth of the child in 1885. That is sufficient to enable us to answer the question in the affirmative.

Lord Craighill.—It appears to me that the will executed in 1882 was revoked by the subsequent birth of the child. If it had been necessary for the decision of the case I should probably have adopted your Lordship's reading of the deed itself, but I do not think it is necessary to decide that question when my opinion is so clear to the effect that the will was revoked.

Lord Rutherfurd Clark.—I also am of opinion that the will was revoked, and can receive no effect. Whether it could be set up again by the mere survivance of the maker without executing a subsequent deed I greatly doubt. I am much inclined to the opinion that the revocation was absolute, and that, even had the maker survived the birth of the child for a long time, the will could receive no effect. I doubt whether survivance, however long, would justify us in holding that a wish was implied that the will should receive effect. Further, even were we to go into the circumstances of this case, I think there is nothing to lead to the conclusion that Mrs Hallett intended that the will should subsist.

The Court answered the question in the affirmative.

J. & A. F. Adam, W.S., Agents for First and Third Parties—Cairns, M'Intosh, & Morton, W.S., Agents for Second and Fourth Parties.

No. 3.
Oct. 22, 1887.
Trail v. Kelman & Co.

Mrs Cecilia Trail and Others, Pursuers (Appellants).—
J. A. Reid—Shaw.
William Kelman & Company, Defenders (Respondents).—
J. C. Thomson—Jameson.

Reparation—Employers Liability Act, 1880 (43 *and* 44 *Vict. c.* 42), *secs.* 4 *and* 7—*Notice of injury.*—*Held* that the question whether the excuse offered by a pursuer, suing for damages under the Employers Liability Act, 1880, for omitting to send notice of the injury to the employer in terms of sec. 4,* is reasonable, may be decided by the Court at the adjustment of issues, or may in their discretion be postponed for the decision of the Judge who tries the cause.

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* Section 4 of the Employers Liability Act, 1880, enacts,—"An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death, within twelve months from the time of death; provided always that in case of death the want of such notice shall be no bar to the maintenance of such action, if the Judge shall be of opinion that there was reasonable excuse for such want of notice."

No. 4.

Oct. 25, 1887.
Macmillan v. Wilsons.

unless the Judge before whom the verdict is obtained shall certify that the action was brought for vindication of character, and was, in his opinion, fit to be tried in the Court of Session.

Held that when the Judge grants such certificate the Court will give effect to his opinion, and award expenses to the pursuer.

1st Division.
M.

In an action of damages for slander at the instance of Robert Macmillan against Messrs H. J. & J. Wilson, the proprietors of the *Edinburgh Evening News*, the jury awarded the pursuer one farthing of damages, and the pursuer now moved the Court to apply the verdict, and to find the defenders liable in expenses. An application had previously been made under the 40th section of the Court of Session Act, 1868,* to Lord Shand, who had tried the case, and his Lordship had granted a certificate that the action was brought for vindication of character, and fit to be tried in the Court of Session.

The defenders opposed the motion, contending that it had been established at the trial that the pursuer had no character to lose, and that the jury had taken that view when they awarded only one farthing of damages. Under the 40th section it was in the discretion of the Court to abstain from giving expenses, even after the presiding Judge had granted a certificate.

Lord President.—The 40th section of the Court of Session Act provides that when a verdict is obtained from a jury carrying less than £5 damages in the case of an action for defamation or for libel, the pursuer is not to be found entitled to expenses unless he satisfies the presiding Judge, and obtains from him a certificate to the effect, that the action was brought for the vindication of character, and was, in his opinion, fit to be tried in the Court of Session. I think it will be in the recollection of your Lordships that before the passing of this Act the rule was the same in substance, and that anybody obtaining expenses upon a verdict for nominal damages in an action for defamation or for libel was bound to shew that the action was brought for vindication of character, and was fit to be tried in the Court of Session. Therefore, the only novelty introduced by the 40th section of the Court of Session Act was to leave the determination of the question to the presiding Judge. That was the sole change introduced by the section. In this action we have the certificate of the presiding Judge that it was one brought for the vindication of character, and was fit to be tried in the Court of Session. Therefore I think the question depends upon the certificate of the presiding Judge, and that we have no right to interfere.

Lord Mure concurred.

Lord Shand.—I agree in thinking that the certificate of the presiding Judge in a matter of this kind is final, and that upon him alone rests the responsibility of saying whether the action was brought for the vindication of character, and was fit to be tried in this Court. I had no difficulty whatever in granting the certificate in this case. It is no doubt the case that I told the jury very strongly

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* The 40th section enacted,—"Where the pursuer in any action of damages in the Court of Session recovers by the verdict of a jury less than five pounds he shall not be entitled to recover or obtain from the defender any expenses in respect of such verdict, unless the Judge before whom such verdict is obtained shall certify on the interlocutor sheet . . . . in the case of actions for defamation or for libel, that the action was brought for the vindication of character, and was in his opinion fit to be tried in the Court of Session."

No. 3.
—
Oct. 22, 1887.
Trail v.
Kelman & Co.

by the presiding Judge at the trial,* at all events the Court could postpone the consideration of the question till then. The object of the provision that notice should be sent was that the employer might have an opportunity of inspecting the *locus* and making inquiries, not to give him notice that an action was to be raised, as the statutory notice contained no such intimation. Here the defenders had had every facility for learning the truth which a notice could have afforded them.

Lord Justice-Clerk.—It seems to me that under the statute the question whether there is a "reasonable excuse" for no notice being sent in terms of the 4th section falls to be decided by the Judge who tries the case. No doubt it is in the discretion of the Court to consider the question at this stage, but I do not see how in the circumstances of the present case we can dispose of it.

Lord Young.—I am clearly of opinion that Mr Thomson's argument on this question was unsound. I should not say that the question of whether the statutory notice was sufficient, or whether the excuse for not sending such notice was reasonable, should in all cases be delayed till the trial of the case. I rather think that where no notice is given, and no reasonable excuse is offered for the omission, the object of the Legislature was to stop the trial before the expenses of a jury trial were incurred. On the other hand, it is clearly in the discretion of the Court to postpone the decision of the question till the trial, if they should think proper. Here the only question is whether the excuse for not sending the notice is reasonable, and, it being admitted that the case must in any view go to trial on the facts, I think it expedient that the matter should be decided by the presiding Judge at the trial.

Lord Craighill.—I think this question should be left to the decision of the Judge who presides at the trial. I do not think that it is possible for us at present to decide it—not that it is not competent for us to do so—but it seems to me that the most expedient course would be for us to approve the issue, and leave the question whether the excuse for not sending the statutory notice to the defender was reasonable to the presiding Judge.

Lord Rutherfurd Clark.—In the circumstances I think this question should be reserved. It is in my opinion in the discretion of the Court whether the consideration of such a question should be reserved or not.

The Court approved the issue, and remitted the cause to Lord Lee, Ordinary, to proceed.

James Skinner, S.S.C.—Fodd, Simpson, & Marwick, W.S.—Agents.

No. 4.
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Oct. 25, 1887.
Macmillan v.
Wilsons.

Robert Macmillan, Pursuer.—*Rhind—Hay.*
H. J. & J. Wilson, Defenders.—*J. C. Thomson—Strachan.*

Expenses—Jury trial—Slander—Nominal damages—Court of Session Act, 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 40.—The 40th section of the Court of Session Act, 1868, enacts that where the pursuer in an action of damages in the Court of Session for defamation or libel recovers by the verdict of the jury less than £5, he shall not be entitled to recover from the defender any expenses

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* Sec. 7 enacts,—"A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

No. 5.
Oct. 25, 1887.
M'Beath v. Forsythe.

The petitioner argued;—An application like the present was always granted unless cause was shewn to the contrary.[1] No case could be found in the books where interim execution of a decree, either for a principal sum or for expenses, had been refused, caution to repeat having been offered.[2] Interim possession was wholly different.[3]

The respondent conceded that there was no case where interim execution of such a decree had not been given.

Lord President.—I think we should be introducing a new rule if we refused this application. When a decree has been granted for an ascertained sum of money, the person holding the judgment is entitled to have interim execution of the judgment pending an appeal to the House of Lords.

Lord Mure.—I am of the same opinion.

Lord Shand.—I think the statute contemplated that the Court should have a much larger discretion than it has been in the habit of exercising. But where there has been a settled rule for a number of years, I do not think we can now go back upon it.

Lord Adam was absent.

The Court accordingly granted the prayer of the petition.

David Forsyth, S.S.C.—William Gunn, S.S.C.—Agents.

No. 6.
Oct. 27, 1887.
Royal Bank of Scotland v. Greenlees.

Royal Bank of Scotland, First Party.—*Fleming.*
James Greenlees (Ralston's Judicial Factor).—*D. Dundas.*

Judicial Factor—Making up Title—Royal Bank Stock.—Held that an interim act and decree appointing a judicial factor on a trust-estate in place of a deceased judicial factor, and authorising him to complete a title in his person to, *inter alia*, certain stock of the Royal Bank of Scotland standing in the name of the former judicial factor in the books of the bank, was a sufficient title to the bank to register him as proprietor of the stock in their books.

2d Division.
M.

The Royal Bank of Scotland was an incorporation constituted by royal charter, dated, registered, and sealed July 1727. The royal warrant on which this charter proceeded, and of which it was a translation into Latin, provided for the transference of the stock of the bank *inter vivos* by entry in the bank books according to certain forms, declaring "that the entry, signed as aforesaid, and no other way or method, shall be the manner and method used in the passing, assigning, and transferring the interest or shares in the said capital stock or fund"; but with regard to the transference of stock from the dead to the living, the warrant provided as follows:—"Provided always, that any person having any share or interest in the said capital stock or fund may dispose and devise the same by his or her last will and testament. But, however, that the executor or administrator shall not transfer the same, or be entitled to receive any dividend, until an extract of the testament be delivered to the company, and until an entry or memorandum of so much of the said will as relates to the said stock or fund be made in the book or books to be kept by or by order of the said corporation for that purpose." Subsequent

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[1] Mackay's Practice, ii. 429.

[2] Ross v. Matheson & Son, Dec. 7, 1847, 10 D. 222, 20 Scot. Jur. 63; Cochrane v. Bogle, Dec. 11, 1847, 12 D. 302.

[3] Gray v. Low, March 12, 1859, 21 D. 723, 31 Scot. Jur. 385.

No. 4.

Oct. 25, 1887.
Macmillan v.
Wilsons.

that they were to look at the character of the pursuer, of which I took a very unfavourable view, in assessing the damages, but still I added that this would not deprive him of his right to obtain damages, the amount of which might be nominal merely. The defenders' contention now comes to this that if a man has a sufficiently bad character, the publisher of a newspaper or a private individual may slander him to their heart's content with impunity, even by making charges against him which are utterly unfounded. In this instance the pursuer was charged with the fraudulent acts of another person, committed in Sheffield, where he never was in his life. The argument seems to be that because the pursuer had been convicted of fraud in Edinburgh he may thereafter with impunity be charged with other fraud of which he was entirely innocent. That would lead to very extraordinary results, and just as I think the pursuer was entitled to damages, so I think in the circumstances he was entitled to the expenses in a trial in which the falsity of the charge was established. I had the less hesitation in granting this certificate, because when the defenders received a letter from the pursuer's agent complaining that they had represented his client of being guilty of fraud in Sheffield, whereas he had never been in that town, it was clearly their duty to have ascertained the facts by making inquiries in Sheffield, so as to see whether they had done him an injury or not. This, however, they did not do. There was no such inquiry made, and no withdrawal or apology for the false charge. This is therefore clearly a case where the pursuer was entitled to a verdict to clear his character of an obviously false charge, and I cannot say it was not a fit action to be tried in this Court.

LORD ADAM concurred.

THE COURT accordingly applied the verdict, and found the defenders liable in expenses.

DAVID MURRAY, Solicitor—A. SUTHERLAND, S.S.C.—Agents.

No. 5.

Oct. 25, 1887.
M'Beath v.
Forsythe.

JAMES M'BEATH, Petitioner.—*A. J. Young.*
JAMES FORSYTHE, Respondent.—*Baxter.*

Appeal to the House of Lords—Interim execution pending appeal.—Where an appeal is taken to the House of Lords against a decree of the Court of Session for an ascertained sum of money, the Court will, pending the appeal, allow interim execution of the decree.

1st Division.
M.

IN an action of count, reckoning, and payment arising out of a series of transactions extending over a long period of years at the instance of James M'Beath, farmer, Thurso, against James Forsythe, farmer, Oust, in the county of Caithness, the Lord Ordinary (M'Laren), on 16th February 1887, gave decree against the defender for £2769, 14s. 11d., with interest from 23d May 1884, and *quoad ultra* found no expenses due to or by either party. The defender having reclaimed, the First Division, on 15th July 1887, adhered to the Lord Ordinary's interlocutor.

An extract of these interlocutors was thereafter obtained, and a charge of payment served upon the defender.

On 15th August following the defender presented a petition of appeal to the House of Lords against the above interlocutor, and M'Beath was afterwards ordained to lodge his printed case.

No payment having been made under the decree and charge, M'Beath presented a petition for execution pending the appeal, in terms of the 17th section of the Act 48 Geo. III. cap. 151.

No. 5.
—
Oct. 25, 1887.
M'Beath v. Forsythe.

The petitioner argued;—An application like the present was always granted unless cause was shewn to the contrary.[1] No case could be found in the books where interim execution of a decree, either for a principal sum or for expenses, had been refused, caution to repeat having been offered.[2] Interim possession was wholly different.[3]

The respondent conceded that there was no case where interim execution of such a decree had not been given.

Lord President.—I think we should be introducing a new rule if we refused this application. When a decree has been granted for an ascertained sum of money, the person holding the judgment is entitled to have interim execution of the judgment pending an appeal to the House of Lords.

Lord Mure.—I am of the same opinion.

Lord Shand.—I think the statute contemplated that the Court should have a much larger discretion than it has been in the habit of exercising. But where there has been a settled rule for a number of years, I do not think we can now go back upon it.

Lord Adam was absent.

The Court accordingly granted the prayer of the petition.

David Forsyth, S.S.C.—William Gunn, S.S.C.—Agents.

No. 6.
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Oct. 27, 1887.
Royal Bank of Scotland v. Greenlees.

Royal Bank of Scotland, First Party.—*Fleming.*
James Greenlees (Ralston's Judicial Factor).—*D. Dundas.*

Judicial Factor—Making up Title—Royal Bank Stock.—Held that an interim act and decree appointing a judicial factor on a trust-estate in place of a deceased judicial factor, and authorising him to complete a title in his person to, *inter alia*, certain stock of the Royal Bank of Scotland standing in the name of the former judicial factor in the books of the bank, was a sufficient title to the bank to register him as proprietor of the stock in their books.

2d Division.
M.

The Royal Bank of Scotland was an incorporation constituted by royal charter, dated, registered, and sealed July 1727. The royal warrant on which this charter proceeded, and of which it was a translation into Latin, provided for the transference of the stock of the bank *inter vivos* by entry in the bank books according to certain forms, declaring "that the entry, signed as aforesaid, and no other way or method, shall be the manner and method used in the passing, assigning, and transferring the interest or shares in the said capital stock or fund"; but with regard to the transference of stock from the dead to the living, the warrant provided as follows:—"Provided always, that any person having any share or interest in the said capital stock or fund may dispose and devise the same by his or her last will and testament. But, however, that the executor or administrator shall not transfer the same, or be entitled to receive any dividend, until an extract of the testament be delivered to the company, and until an entry or memorandum of so much of the said will as relates to the said stock or fund be made in the book or books to be kept by or by order of the said corporation for that purpose." Subsequent

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[1] Mackay's Practice, ii. 429.

[2] Ross v. Matheson & Son, Dec. 7, 1847, 10 D. 222, 20 Scot. Jur. 63; Cochrane v. Bogle, Dec. 11, 1847, 12 D. 302.

[3] Gray v. Low, March 12, 1859, 21 D. 723, 31 Scot. Jur. 385.

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charters were granted in favour of the bank, but no alteration was thereby made in regard to the transfer of its stock, although by the Royal Bank of Scotland Act, 1873 (36 and 37 Vict. cap. ccxvii.), a new form of transference *inter vivos* was provided.

Samuel Greenlees, distiller, Campbeltown, judicial factor on the trust-estate of Mr and Mrs Ralston, having died, James Greenlees was appointed judicial factor in his place. Samuel Greenlees was at the date of his death registered, as judicial factor foresaid, as proprietor of the sum of £440 of the capital stock of the Royal Bank, which stood in his name in the books of the bank, and the interim act and warrant appointing James Greenlees to be factor granted warrant to and authorised him, as judicial factor foresaid, to complete a title in his person to the heritable and moveable or personal property specified and described in the inventory annexed to the petition, which inventory included the £440 of the stock of the Royal Bank.

James Greenlees, as judicial factor, called upon the bank to register him as proprietor of this sum of £440 of their capital stock, or to prepare and send to him for execution such transfer or memorandum or deed as might be necessary for transferring the stock to his name as judicial factor, on the ground that the interim act and decree was a good and sufficient title to the stock in his person, or at least a sufficient warrant to authorise the bank to transfer the same from the name of Samuel Greenlees as judicial factor to his (James Greenlees') name as judicial factor. But the bank declined to make the transfer, on the ground that by the terms of their charters and Act of Parliament, the interim act and decree was not *per se* a sufficient title in the person of James Greenlees to the stock in question, nor a sufficient warrant to authorise the bank to transfer the same to his name.

In these circumstances a special case was presented, to which the bank was the first party and the judicial factor the second party.

The question put was,—"Is the said interim act and decree of itself a good and sufficient title to the said bank stock, and are the bank entitled and bound to recognise the same as a sufficient warrant under which to register the second party as proprietor in the books of the bank? or is the said interim act and decree a good and sufficient warrant to authorise the bank to prepare a transfer or memorandum or deed of transfer of the said stock in favour of the second party, and upon execution thereof, to register him as proprietor of the said stock in the books of the bank?"

Argued for the bank;—The provisions of the bank's charter as to the mode of transferring the stock were quite explicit, and although it had been held that the stock might be transferred by adjudication,[1] the bank did not feel that they were in safety in making a transfer on production merely of the factor's act and warrant, which conferred a right to the stock, but not, it was thought, a title. If the views of the second party were sound, the original factor might equally have had his title completed by the mere production of the act and warrant authorising him to complete a title. [LORD YOUNG.—That by no means follows.]

Argued for the second party;—This was the case of a factor being appointed on the death of the factor originally appointed; to the original appointment different considerations applied, but the stock was now in the hands of the Court, and the act and warrant of the Court was a sufficient authority to the bank to transfer the stock from the name of the old officer to that of the new.

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[1] Royal Bank of Scotland v. Fairholm, Feb. 14, 1770, M. Adjudication, Appx. I.

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LORD YOUNG.—The estate of which this bank stock is a part is being administered by this Court, and by an officer of this Court, not a permanent official of the Court, but by an officer appointed for the special purpose of administering this estate. The officer who was appointed in the first place died, and we supplied the loss by appointing another, and that other will receive the whole of the trust-estate which was in the hands of his predecessor. All that we are here asked to do is to authorise the bank to insert in their books the name of the recently appointed officer in place of that of the deceased officer, as proprietor of the stock belonging to the estate. Now, that is a perfectly simple thing, with no risk or danger to anybody. The aim of everyone ought to be simplicity, and the avoidance of expense, and transferring what was in the hands of the deceased officer into the hands of the living officer is not a matter of completing titles at all. Accordingly I should propose to your Lordships to answer the first part of the question in the case in the affirmative.

LORD RUTHERFURD CLARK.—I do not think any harm will arise from making the transference of the stock in the way proposed, especially as it is the case of transferring from the name of one judicial factor who is deceased to another who is living, but I cannot say that I am altogether satisfied.

LORD JUSTICE-CLERK.—Your Lordships answer the first part of the question in the affirmative.

LORD CRAIGHILL was absent on Circuit.

THE COURT answered the first part of the question in the case in the affirmative.

DUNDAS & WILSON, C.S.—M'NEILL & SIME, W.S.—Agents.

No. 7.

Oct. 28, 1887.
Clacevich v. Hutcheson & Co.

ANDREA CLACEVICH AND MANDATARY, Pursuers (Appellants).—*Baxter.*
GEORGE HUTCHESON & COMPANY, Defenders (Respondents).—
J. A. Reid—Salvesen.

Ship—Demurrage—Discharge of mixed cargo in separate lots—Custom of the port.—A ship, chartered to carry to the United Kingdom a cargo of ash and bones, the discharge of cargo to be according to the custom of the port of discharge, received from the charterers and loaded 33 tons of ash, about 397 tons of bones, and about 20 tons of horns, hoofs, and piths (which last were partly intermixed with the bones, and partly loaded on the top of them). The master granted bills of lading for 33 tons of ash and 417 tons of bones. On arrival at the port of call the ship was directed to proceed to Aberdeen. The master having on the demand of the consignees there, but under protest, separated the hoofs, horns, and piths from the bones before giving delivery, brought an action against the consignees for four days' demurrage on account of the delay caused by this separation. The defenders pleaded that the hoofs, horns, and piths having been loaded separately, ought to be so discharged, and that in any case the custom of the port of Aberdeen was that they should be separated from the bones by the ship before delivery. After a proof, from which it appeared, *inter alia*, that the trade in bones at Aberdeen was of only about thirty years' standing, and almost entirely in the hands of the defenders themselves, *held* (1) that the hoofs, horns, and piths had been tendered in bulk as part of a cargo of bones; (2) that delay had been caused by the separation; (3) that the defenders had failed to prove any custom of the port entitling them to require the ship to effect such separation; and therefore (4) that the pursuers were entitled to deliver the cargo in bulk as they received it, and to have decree for the sum sued for as demurrage.

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2D DIVISION.
M.

BY charter-party, dated Buenos Ayres, 19th January 1886, it was mutually agreed between Andrea Clacevich for himself and the owners of the Austrian barque "Una" of Dabrota, whereof he was master, and Diaz & Viademonte, merchants and affreighters, *inter alia*, that the said vessel should proceed to Rosario, and there load from the factors of the said affreighters a full and complete cargo of 50 tons of ash, 60 tons of mess bones, and the remainder of country bones, and being so loaded, should therewith proceed to Queenstown, Falmouth, or Plymouth for orders. There was no stipulation as to lay-days or demurrage for discharge, but it was provided that "the discharge of the cargo shall be according to the custom of the port of discharge."

The vessel proceeded to Rosario, and there loaded a cargo consisting of 33 tons of ash, about 397 tons of bones, and about 20 tons of hoofs, horns, and piths. A certain proportion of the last-mentioned were intermixed with the bones, but the greater part were put on board last, and lay on the top of the bones.

The bills of lading bore that the master had received on board 33 tons of ash and 417 tons of bones, and there was the declaration that weight and contents were unknown.

The vessel reached Plymouth on 7th July 1886, and there received orders to discharge at Aberdeen, Hutcheson & Company of that port being the consignees of the cargo. She arrived at Aberdeen on the 15th July, and was ready to discharge on the following morning. Hutcheson & Company directed the master, before weighing the cargo or giving delivery, to separate the bones from the hoofs, horns, and piths, and the hoofs, horns, and piths from each other, an operation which, as carried out, involved the formation of seven (or including the ash, eight) different classes of cargo (the bones being divided into four classes according to size). The master did so, but objected to the deck and holds being taken up in this way, and to the delay which the operation involved, and on the 21st July wrote to Hutcheson & Company intimating that he would hold them responsible for demurrage for all days occupied by them in taking delivery of the cargo beyond what would be required if delivered at the rate of 25 tons a-day.

The discharge of the cargo having in all occupied twenty-two days, being four in excess of what was required at the above rate, the master and Richard Connon, shipbroker, Aberdeen, his mandatary, brought an action in the Sheriff Court at Aberdeen to recover £28, being the demurrage for four days, at £7 a-day.

The pursuer pleaded;—(1) The defenders, having through their own fault and negligence exceeded the time allowed by the custom of the port for discharging similar cargoes, are liable to the pursuers in demurrage in terms of charter-party and bills of lading. (3) The defenders having detained the said vessel without discharging her cargo beyond a reasonable time by the period of four days, are liable to the pursuers in demurrage as craved, with expenses.

Hutcheson & Company defended.

The following averments appeared in the defenders' statement of facts:—(Stat. 3) "On opening the main hatch it was found that there was a large quantity of hoofs, horns, and piths, although no such cargo was mentioned in the bill of lading signed by the captain, and although he was quite well aware of the quantity, quality, and contents of his said vessel. Denied that pursuers were not aware that horns, hoofs, and piths were in his cargo." (Ans. 3) "Not known, and not admitted. Explained and averred that if there were horns, hoofs, piths, and other such goods, they were shipped as bones, and the pursuer had no right nor power at the port of loading to refuse to take them on board, as they are according to custom at port of loading shipped as bones. The bill of lading is referred to, where it is stated that the pursuer is ignorant of the weight and contents." (Stat. 4) "The defenders on making this discovery at once explained to the pursuer, before beginning to discharge, that the hoofs, &c. were not mentioned in the bills of lading, and that he would require to separate these, as is the custom in this port, from the cargo mentioned in the bills of lading. The pursuer thereupon agreed to allow his own men to separate the different classes of cargo, and to discharge the hoofs, horns, and piths on deck, and to allow them to remain there until arrangements could be made for their disposal. . . . The pursuer's explanations in answer are denied." (Ans. 4) "Denied. Explained and averred that the defenders were perfectly well aware that the goods they specify had been shipped as bones."

The defenders pleaded;—(2) The question of demurrage in the discharge of said cargo being by the charter-party solely referable to the custom of the port of discharge, pursuer must abide by that custom. (3) The cargo not being a general one, and the defenders being sole consignees, the claim for demurrage did not arise till the cargo, which was omitted from the bill of lading, was first cleared. (5) The pursuer himself having been a party to and having acquiesced in the mode of discharging said cargo adopted by himself and the defender was bound by it, and cannot now make a claim for demurrage.

A proof was allowed. The following were the material results of the evidence:—The trade in bones, &c., at Aberdeen had been in existence for about thirty years, and was almost exclusively in the hands of Hutcheson & Co. It was not disputed that bones, horns, hoofs, and piths were in this country regarded as different articles commercially, but witnesses for the pursuer deponed that at the port of shipment they were all considered to be "bones," and were shipped indiscriminately as such. George Hutcheson, one of the defenders, deponed that almost every cargo of what he admitted were rightly shipped as "bones" contained from a half to one per cent of horns, hoofs, and piths, but that when a quantity of these last three articles was tendered, as in the present case, they ought to be entered in the bill of lading, and were, according to the custom of the port of Aberdeen, separated from the bones by the ship before delivery to the meters. This evidence was corroborated by that of several purchasers of bones, &c., from Hutcheson & Co., and as regarded the practice of separation, by that of one or two meters. George Hutcheson further deponed that while the separation, which had in the present instance taken place, of the bones into four classes, had not been by his orders, but solely for the convenience of the meters, it was the practice for the ship to separate the horns, hoofs, and piths each into a class by itself before delivery. There was less corroboration of this branch of the alleged custom, which with the other was denied by the pursuer's witnesses, although it was admitted that whatever Hutcheson & Co. had demanded in the way of separation had hitherto been conceded by the masters, usually after a dispute, but until the present case without litigation. It further appeared that in many instances the charter-party stipulated for a certain number of lay-days for unloading, and there was no evidence that these days were in any case exceeded. The defenders lodged a state, shewing the times taken to unload all the vessels arriving at Aberdeen with bones, &c., from January 1883 down to December 1886. The results of this state appear from the Sheriff's note, *infra.* On the other hand several witnesses for the pursuer, including the stevedore employed by them to unload the "Una," deponed that she could easily have been un-the cargo exceeded the time allowed by the custom of the port of Aberdeen for discharging similar cargoes, and in consequence has assoilzied the defenders.

I am of opinion that the master was not bound to allow his ship to be used for the separation of the cargo; if there was anything wrong in the mixture of the cargo, recourse should have been against the shippers who loaded it, there being no allegation of any failure to stow properly on the part of the shipowner. I think that the shipowners were entitled to carry and deliver the cargo as it was tendered to them. The cargo was tendered as one of bones and ash, and as such was received by the shipowners. I think they were entitled to deliver it in bulk as they received it, and that the captain was not bound to allow the separation to be made on board his ship. I therefore think his claim for demurrage should be allowed.

My only ground for hesitation on the subject was as to whether the master of the vessel, by separating the cargo into different classes at the request of the merchants, though no doubt under protest, had not abandoned his contention and acquiesced in their demand. But I think this would be too stringent a view to take. The real foundation of the merchant's defence was that this separation of cargo was according to the custom of the port of Aberdeen. I do not think that any such custom has been proved. In the first place the trade in bones has grown up lately, within the last thirty years. Then there is only one merchant in Aberdeen who deals largely in bones, and that is the defender Mr Hutcheson, and his practice cannot raise up such a custom of the port as would be sufficient to bind traders. I think that the captain was entitled to deliver his cargo in bulk, any practice to the contrary not being binding.

LORD YOUNG.—I concur in the judgment which your Lordship proposes, and in doing so I cannot but express my regret that there should have been so much litigation about so small a matter. It is an action for payment of £28 only, and I do not see that the case presents any general question of such importance that it would be for the public use and benefit to have the decision of this Court on it. My concurrence rests on this simple ground that I cannot hold that the Sheriff-substitute, who took the evidence and disposed of the case, arrived at a wrong conclusion in construing the evidence. If I had been the Sheriff I think that I should have affirmed the Sheriff-substitute's decision. The import of the evidence according to that decision is that there was undue delay in discharging the cargo, and that that undue delay was occasioned by the consignee insisting on having the cargo separated into no less than eight classes before taking delivery, and so delaying the discharging of the cargo by four days. The Sheriff-substitute thought that that was an undue delay, and therefore gave decree for demurrage for these four days. I am not prepared to decide any more general question than that here—that the four days' demurrage was properly given in the circumstances of this particular case. *Prima facie* it looks unreasonable that a ship should be detained while the cargo is being sorted out in the hold or on deck, but everything depends on the nature of the cargo and the circumstances of the case. The cargo may be of such a kind that it cannot be thrown out of the ship in any way like a cartload of coals—it may frequently, perhaps commonly, be such as to require care and assortment while being discharged. I see no sufficient reason here, however, for differing from the conclusion of the Sheriff-substitute, that there was undue delay in discharging this particular cargo through the consignees insisting on having the separation made. The question raised as to the custom of the port is really as to the custom of this one merchant. It appears that he is in the habit of insisting on having the cargoes consigned to him separated on board the ships which brought them, but I cannot regard that as a custom of the port within the meaning of this charter-party. The practice of a single merchant to use ships in this way for his own convenience is not a custom of the sort to which the charter-party refers. With regard to a remark made by your Lordship as to the remonstrance of the captain, I think that the captain was powerless, and that he could only submit with a remonstrance. I think that he could not have resisted the wishes of the merchant. All he could say was, "I object to this separation, and you must pay for the delay it occasions, but if you choose to use the ship at £7 a-day I cannot actively interfere to prevent it." I think that he acted with propriety, and that his remonstrance was sufficient, and in giving judgment as we do now we are merely giving effect to that remonstrance.

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LORD RUTHERFURD CLARK concurred.

LORD CRAIGHILL was absent on Circuit.

THE COURT pronounced this interlocutor:—"Find in fact (1) that a portion of the cargo carried in the pursuer's vessel consisted of horns, hoofs, and piths, but that this portion was tendered and loaded as part of a cargo of bones, and that the whole cargo was loaded in bulk without separating one portion from another; (2) that in unloading at Aberdeen the consignees extended the time necessary for doing so by four days, which were occupied in separating the said portion from the rest of the cargo; (3) that the defenders have failed to prove that they were entitled by the custom of the port to use the ship for such separation: Find in law that the cargo having been shipped as a cargo of bones, the pursuer was entitled to deliver it in bulk, and is entitled to demurrage for the time occupied in separating it, and that £7 per day is a reasonable rate: Therefore sustain the appeal, recall the judgment of the Sheriff appealed against, and affirm the judgment of the Sheriff-substitute: Of new ordain the defenders to make payment to the pursuer of the sum of £28 sterling, with interest thereon at the rate of £5 per centum per annum from the 5th day of March 1887 till paid: Find the pursuer entitled to expenses in this Court, and of new find him entitled to expenses in the inferior Court," &c.

HENRY & SCOTT, S.S.C.—R. C. GRAY, S.S.C.—Agents.

PATRICK JAMIESON, Pursuer (Appellant).—*Macfarlane.*
DUNCAN M'INNES, Defender (Respondent).—*Wallace.*

No. 8.
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Oct. 29, 1887.
Jamieson v. M'Innes.

Contract—Construction—Whether according to schedule rates or for a lump sum.—A builder, by offer appended to a schedule, offered to do the mason work of a proposed tenement, "agreeably to plans thereof now shewn and to the extent of this schedule, for the sum of £286, 10s. 8½d." The schedule, to which this letter was annexed, gave the estimated quantities of work required, and the offerer inserted the rate at which he proposed to do each item, adding a calculation of the cost of each item at that rate, and a summation at the end of the total cost, being the sum in the offer. Full power was reserved to the proprietor to alter the quantity of work required, and there was also this stipulation appended to the schedule,—"The work to be measured when finished and charged at schedule rates, or others corresponding thereto, as also in pro-

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portion to the slump sum in this letter of offer." In point of fact the offerer made an under calculation of about £30 in bringing out the cost of one item. *Held* that the contract was a contract according to the schedule rates, and not a contract for a lump sum, and that the offerer was not barred by his error from claiming the full sum brought out at his rates.

2D DIVISION.
Sheriff of Renfrew and Bute.
I.

DUNCAN M'INNES, grocer, Port-Glasgow, being desirous to build a tenement there, sent out (sometime prior to June 1883) schedules giving the estimated quantities of work required, with the view to tradesmen returning offers. Appended to the schedules for the digger, mason, and brick work, were the following "notes":—"The work to be done to the entire satisfaction of the proprietor and architect, or that of any person appointed by them to inspect the same, who reserve full power to increase, lessen, or altogether omit, or make any alterations on the work as they may think proper. The work to be measured when finished and charged at the schedule rates or others corresponding thereto, as also in proportion to the slump sum in the letter of offer."

Patrick Jamieson returned one of the schedules for the digger, mason, and brick work, with the rate at which he offered to do each item of work filled in, and also with a calculation of the cost of each item on the footing of these rates and the estimated quantity of the work given in the schedule. The total cost of the work, as Jamieson calculated it in the schedule, was £286, 10s. 8½d., at which sum he made an offer in the following terms:—"Sir,—I hereby offer to execute the digger, mason, and brick works of the tenement you propose to erect in Bay Street, Port-Glasgow, agreeably to plans thereof, now shewn, and to the extent of the schedule, for the sum of two hundred and eighty-six pounds ten shillings and eightpence halfpenny.—Sir, your obedt. servt."

This offer M'Innes accepted, but sometime afterwards the sum named was reduced by £5 on the proposal of Jamieson in the following terms:—"Dear Sir,—Having got a cheaper price for my mold columns and lintels, I want to give you share in the reductions, and will take £5 off my contract price, and hereby offer to work according to plans and specification for the sum of two hundred and eighty-one pound ten shillings (£281, 10s. 8½d). Your acceptance of this offer will be binding on your obt. ser."

When on its completion the work came to be measured it was found that Jamieson had under-calculated the cost of one item by £32, 10s. (as detailed in the Sheriff's note), and there were minor errors in other items, making the total difference £32, 11s. 9d. The amount of work actually done was less than the amount given in the schedule, and consequently the actual cost (on Jamieson's rates) was only £306, 18s. 5d., in place of £319, 2s. 5d., the sum that Jamieson should have brought out in his schedule. M'Innes, who had paid a sum to account, declined to pay the balance of £38, 15s. 5d., except under deduction of £31, 6s. 10d., that sum bearing the same proportion to £306, 18s. 5d. that £32, 11s. 9d. bore to £319, 2s. 5d.

In June 1887 Jamieson brought an action against M'Innes in the Debts Recovery Court, at Greenock, for the above balance of £38, 15s. 5d.

The question at issue was, whether the contract was for payment according to the schedule rates, as the pursuer maintained, or for a lump sum, according to the defender's contention, but the defender having pleaded the triennial prescription, that plea was sustained, and the case referred to the defender's oath. There was, however, no dispute about the material facts, which were as above narrated, and appeared from the defender's oath. He further deponed that he had had an offer to do the work for £289, 4s. from another mason, who would have got the contract had the pursuer's error been discovered before acceptance.

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On 10th June 1887 the Sheriff-substitute (Nicolson) found the oath affirmative of the reference, and decerned in terms of the conclusions of the summons.

On appeal, on 2d August, the Sheriff (Moncreiff) pronounced this interlocutor:—"Sustains the appeal, and recalls the interlocutor of the Sheriff-substitute of 10th June 1887: Finds that the defender admits in his defences liability for the sum of £7, 8s. 7d.: *Quoad ultra*, for the reasons stated in the following note, finds the defender's deposition negative of the reference: Therefore decerns against the defender for the said sum of £7, 8s. 7d. sterling: *Quoad ultra* assoilzies the defender." *

The pursuer appealed, and argued;—The contract was a contract according to the schedule rates, and not for a lump sum. The conditions of the contract generally, and in particular the provision for the measurement of the work when completed, made that plain. The defender so regarded the contract when that view was favourable to him, and repudiated it only when it would benefit the pursuer. He had had the completed work measured, and had taken advantage of the fact that the work actually done was smaller than the estimated quantity in the schedule by making that diminished quantity the basis of his calculation. In short, he treated the contract as being both for a lump sum and for the schedule rates, whereas, to be consistent, he ought to have admitted liability for £281, 10s. 8½d., neither more nor less.

Argued for the defender;—The Sheriff had taken the sound view. The only way of reconciling the somewhat obscure conditions of the contract was that adopted by the defender. The mistake was the pursuer's, and it was equitable that he should bear the consequences, and not the de-

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* "NOTE.— . . . By estimate, No. 7 of process, the pursuer undertook to execute the work specified in the schedule for the sum of £286, 10s. 8d., and by a subsequent letter he reduced his offer to £281, 10s. 8½d. The defender, at the same time, got an offer from a firm of M'Bride & Company to execute the work for £289, 4s. The pursuer's offer was accepted, being the lowest, and the defender says (and of this there can be little doubt), that if he, the defender, had known that the pursuer's offer should really have been to do the work for a lump sum of £320, instead of £281 odds, the contract would have been given to M'Bride & Company, and not to the pursuer. The pursuer, however, maintains that he is not bound by the lump sum brought out in his offer. One of the items in the schedule, as filled up by the pursuer, stood thus:—'18″ brick walls, gables , &c. Roods 10 . 16 / 234/ £89, 14/.' Now, it is plain that if the rate is correct, the sum entered in the money column is incorrect. The sum should have been £122, 4s., instead of £89, 14s., making a difference of £32, 10s. The pursuer broadly maintains that the rate must rule, and not the sum set against it. No doubt the estimate, No. 7 of process, must be construed as part of the defender's oath; but on the evidence before me, I think the balance of considerations is against the pursuer. The original fault undoubtedly lay with him. Even if the defender ought, as a matter of prudence, to have checked the schedule before accepting the pursuer's offer, the greater fault was that of the pursuer. The purpose of filling up the money column and offering to do the work for a lump sum, presumably is to enable the customer to decide between competing offers; and if, through the carelessness of the offerer, too small a sum is brought out, it is only fair that he should bear the loss, and not the customer, who could have got the work done more cheaply by another contractor. No doubt the rate and the sum set against it cannot stand together. But why should the rate prevail, and why is it to be presumed that the rate is right and the sum wrong? The rate and the sum have no apparent relation to each other; the error is not merely clerical, such as the substitution of a 3 for a 5, and I fail to see why, if a mistake has been committed, the rate should be taken as binding on the defender. . . ."

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fender, who, beyond question, could have had the work done for less than the sum now claimed.

Lord Young.—It it had not been for the judgment of the Sheriff I should not have thought this case arguable. The pursuer contracted to do a certain amount of work at prices according to rates put down in a schedule. The schedule was made out in the ordinary form, and as usually happens, the price of each item was calculated on the estimated amount of work according to the schedule rate, and the whole summed up at the end. The parties assumed that it was correctly calculated and summed up, for the pursuer offered to do the work for the sum of £286, 10s. 8½d. thus brought out, and the defender accepted that offer. The contract, however, was not a contract to do the work for a lump sum, but a contract for a sum to be fixed when the work had all been finished, and measured, so as to shew what amount of work was actually done, and the schedule rates applied to that actual amount of work. Well, that was what was done here; the work when finished was measured, and the rates were applied to the measurements, and the sum sued for is the balance still due on the sum so brought out. It appears that the pursuer's original calculation of £286, 10s. 8½d. was an under-estimate to the extent of about £30, and the defender declines to pay the pursuer except under deduction of that sum. The answer which the pursuer makes is, "Oh, but the error was an *error calculi* in applying the schedule rates to the estimated amount of work to be done, bringing out a smaller total than I was entitled to charge." "True," replies the defender, "but the error was yours, and I am entitled to have the difference deducted from your account." I think that is an extravagant proposal, but to excuse its extravagance the defender says that when he had the pursuer's offer before him he also had another offer to do the work for a somewhat larger sum than the pursuer's, as it erroneously appeared to be, but which is somewhat smaller than the sum now claimed by the pursuer, and the defender says that he would not have accepted the pursuer's offer had he not been induced to do so by the pursuer naming the smaller total sum. I do not think that is a good plea; the work was honestly done, and ought to be paid for. No injustice, therefore, will be done by giving the pursuer the decree which he asks. But I do not proceed on that ground. I think that the contract was a contract for a sum to be fixed according to measurement, and not for a lump sum.

Lord Craighill.—I concur. On reading the papers last night I cannot say that I had any doubt upon this question. I think the contract was not one by which the contractor undertook for a lump sum to execute the digging, mason, and brick work that was provided in the specification, but on the contrary was a contract by which he became bound to do the work at certain rates, which were specified; what was to be due to the contractor depended upon the extent of the work done, as multiplied by the rates which were specified. The brick work, like the rest, was measured at the end of the day, as was provided for by the contract. The fact that there was to be a measurement of the work after the work was done shews that it was in the view of the parties that the quantities in the specification were not to be conclusive. If anything was to be conclusive it was a second measurement, by which the extent of work done was to be ascertained, and a charge made at the specified rates. It is true that an error was committed, but it seems to me that that error is of the same legal character as an error in addition.

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It seems to me, therefore, that the Sheriff-substitute was right, and the Sheriff was wrong, when the one held, and the other did not, that the contract was one for work done as at certain rates, and that the contractor is entitled to the sum sued for, notwithstanding the error that was committed.

LORD RUTHERFURD CLARK.—I concur in the judgment proposed. There are only two questions to determine—namely, what is the contract? and what is due under the contract? What the pursuer claims is for work done under the contract, measured according to the contract, and at rates specified in the contract. Now, I cannot see my way to resist the argument by which that claim is supported. But what the defender says is, that he had a lower offer which he would have accepted but for the total sum of pursuer's offer being of the amount of £31 less than what is sued for. Well, that may be so, but that rather points to a different remedy. I am not going to say whether or not there is a claim for damages on the part of the defender for being led to reject an offer to do the work for a less sum than the pursuer is entitled to under the contract. Nor would I say that such an action should be brought; but it seems clear on the present contract, and on this record, that the pursuer must get paid on the actual measurement and at the rates which he stipulated for.

The LORD JUSTICE-CLERK was absent.

THE COURT sustained the appeal, repelled the defences, and decerned in terms of the conclusions of the summons, with expenses.

MORTON, NEILSON, & SMART, W.S.—ADAM SHIELL, S.S.C.—Agents.

No. 9.

Nov. 15, 1887.
Miln v. North British Fresh Fish Supply Co. Limited.

WILLIAM SIMPSON MILN, Petitioner.—*J. C. Lorimer.*
THE NORTH BRITISH FRESH FISH SUPPLY COMPANY, LIMITED, Respondents.—*C. S. Dickson.*

Company—Register of members—Effect of registration.—Held that a person who applied for shares in a company registered under the Companies Acts, and authorised his name to be placed on the register of members, became, on allotment of the shares and registration of his name in terms of his authority, a shareholder of the company, and was not entitled to have his name removed from the register by shewing that he did not become a shareholder on his own account, but merely that he might, by agreement with the directors, place the shares among such persons as he found willing to take them.

1ST DIVISION.
M.

THE NORTH BRITISH FRESH FISH SUPPLY COMPANY, LIMITED, was incorporated under the Companies Acts, with its registered office in Scotland, and having a nominal capital of £50,000 in 50,000 shares of £1 each, of which the first issue of 30,000 shares was offered in December 1886.

On 22d December 1886 William Simpson Miln, Southgate Road, London, sent an application for 1000 of these shares in the following terms:—"To the Directors of The North British Fish Supply Company, Limited.

"Gentlemen,—Having paid to your bankers the sum of £25 stg., being a deposit of 2s. 6d. per share, less 2s. per share commission, on an application for 1000 shares of £1 each in the North British Fresh Fish Supply Company, Limited, I hereby request you to allot me that number, and I agree to accept such shares, or any less number you may allot to me, upon the terms of the accompanying prospectus, dated December 1886. I further agree to pay to your bankers the sum of 7s. 6d. per

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share on allotment, and the further sums as provided by the prospectus, and I authorise you to place my name on the register of shareholders in respect of such shares." Then followed the applicant's signature, address, and occupation, with the date.

Enclosed with this application was a letter from Miln to the secretary of the company in these terms:—"22d December 1886. Dear Sir,—Enclosed I beg to hand you application for 1000 shares, together with £25, being deposit of 2s. 6d. per share, less 2s. per share commission. Please to put this application before your directors at their allotment meeting on the following conditions: I do not wish to invest my own money in the shares of your company up to that extent, but see my way to invest 1000 shares amongst my friends and clients. Although I have been very busy lately, still a good many shares were applied for through me, and certainly after allotment I feel sure that I can place at least that number, more especially as the London Founders' Association, Limited, have agreed to give me their full commission of 10 per cent. I authorise to forfeit the deposit sent you herewith in case I fail to place the shares I apply for within two months from this date. I intend to remit you as and when I sell the shares, which I will sell by transfer out of my name, giving you notice of every transfer I sign.—Yours faithfully."

On the 23d December the secretary of the company sent to Miln—(1) An allotment letter of that date for the 1000 shares, shewing 2s. 6d. per share, or £125, as paid on application, and 7s. 6d. per share, or £375, as payable on allotment; and (2) a receipt for "the sum of £25, being the deposit of 2s. 6d. per share required on the application for an allotment of 1000 shares of £1 each in the above company (less 2s. per share commission)."

On the 23d February 1887 Miln wrote to the directors of the company in these terms:—"Dear Sirs,—I beg to refer you to my letter of 22d December last with reference to my conditional application for shares, and of which a copy is herewith annexed, and to now inform you I have not placed the shares for many good reasons." He then gave his reasons, and concluded—"I believe the company will succeed if properly controlled. If the board intend to exercise real control, and by this I mean that the London directors will attend the meetings, I have no doubt that I will be able to place the shares referred to or even more, and I shall therefore be obliged by the directors extending the time for placing them for three months from this date.—Yours faithfully."

The secretary of the company replied on the 4th March intimating "that the directors agree to grant your request for an extension of time for three months, from 22d February 1887, to enable you to get the shares allotted to you placed amongst your friends. I shall be glad to receive any transfers you make as soon as they are signed."

Miln did not get any of the shares placed, and on 4th July intimated this to the secretary of the company, and requested that in the circumstances the deposit of £25 should be refunded, he returning the receipt for £25 and abandoning his commission. On 27th July the directors replied that they had no power to do anything in the matter. Miln then intimated to the company that he had resolved to abandon the £25 deposited on application, and he at the same time returned the allotment letter and receipt, and requested that his name should be removed from the register of members. On 26th September the secretary of the company intimated that the directors were advised that they had no power to remove Miln's name without an order of the Court.

Miln then presented this petition to the Court, under the 35th section of the Companies Act, 1862 (25 and 26 Vict. cap. 89), for rectification of the register of the company by removal of his name therefrom.

The petitioner set forth the substance of the foregoing correspondence, and then averred:—"Throughout the whole transaction the petitioner acted as paid agent of the company, and the shares were allotted in his name provisionally and for convenience in the execution of the agency. The petitioner's name accordingly should now be removed from the register of members, the agency to facilitate which the shares were so provisionally registered having proved abortive and come to an end."

The Company lodged answers, in which they admitted the correspondence, but stated,—"The petitioner duly applied for the shares in question, and, as he was well aware at the time, these shares were allotted to him, and he was entered on the register as a shareholder in respect thereof, and agreed to become a shareholder in respect thereof. The shares were all along dealt with by the petitioner and the company as having been finally and unconditionally allotted to and accepted by the petitioner. In these circumstances, the respondents submit that the petitioner's averments are irrelevant and, so far as material, unfounded in fact; that the petitioner has no title to make or insist in the present application; and that the petition should be refused, with expenses."

Argued for the petitioner;—The question here, under the 23d section of the Act,* was whether the petitioner had agreed to become a member of the company. The fair reading of the correspondence was that he had not. Neither he nor the directors intended that he should become a shareholder. His name was no doubt put on the register, but that was merely part of the machinery to carry out the real agreement between him and the company. It was not intended thereby to make him a shareholder. The parties thought that his name might be put on the register without making him a shareholder, and, no question with creditors arising (and there was none here), effect should be given to what the parties supposed, even if erroneously, to be within their powers. In *Muir's* case[1] there was no question about the trustees, whose position was in question, being shareholders; the only question was whether they might be shareholders *qua* trustees, *i.e.*, whether shareholders of a company might be such with a qualification. Here the question was whether the petitioner was a shareholder at all. With reference to the distinction between conditions precedent and collateral agreements, illustrated by the passage from Lord Cairns' opinion in *Elkington's* case,[2] cited by the respondent, it was held in *Simpson's* case,[3] on evidence very similar to the present, that the condition was precedent. *Pellatt's* case[4] was to the same effect. But it was to be observed that the distinction drawn by Lord Cairns had

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* The Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 23, enacts,—"The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company."

[1] Muir v. City of Glasgow Bank, April 7, 1879, 6 R. (H. L.) 21, L. R. 4 App. Ca. 337.

[2] Quoted *infra*, p. 24.

[3] *In re* Aldborough Hotel Co. (Simpson's case), Jan. 21, 1869, L. R. 4 Chan. App. 184.

[4] *In re* Richmond Hill Hotel Co. (Pellatt's case), April 13, 1867, L. R. 2 Chanc. App. 527. The Consolidated Copper Co. of Canada v. Peddie, Dec. 22, 1877, 5 R. 393, was also cited.

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reference to the conditions under which persons agreed to become shareholders—and not to the conditions of their registration in the register of members. Here, even if the petitioner had unconditionally allowed his name to go on the register, he had, as already stated, never agreed to become a member conditionally or otherwise; consequently Lord Cairns' *dictum* had no application.

Argued for the respondents;—The application for shares here was in the ordinary form, and was unconditional—and the letter of allotment was the same. The letter which accompanied the application, so far from qualifying that application, made it plain that the applicant intended to become a shareholder, for he spoke of signing transfers of the shares, which only a shareholder could do. There could be no doubt that the petitioner became a shareholder, and had his name put on the register with his own full intention and authority. If there was an agreement between him and the directors as to the purpose for which he took the shares, it was plain that that agreement was not intended to be suspensive of his becoming a shareholder. Consequently, the case fell within the first of the alternatives put by Lord Cairns in the following passage from *Elkington's*[1] case. "The real point for determination in this case may be said to be this: Did Messrs E. intend and agree to become shareholders *in presenti*, with a collateral agreement as to what should be the effect of their so becoming shareholders? or, on the other hand, did they agree that if and when a certain preliminary condition should be performed, and not otherwise, they would become members and shareholders?" The contention of the petitioner really came to this, that he held in trust for the company, but *Muir's* case had finally settled that a trust or any other qualification of shareholders' registration could not be recognised. The present was a case of an absolute contract with a collateral agreement.[2]

LORD PRESIDENT.—I think that this is quite a clear case. The petitioner, on 22d December 1886, applied for shares in this company in the usual way by letter of application, in which he expresses his agreement to accept one thousand shares, or any less number which the directors might allot to him, upon the terms of the accompanying prospectus, and he authorises the directors to place his name on the register of shareholders in respect of such shares. This was accordingly done in due and competent form, and the question comes to be whether there was any agreement apart from this letter of application and consequent registration of the petitioner's name which suspended the petitioner's liability and imported an agreement that his name was not to be put on the register until a condition precedent had been fulfilled. There certainly is no such agreement in this case. The letter of 22d December, which accompanied the letter of application, and which was founded on by Mr Lorimer as implying such a suspensive condition, I think plainly contemplates that the petitioner's name was to be put on the register, and was not to be removed from the register except in one way, and that is by the petitioner executing a transfer or transfers in favour of other persons. Now, no one can execute a transfer of shares except a shareholder, and therefore I think that this letter proves very clearly that what was to be done—was necessarily to be done—was to register the petitioner's name,

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[1] *In re* Richmond Hill Hotel Co. (Elkington's case), March 20, 1867, L. R. 2 Chanc. App. 511, per Lord Cairns, p. 522.

[2] *In re* General Provident Assurance Co. (Bridger's case), Dec. 21, 1869, L. R. 9 Eq. 74, Feb. 10, 1870, 5 Chanc. App. 305; *In re* Southport and West Lancashire Banking Co. (Fisher's case), Nov. 6, 1885, 31 Chanc. Div. 120.

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and to register it as that of a partner of this company. But no one can be registered as a partner of a company such as this with a qualified liability—no one can be registered as a partner without incurring the same liabilities as the other partners, and therefore even if we suppose that there was such an agreement as Mr Lorimer contended for, that the petitioner was only to become partner conditionally,—even if we suppose that the letter of 22d December bore that meaning expressly,—I do not think it would have aided the petitioner, for I think that such an agreement would have been plainly beyond the powers of the directors. But I do not think the letter can be read as implying any such agreement. I think the petitioner's meaning was just this,—"I do not intend to continue a partner after I can find other persons willing to take my shares, but I do intend to become a partner, and to do so with the view of being able to transfer my shares in regular and competent form to the other persons when I find them." That being so, I am of opinion that the petitioner is not entitled to have his name removed from the register, and accordingly I am for refusing the petition.

LORD MURE concurred.

LORD SHAND.—The question under the 23d section of the Companies Act, 1862, is this: Did the petitioner agree to become a member of the company? Now, I am of opinion that anyone who has applied for shares, and requested his name to be put on the register of shareholders, has agreed to become a member of the company. There is a class of cases where the applicant stipulates that registration is to take place only after some condition precedent has been fulfilled, and if in such a case the directors proceed to register the applicant's name at once, without waiting for the fulfilment of the condition, they exceed their mandate, and the Court will give redress. Here we have no such case. It is plain that this is a case in which the applicant requested that he should be registered as a shareholder at once, and unconditionally, for his intention, as stated in his letter, was to dispose of his shares after he was registered, and to transfer them to new shareholders; and so I think he is liable as a member. I also agree in your Lordship's observations as to the want of power of the directors of a company like this to register anyone as a shareholder with qualified liability.

LORD ADAM concurred.

THE COURT refused the petition.

P. MORISON, S.S.C.—THOMAS DALGLEISH, S.S.C.—Agents.

ANDREW RAMSAY, First Party.—*Asher*—*James Reid.*
WILLIAM SMITH RAMSAY, Second Party.—*Balfour*—*Strachan.*

No. 10.

Nov. 15, 1887.
Ramsay v. Ramsay.

Heir and Executor—*Incidence of burdens.*—Heritable property, burdened to the extent of £5000, was sold for £5100, the seller coming under an obligation to clear off incumbrances upon payment of the price. A few days after the purchase the purchaser died intestate. At the time of his death he had almost completed negotiations for a re-sale of the property, of which he had still to pay the price, and which was still burdened for £5000. In a special case between his heir and his executor, *held* (1) that it being incompetent to look at the circumstances as evidence of an intention on the part of the deceased to treat the subject purchased as moveable, it fell as heritable succession to the heir; and

No. 10. (2) that the price of £5100 fell to be paid by the executor without relief from the heir.

Nov. 15, 1887.
Ramsay v. Ramsay.
1st Division.
M.

On 19th July 1885 the subjects known as the Abbotshall Mills, near Kirkcaldy, were exposed to sale by public roup. By the articles of roup the purchasers were to have entry at 1st September 1885, the price being payable on or before that day, and the exposers bound themselves to clear the subjects of incumbrances. The subjects were then burdened with two bonds for £4000 and £1000 respectively.

Mr John Chalmers Ramsay, wine-merchant, Kirkcaldy, purchased the mills at the roup for the price of £5100.

Mr Ramsay died suddenly, intestate, on 6th August 1885. He was then negotiating, and had almost completed, a sale of the mills to David Yule, merchant, Kirkcaldy. At the date of his death the price of the mills had not been paid, nor was any conveyance thereof granted in his favour, and the bonds remained undischarged. Thereafter, on 18th September 1885, William Smith Ramsay, brother and heir-at-law of the deceased, sold the mills to Yule for £6000.

A question having arisen between W. S. Ramsay, as heir-at-law, and Andrew Ramsay, as executor-dative of the deceased, as to the liability for the price of £5100 agreed to be paid by the deceased for the mills, a special case was presented. The executor was the first party, and the heir the second.

The facts just narrated were stated in the case.

The second party contended that while the right to the subjects acquired by the deceased was heritable, and vested in the second party as heir-at-law, the price, which was not paid at the time of his death, formed a burden on his executry, and fell to be paid out of his moveable estate. The first party, on the other hand, maintained that the subjects having been burdened at the time of the sale with heritable debts amounting to £5000, the second party, as heir-at-law of the deceased, was only entitled to the subjects under burden of these bonds, which he himself must discharge, and was not entitled to have any part of the price paid out of the executry.

The question put was:—"Whether the executry estate of the said John Chalmers Ramsay is liable for the foresaid sum of £5100, agreed to be paid by him as the price of the said subjects, without relief from the second party? or, Whether the second party, as the heir-at-law of the said John Chalmers Ramsay, takes the said subjects under burden of the heritable debts thereon, and is not entitled to have the price or any part thereof paid out of the executry?"

Argued for the first party;—It was competent to look at the circumstances in order to determine whether the deceased intended property *de facto* heritable to be regarded as moveable,[1] and the whole circumstances here left no doubt that that was Mr Ramsay's intention. In any case, the heir could take the heritable property only under burden of the debts existing over it at Mr Ramsay's death. The obligation to purge of incumbrances was a personal obligation in favour of the deceased, which vested in his executor.

The second party was not called on.

Lord President.—This is a hard case no doubt, but I am afraid that there is nothing more to be said for the executor beyond what Mr Reid has urged, and that has failed to convince me that the executor is entitled to any relief.

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[1] Macnicol v. Macnicol, June 16, 1814, F. C.; Ross v. Clayton, Nov. 12, 1824, 3 S. 271, aff. March 3, 1826, 2 W. & S. 40.

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The deceased was not debtor in any debt binding his heritable estate. He was personally liable in payment of the price of certain heritable property, and that is a debt which transmits against his executor. The heritable estate, the price of which the deceased was personally bound to pay, was burdened with two bonds, which the sellers were under obligation to discharge on receipt of the price, so that what the purchaser—the deceased—was to get was an unencumbered estate, and what he was to give in exchange was a sum of £5100 in cash, and in these circumstances it is impossible to say that there is any heritable debt of which the heir is bound to relieve the executor. The case of *Macnicol*, which was referred to by Mr Reid, is, I think, almost conclusive against his contention, if, indeed, there is any room for doubt as to the general principle of law, and the other case cited by Mr Reid,—the case of *Ross* v. *Clayton*,—is an illustration of the same principle. It is very fully reported in the Faculty Collection, though meagrely in Shaw, but the result is that the deceased, the purchaser, took over a bond on the estate which he had bought, which, according to the ordinary rule of law, transmitted against his heir without relief against the executor. That is exactly the converse of the present case. I think your Lordships should answer the first branch of the question put in the case in the affirmative.

LORD MURE concurred.

LORD SHAND.—I agree, and do not indeed think the question doubtful. The deceased had before his death stipulated that he should get an heritable estate unencumbered with debt. On the other hand, he was under obligation to pay a sum of £5100 as the price of the unencumbered heritable estate, and that money must be paid by the executors. It is quite true that all might have been changed had the deceased lived a week longer and completed the sale of the property which he was in process of carrying out at his death; but I do not think that we are entitled to look at such intentions on the part of one who has died intestate, although, had they been carried into effect, the character of his succession would have been materially changed. I think the Court can look only at the condition of the estate of the deceased as it was at the time of his death.

LORD ADAM.—I think we must here be guided by the rules of intestate succession only, and to look at the supposed intention of the deceased would just be to make a will for him when he has himself made none.

THE COURT pronounced the following interlocutor:—"Find and declare in terms of the first question in the case that the executry estate of the deceased John Chalmers Ramsay is liable for the sum of £5100, agreed to be paid by him as the price of the Abbotshall Mills, without relief from the second party."

WADDELL & M'INTOSH, W.S.—DAVID HUNTER, S.S.C.—Agents.

No. 11.

Nov. 15, 1887.
Scott v. Gray.

HERCULES SCOTT AND ANOTHER, Pursuers (Respondents).—
D.-F. Mackintosh—H. Johnston.
WILLIAM GRAY AND OTHERS, Defenders (Appellants).—
Sir Charles Pearson—Murray.

Property—Fishing—Waste or uncultivated land beyond high-water mark—Act 11 *Geo. III. cap.* 31, *sec.* 11.—The Act 11 Geo. III. cap. 31, sec. 11, gives

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persons employed in the British white and herring fisheries the right to use all shores and forelands in Great Britain "below the highest high-water mark, and for the space of 100 yards on any waste or uncultivated land beyond such mark, within the land, for landing their nets, casks, and other materials, utensils, and stores, and for erecting tents, huts, and stages, and for landing, pickling, curing, and reloading their fish, and in drying their nets, without paying any foreland or other dues."

Prior to 1868 a piece of ground about four acres in extent, lying between a high road and the sea, and within 100 yards above the highest high-water mark, was in a waste and uncultivated condition. In that year the proprietor, at some expense, had it levelled, top-dressed with earth, and sown out with grass seeds, the result being that in place of a piece of beach with very rough accommodation for nets, a piece of fairly good pasture and of good net ground was provided. Both prior to and after 1868 fishermen made use of it for drying their nets, &c., paying a small rent to the tenant of the farm to which the ground belonged. In 1886 they claimed right to make use of it, under the above statute, without payment of rent. In an action by the proprietor and his tenant to have the fishermen interdicted from so using the ground, *held* that the ground was not waste or uncultivated. Interdict *granted* accordingly.

2D DIVISION.
Sheriff of Aberdeen, Kincardine, and Banff.
I.

IN August 1886 Hercules Scott, of Brotherton, and David Legg, tenant of the farm of Whitehouse, part of the estate of Brotherton, brought an action in the Sheriff Court at Aberdeen against William Gray and two other fishermen, residing at Gourdon, praying to have the defenders interdicted from "entering on the ground on the farm of Whitehouse, lying between a road leading from Gourdon to Johnshaven on the one side, and the sea-shore on the other, and from laying down or drying herring-nets or other fishing material thereon, or on any part thereof, or in any other way interfering with or disturbing the pursuers in the possession of the same."

In defence the defenders, founding on the Act 11 Geo. III. cap. 31, sec. 11,* averred that the ground in question was waste or uncultivated ground in the sense of the Act (which the pursuers denied), and pleaded, *inter alia*;—(3) The ground in question being waste or uncultivated, and on the sea-coast within the limits prescribed by the statute founded on, the defenders are entitled, in the exercise of their trade, to the free use and possession thereof, for the special purposes authorised by the statutes.

A proof was allowed. The following excerpt from the note of the Sheriff-substitute (Dove Wilson) sufficiently shews the result of the evidence:—"The piece of ground in dispute lies between a road and the sea. Its extent is about 4 acres. It is not, and never has been, enclosed; and on the side next to the sea it is plain that it could not be enclosed, except at great expense. The ground consists of shingle and rock, and prior to 1868 it was properly designated as beach, and it undoubtedly then lay waste. Its surface was then partly bare and partly covered with rough grass and thorns. It was uneven; partly from natural inequalities, and partly because it had been used as a place for depositing stones from the adjacent lands. The situation of the ground is immediately above high-water mark, and within 100 yards of it. High waves occasionally wash over it, or parts of it, in storms; but this does not make it foreshore. The highest place where the water has left any mark is the steep bank of shingle spoken to by the witnesses, and the bare strip, 3 or 5 yards wide, along the top of it. . . . In 1869 and 1870 it was improved. It was levelled, the thorns removed, the bare parts covered or top-dressed with a coat of earth of an inch or two in thickness, and it was then sown out with grass seeds. This work was done at an outlay to the proprietor of between £14 and £15, the tenant performing the cartages. No estimate of the value of the latter was or probably could be given; but they must have borne a fair proportion to the rest. Assuming that the whole expenditure was from £20 to £30, this makes an expenditure per acre of from about £5 to about £7. The result has been that in place of a piece of beach with very rough pasture and only partial accommodation for nets a piece of fairly good pasture and of good net ground has been provided. The object was to improve the ground for both purposes, and it may be doubted whether, if it had not been for the sake of increasing the rents for nets, the improvement would have been undertaken. The improvements alleged to have been made by the fishermen apparently did not amount to much. When spreading their nets they seem to have thrown aside stones brought up by the sea, to have occasionally filled up holes, and occasionally cut away thorns. The principal use of the lands hitherto has been for spreading nets, and the statute now founded on by the defenders having apparently been forgotten, the fishermen appear to have made annual payments for the privilege, both before and after the improvements; and these payments being made to the adjacent tenant, who did the carting, also covered anything that could be claimed either for it or for the ground." It was in consequence of the defenders claiming the right to use the ground without payment that the present proceedings were brought.

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* The Act 11 Geo. III. cap. 31 ("For the encouragement of the White Herring Fishery"), sec. 11, enacts,—"That all and every person or persons employed in the said fisheries may fish in any part of the British seas, and shall have and exercise the free use of all ports, harbours, shores, and forelands in Great Britain, or the islands belonging to the Crown of Great Britain, below the highest high-water mark, and for the space of 100 yards on any waste or uncultivated land beyond such mark, within the land, for landing their nets, casks, and other materials, utensils, and stores, and for erecting tents, huts, and stages, and for the landing, pickling, curing, and reloading their fish, and in drying their nets, without paying any foreland or other dues, or any other sum or sums of money or other consideration whatsoever for such liberty (except as hereinafter excepted), any law, statute, or custom to the contrary notwithstanding."

On 21st February 1887, the Sheriff-substitute (Dove Wilson) pronounced this interlocutor:—"Finds that the pursuers have failed to prove that the defenders have exceeded the rights conferred upon them by the Statute 11th Geo. III. c. 31, sec. 11, and therefore assoilzies the defenders from the conclusions of the petition: Finds the defenders entitled to expenses," &c.*

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* "NOTE.—This seems to me a very difficult case, and I should not be surprised if differences of opinion were entertained as to it." (The Sheriff-substitute then gave the substance of the proof as above quoted.) "There is room for a great deal of argument as to whether the ground in dispute comes under the definition of 'waste or uncultivated land.' If it had been land enclosed by a permanent fence it might have been brought under the category of permanent pasture, and thus have been considered to be neither waste nor uncultivated. But it is not enclosed, and, as already pointed out, apparently could not be enclosed, except at great expense, on the sea side. It is not waste land, as it apparently has some annual value; but if it is not 'uncultivated land' within the meaning of the statute, I am at a loss to see what land there is which the statute could have meant to include. If any trace of the exercise of human skill upon land is to be held as taking it out of the category of 'uncultivated,' of course this land is cultivated, because something has been done to it. This, however, is a very strict view, and it does not preclude the possibility of the view that, in the ordinary use of language, this is what would be called 'uncultivated land.' The Legislature must have been thinking of the division of land

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On appeal, the Sheriff (Guthrie Smith) recalled this interlocutor; found that the defenders had failed to prove that the ground to which access was claimed was waste or uncultivated land within the meaning of the Act of Parliament; repelled the defences, and granted interdict as craved; found the defenders liable in expenses, &c.*

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into cultivated and uncultivated, and it is necessary to see what it meant to include in the latter description. I have consulted a large number of dictionaries, but I have found no better definition of the word 'cultivate' than that contained in the original edition of Johnson, viz., 'to forward or improve the product of the earth by manual industry.' This at once excludes from view all that has been done to the land simply to improve it as a net ground, and to do this seems reasonable under the statute. If the fishermen have a right to use the ground in a state of nature for net ground, the Legislature cannot have meant that they were to be obliged to pay rent for it simply because the proprietor made it better for their purposes than they asked it to be made. It is only the industry which has gone to improve or forward the product of the earth—in this case the pasture—which can be taken into account. This view probably throws out of consideration the bulk of the improvement which was done, as but for the chance of drawing rents for the nets the ground would probably not have been worth the touching. Then as to the agricultural improvement, if a little top-dressing with earth and the sowing of some seeds is enough to take away the statutory right, it can be taken away wherever it is valuable. This consideration would be immaterial if it appeared that such a treatment of the land could be called cultivation in the ordinary sense of the word. I do not think it can be so called. It is only land still in its natural condition, though somewhat improved. Of cultivation in the ordinary sense the land indeed seems incapable, and it does not occur to me that anyone desirous of describing this piece of ground, apart from any ulterior motives, would think of describing it as a piece of cultivated land adjoining the sea-shore. It seems to me that, while he would naturally speak of the farms on the other side of the road as being cultivated land, he would speak of this as a bit of still uncultivated land between them and the sea. Whatever a more persevering system of improvement may have been able to do with the adjacent lands, the mere skin of soil which overlies the shingle seems as yet uncultivated, and incapable of anything that could be called tillage. If it can be cultivated, in the ordinary sense of the word, the pursuers are at liberty to do so, and the statutory rights of the defenders to its use would at once end."

* "NOTE.—The ground in question lies between the sea-beach and the road leading from Gourdon to Johnshaven. Beyond doubt it is part of the pursuer's estate, and without his consent no one is entitled at common law to enter upon it for any purpose whatever. The question whether the defenders, being fishermen, are entitled to use it during the herring fishing for the purposes of spreading and drying their nets turns on the construction of the Act 11th George III. cap. 31, sec. 11. The Sheriff-substitute has thrown on the pursuer the burden of proving the negative. In my opinion there is no *onus* on the pursuer at all. The field—if it may be so called—is embraced in his title, and, having established this much, it is not for him, but for the defenders, who are claimants *in solo alieno*, to make out their case. The Act on which they found applies to 'waste or uncultivated land' within a certain distance of the sea. We all know what these words mean in popular speech. All along the sea-coast there are great stretches of rocky, shingly, barren land, void and worthless, but excellent for the spreading and drying of nets; and it is enacted that wherever this may be found the fishermen may take it for net ground without asking anybody's leave. It is assumed that no one will object, or rather that no one will have any interest to object, for it is supposed to be lying unoccupied and valueless in its natural state. But when, by a little expenditure, the proprietor has been able to reclaim it to the extent at least of making it worth something for agricultural purposes, it was never contemplated that it should remain subject to those uses which the Act sanctions for the benefit of the

The defenders appealed.[1]

At advising,—

LORD YOUNG.—The issue which this case presents is one of pure fact, without any law in it at all, that question of fact being whether the piece of ground referred to is or is not waste or uncultivated. If it is, then the pursuer must fail; if it is not, then I think he must succeed.

Upon this question of fact the Sheriffs have differed in opinion, the Sheriff-substitute, however, stating at the outset of his judgment—which is a thoughtful and carefully considered judgment, as all his judgments are—that it seemed to him a very difficult case, and that he should not be surprised if difference of opinion were entertained regarding it.

The case really involves this question, what departure from being waste and uncultivated will make ground cease to be properly so described? It seems that some years ago upon this piece of ground some money was expended—although not very much—and it has thereby been converted into what the Sheriff-substitute describes in his note as a piece of fairly good pasture and good net ground. Now, with great deference to the Sheriff-substitute, I do not think that such language,—which, with him, I think applicable to the case in hand,—is consistent with the ground being waste and uncultivated. It has been cultivated, though not at a very large expense, still money has been expended on it, with the result of making it a piece of fairly good pasture and good net ground. That being its condition, it has been let by the landlord to the tenant of the farm of which it is part, and he partly pastures it and still more extensively gets the benefit of it by taking a rent from the fishermen who use it as a good net ground. Well, if we refuse the term "waste or uncultivated" to this piece of ground, the legal conclusion is certain that the pursuer must succeed. That being my view on the question of fact, agreeing therein with the Sheriff-principal, I think his judgment is right, and ought to be affirmed.

LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK.—I do not wish to dissent from the judgment to which your Lordships have come. My impression originally was—and I must confess to a certain extent still is—towards the opposite conclusion, but the line of demarcation is slender, and, as I have said, I do not wish to say anything fur-

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fishermen when it was in a state of nature. The operations carried out by the pursuer consisted in first filling up the holes, levelling down the hummocks, and spreading any soil which they contained on the surface. This occupied the witness Caird and three assistants six or seven weeks. Some carts of soil were then strewn on the levelled ground wherever it was required, and the whole sown over with grass seeds. These grew abundantly, and there is now a good sole of grass upon it, worth, according to the skilled witnesses, 10s. or 12s. an acre. In my opinion ground which has been treated in this manner is properly called pasture, and not waste. I attach no importance to the fact that it is still unenclosed, for it lies along the sea-beach, and it is not necessary to fence against the sea; nor that it has no depth of soil sufficient to bear the plough, for when grass is the crop to be cultivated, no ploughing is required. In my opinion all the evidence tends to shew that the field in question has, by the judicious operations of the pursuer, ceased to be of the description mentioned in the Act of Parliament, and that in a question with the public he is entitled to be protected in this property."

[1] Hoyle v. M'Cunn, Dec. 10, 1858, 21 D. 96, 31 Scot. Jur. 63; Stephen v. Aiton, Feb. 27, 1875, 2 R. 470.

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ther in the way of dissent. I am content that judgment should be as your Lordships propose.

LORD CRAIGHILL was absent on Circuit.

THE COURT pronounced this interlocutor:—" Find that the ground to which access is claimed by the defender is not waste or uncultivated; therefore dismiss the appeal; affirm the judgment of the Sheriff appealed against: Find the pursuer entitled to expenses in this Court," &c.

COWAN & DALMAHOY, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 12.

Nov. 15, 1887.
Shaw's Trustee v. Stewart & Bisset.

JAMES LAMOND (Shaw's Trustee), Pursuer (Respondent).—*M'Kechnie—Craigie.*

STEWART & BISSET, Defenders (Appellants).—*D.-F. Mackintosh—Law.*

Cessio—Bankruptcy—Cash payment by insolvent debtor—Effect of cessio.—A petition was presented in the Sheriff Court to ordain A, a farmer, to grant a disposition *omnium bonorum* under the Cessio Acts. On 28th September, the Sheriff, on the narrative that he was satisfied that there was *prima facie* evidence of A's notour bankruptcy, ordained him to lodge a state of his affairs by 6th October. On 30th September, A granted a trust-deed for behoof of his creditors. He did not lodge the state required by the deliverance, but on 7th October he sold part of his stock, and paid the proceeds to a firm of merchants in payment of an account due by him to them. The merchants were at the date at which the payment was made aware of A's insolvency, that the petition for cessio had been presented, and the first order pronounced thereon. In a question between the trustee and the firm of merchants *held* that the trustee was entitled to repetition of the amount paid to them in respect of their debt.

2D DIVISION.
Sheriff of Perth.
I.

ON 15th September 1886, David Shaw, farmer, Mid-Derry, in the parish of Glenisla, was charged on an extract registered protest, recorded in the Sheriff Court Books of Forfarshire, at the instance of James Matthewson of Little Kilry, for payment of a bill for £155, 1s. 2d., with interest. Shaw failed to implement the charge, which expired on 21st September 1886; he having been previously insolvent, thereupon became notour bankrupt.

A petition, at the instance of Mr Matthewson, was forthwith presented to the Sheriff of Forfarshire at Forfar to compel Shaw to grant a disposition *omnium bonorum* under the Cessio Acts, and on 28th September an interlocutor was pronounced by the Sheriff, on the narrative that he was "satisfied from the productions that there is *prima facie* evidence of the notour bankruptcy of David Shaw," *inter alia*, ordaining Shaw to lodge with the clerk a state of his affairs by 6th October, and appointing him to appear for examination on 12th October. The petition and this deliverance were forthwith served on Shaw, and were advertised in the *Edinburgh Gazette* of 1st October.

On 30th September Shaw executed a trust-disposition of all his estates in favour of James Lamond, Alyth, for behoof of his creditors.

Shaw did not lodge a state of his affairs on 6th October as required by the deliverance of 28th September. On 7th October Shaw sold the stock and implements on his farm to certain persons, and on the same day he paid to Messrs Stewart & Bisset, merchants, Blairgowrie, the sum of £101, 9s. 11d., in payment of an account alleged to be due by him to them.

On 10th December 1886 Mr Lamond, Shaw's trustee, raised an action in the Sheriff Court at Perth against Messrs Stewart & Bisset, concluding for repetition of the sum of £101, 9s. 11d. above mentioned.

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Lamond averred;—(Cond. 4) "The said David Shaw fraudulently, on or about the 7th day of October last, removed from the said farm of Mid-Derry the live stock thereon, together with the implements of husbandry, and by a fraudulent device or arrangement he, of the said date, sold or pretended to sell the said stock and implements to certain parties, who were conjunct and confident with him, for a fraudulent purpose, and not in the ordinary course of business or in the open market, and said bankrupt uplifted the proceeds of these goods. The said proceedings on the part of David Shaw were well known to the defenders, and indeed it was by their advice and at their instigation that David Shaw acted as he did." (Cond. 5) "The said David Shaw also entered into a fraudulent and collusive arrangement with the defenders, by which, on or about the said 7th day of October last, he paid to the defenders the sum of £101, 9s. 11d., which was intended fraudulently and collusively to pay an alleged account said to be due by the said David Shaw to the defenders, but which account was not legally due and resting owing by the bankrupt to the defenders at the said 7th day of October 1886."

The defenders denied these averments.

The pursuer pleaded, *inter alia*;—(1) The payment of the foresaid sum of £101, 9s. 11d. to the defender having been fraudulent and collusive, the pursuer, as trustee for the creditors, is entitled to demand repetition thereof; *et separatim*, the said £101, 9s. 11d. not being legally resting owing to the defenders at the time, the same falls to be repaid. (2) The defenders being in the knowledge of the insolvency of Shaw, were barred by personal exception from taking payment of the foresaid money, and they are *in mala fide* and are bound to repeat. (4) The said payment by the bankrupt to the defenders was not in the ordinary course of business, but was made subsequent to the public insolvency of Shaw, which was within the knowledge of the defenders, and was therefore fraudulent and illegal under the Act 1696, c. 5, the Act 1621, c. 18, the Cessio Acts, and at common law, and repetition falls to be made.

The defenders pleaded;—(1) The payment referred to having been made in ordinary course of business, and in discharge of a *bona fide* debt due by Shaw to defenders, the action should be dismissed. (2) The averments of collusion and fraud on the part of defenders being entirely unfounded in fact, the defenders should be assoilzied.

Proof was led in the cause. A considerable part of the evidence was directed to the question whether the alleged debt was really due by Shaw to the defenders. The Sheriff-substitute (Graham) held that it was, but the Sheriff (Gloag), on appeal, held that it was not. In the Court of Session the judgment proceeded on the assumption that the debt was due.

It was proved that the defenders were aware that Shaw was insolvent at the date at which the payment of which repetition was sought was made, and that an application for cessio had been made. It was, in the opinion of the Court of Session, also proved that they were aware of the granting of the first deliverance in the cessio process.

On 29th March 1887 the Sheriff-substitute assoilzied the defenders, on the ground that it was not proved that the payment in question was made fraudulently or in collusion with the defenders, and that the pursuer could not claim repetition either under the statutes founded on by him or at common law.

The pursuer appealed to the Sheriff, who, on 8th June, pronounced an interlocutor containing these findings:—"(1) That David Shaw, sometime farmer at Strone, thereafter at Mid-Derry, became notour bankrupt on or about 21st September 1886, in respect of his insolvency concurring

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with an expired charge for payment of a bill due to his landlord, Mr James Mathewson: (2) That in a petition for decree of cessio, presented in the Sheriff Court at Forfar by the said James Mathewson against the said David Shaw, an interlocutor was pronounced, dated 28th September 1886, whereby, *inter alia*, the said David Shaw was ordered to lodge a state of his affairs in the hands of the Clerk of Court on 6th October 1886, which order he failed to obey: (3) That on 7th October 1886 the said David Shaw sold a large part of the stock on his farm, and on the same day paid the defenders out of the proceeds of said sale the sum of £101, 9s. 11d., being the amount of an account alleged to be due to the defenders by the said David Shaw: (4) That when said payment was made the defenders were aware that said petition for cessio had been presented some days previously, and that the money paid to them, or great part thereof, was part of the proceeds of said sale: (5) That when said payment was made the said David Shaw was hopelessly insolvent, and was known by the defenders to be so: (6) That it is not proved that the said sum of £101, 9s. 11d. was due by Shaw to the defenders: Finds in law—(1) That the said sale by the said David Shaw was illegal, and in fraud of his creditors: (2) That the defenders, having been in knowledge thereof, were not entitled to take advantage thereof by accepting payment of the proceeds of said sale: (3) That the payment to the defenders was illegal, and in fraud of the creditors of the said David Shaw, and constituted an illegal preference in favour of the defenders: Therefore finds the pursuer, trustee appointed in said process of cessio, entitled to payment from the defenders of the said sum of £101, 9s. 11d. so paid to them." *

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* "NOTE.—I have found this to be an exceedingly difficult case, and am conscious that the above interlocutor may be open to a good deal of question. But I think the case very important, and have formed the opinion that it may be distinguished from the cases on which the judgment of the Sheriff-substitute is rested, and that the pursuer is entitled to decreet. The main facts are these:—Some time ago David Shaw sold the potatoes on his farm of Strone to the defenders, and agreed to deliver the potatoes; the defenders paid him £100 in advance, the bargain apparently being that if the just price should prove more there should be an additional payment, if less, a repayment. The potatoes were never delivered. The market price fell so much that they were sold at a farina mill, and the price, £28, was paid to the defenders. The defenders also supplied Shaw with manure, and in October 1886 they had an account against him amounting to £101, 9s. 11d., one item being this £100, which the defenders seem to have thought themselves entitled to state as a debt against Shaw, on the ground that the transaction had not been completed. Shaw's affairs became hopelessly embarrassed, and after some negotiations his landlord presented a petition of cessio against him, in which the statutory first interlocutor was pronounced on 28th September, which, in compliance with the provisions of the 9th section of the Debtors Act, 1880, 43 and 44 Vict. c. 34, appointed publication, and ordained the debtor to appear for examination on 12th October, and to lodge in Court a state of his affairs six days before that. Shaw did not lodge the state of affairs on that date, but, in violation of the order of the Court, he on 7th October sold a large part of the stock on the farm, and with the price he on the same day paid the defenders their account. The pursuer has stated no objection to any item of this account, except the £100, which cannot, it is maintained, be stated as a debt against Shaw. I have formed the opinion that the defenders, or at least (which comes to the same thing) Mr Stewart, knew that Shaw was hopelessly insolvent when this payment was made. On this point I differ to some extent from the Sheriff-substitute, but I can hardly say more on the subject than that such is the decided impression which the evidence has made on me. There is no doubt

The defenders appealed to the Court of Session.

Argued for the appellants ;—The case was ruled by the cases of *Thomas*

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that Stewart knew of the cessio and of the sale of Shaw's stock, and knew that he was paid out of the proceeds of that sale. I am inclined to think that Mr Stewart was more closely concerned with this sale, and I suspect he suggested it. But that is not quite clear, and I do not assume it. Now, these are the circumstances in which the trustee in Shaw's cessio seeks to recover this sum of £101, 9s. 11d. paid to the defenders, and his action is based on the Act 1696, c. 5, and subsequent Bankruptcy Statutes, and also on common law. He is trying to set aside a preference, and to put the defenders on a footing of equality with the other creditors. It is one of his primary duties as trustee to do so, if the preference is illegal. The preference, however, although undoubted, has been accomplished by a payment in cash, and I think it settled that the Act 1695 is not directed against cash payments of debts which are due. It must further, I think, be admitted that (apart from the Bankruptcy Statutes) a creditor may lawfully take payment of his debt whenever he can get it, whether his debtor be insolvent or no, without any regard to the consequences to other creditors. That, I think, was decided in the case of *Coutts' Trustee* v. *Webster*, 13 R. 1112, quoted by the Sheriff-substitute. Still further, a creditor does not need to inquire where the money with which he is paid has come from ; but that rule, I think, is subject to this qualification, that he may not be able to take advantage of a fraud or illegality of which he is aware, and he may not by taking payment aid the bankrupt in effectuating his fraud. In the case of *Nicol* v. *M'Intyre*, 13th July 1882, 9 R. 1097, the general rule is forcibly expressed by Lord Young, who says 'that it makes no difference that the debtor may have stolen the cash.' But I think that that remark must have been made on the assumption that the creditor was not aware of the theft, otherwise his acceptance of the stolen money would be very like reset of theft. The rule that a payment by an insolvent in cash cannot be challenged, however general, has never been stated as universal or absolute, and the question is whether there may not be in this special case an exception to that rule. In the first place, I think that the sale by Shaw of his stock was illegal, and in fraud of his creditors. Shaw himself seems to have thought his conduct not only illegal but criminal, for he has absconded. The illegality did not arise from any particular duty or obligation which Shaw owed to his landlord, for, as the landlord had no right of hypothec, it may be doubted whether Shaw was under any special obligation to him as such, but I think the illegality arose simply from the fact that Shaw was under a judicial order to lodge in Court a state of his affairs. It seems impossible to hold that a debtor, ordered to lodge a state of his affairs, could lawfully dispose of his effects, pay his creditors, and then lodge a state totally different from the state of his affairs at the date of the interlocutor. That would not be in compliance with the interlocutor. If Shaw had himself presented a petition for cessio, it would have stated his readiness to surrender his affairs, and would have been accompanied by a list of his creditors, which list must have included the defenders ; and it seems clear that he could not after that have disposed of his effects or paid his creditors. I think that the statutory order to lodge a state of affairs pronounced in a petition by a creditor put Shaw in exactly the same position as if the petition had been presented by himself (43 and 44 Vict. c. 34, sec. 9). I cannot doubt that after such an interlocutor the Court would, on cause shewn, have interdicted the sale of Shaw's property, or have proceeded under section 12 of the Act 43 and 44 Vict. c. 34, and granted warrant to take possession of the debtor's money and moveables. The very power to do this seems to involve the illegality of the disposal by the debtor of his effects ; and to shew that the statute regards the debtor as disabled from dealing with his estate after he has been ordered to lodge a state of his affairs. It is true that there is no provision in the Cessio Acts corresponding to section 111 of the Bankruptcy Act, 1856, declaring payments by bankrupts after sequestration null, but protecting *bona fide* purchasers and debtors ; and it is also true that a debtor is not divested of his estate until he has granted, or has been ordered

v. *Thomson*[1] and *Coutts' Trustee and Doe* v. *Webster*,[2] in which it was settled that fraud was not to be inferred from the mere fact that at the time a cash payment was made the debtor was insolvent, and that the creditor knew it. The sale of the stock was valid and effectual. The first deliverance in the cessio did not prevent Shaw from being in a position to give the buyer a good title. That that deliverance had been made was the only distinction between this and *Coutts'* case. The payment would have been good to a creditor who was ignorant of the cessio though aware of the insolvency, and the fact of knowledge of the cessio could not lead a creditor to draw any worse conclusion than the knowledge of insolvency would. *Thomas'* case was very strong, as there both parties knew that the payment made constituted the whole of the debtor's estate. The common law came to this, that a debtor cannot hand over his estate in payment of his debt, but he can sell it and hand over the proceeds. The Court would not inquire as to the history of the money handed over. The Cessio Act, 1880, did not forbid such an action—it was not a statutory crime. There was nothing in that Act answering to the provisions of sec. 111 of the Bankruptcy Act, 1856, which annulled all purchases except in the case of *bona fide* purchasers who were in ignorance of the sequestration. If sec. 13 of the Act of 1880 was to be construed as proposed by the respondents, no tradesman against whom a cessio was brought could sell an article out of his shop, and cessios were often sued against perfectly solvent debtors.

Argued for the respondents;—This was a crime under sec. 13, subsec. B (5) of the Act of 1880,[*] and as the defenders had aided and abetted in

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to grant, a disposition *omnium bonorum*. But I think that the order to produce a state of affairs contained in the statutory first interlocutor, read along with the provisions in section 12, produces practically the same effect, and is practically an interdict against disposal by the debtor of his estate. I hold therefore that the sale by Shaw was in direct violation of the order of the Court. It has next to be considered how that illegal character of this sale affects the payment to the defenders. The defender Stewart knew of the cessio, and although it is not expressly proved that he knew that Shaw had been ordered to lodge a state of affairs, yet I hold that such knowledge must be imputed to him, because that order followed necessarily on the presentation of a petition for cessio, if the Sheriff was satisfied that there was *prima facie* evidence of notour bankruptcy. I think that certainly he was put on his inquiry as to this point, and must be dealt with as if he knew that that order had been pronounced. Holding that order to imply a prohibition of such a sale, the question comes to be—Can the defenders take advantage of Shaw's violation of that judicial order, and receive payment of the proceeds of that sale? I have come to be of opinion that they cannot, and that by taking payment they actively aided Shaw in carrying out and completing the violation of the order of the Court with which he was chargeable. Indeed the payment to the defenders is just as much a violation of the order of Court to lodge a state of affairs as the sale of the stock was, and in that latter act the defenders were of course directly participant. The case seems much the same as if the money had been arrested funds, and as if the defenders had accepted payment of them in knowledge of the arrestment. The fact that the sale by Shaw was in violation of the order of the Court, and that the defenders knew of it, distinguishes this case from *Coutts' Trustee* v. *Webster*. On these grounds I hold that this payment falls to be disallowed as an illegal preference, effected by Shaw illegally and in fraud of his creditors, and in collusion with the defenders. . . ."

[1] Thomas v. Thomson, Jan. 13, 1865, 3 Macph. 358, 37 Scot. Jur. 166.

[2] Coutts' Trustee and Doe v. Webster, July 8, 1886, 13 R. 1112.

[*] Sec. 13 provides that the debtor in a sequestration or cessio shall be guilty of a crime and offence, subsec. B (5), if being insolvent, and with intent to

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its committal they could not benefit by it. The first deliverance of the Court in the cessio interdicted the sale of the stock. The order to produce a state of affairs practically amounted to that. The proceedings in a cessio were for the distribution of the estate, and after the date of the first deliverance were for the behoof of all creditors. This distribution removed the case from the authority of *Thomas'* and *Coutts'* cases.

At advising,—

Lord Justice-Clerk.—This case raises an important question in bankruptcy. It is a demand made by a trustee on a bankrupt estate against a creditor thereon for repetition of a sum said to have been paid to him by his debtor, the bankrupt. It is not, I think, necessary now to go into the question whether the debt was really due or not, though a good deal turns on that. The main question is whether the demand made is in the same position as the demands in the cases of *Thomas* and *Coutts*. In these cases a very important principle was laid down, and I entirely adhere to what I said in my opinion in the latter. The principle there laid down is that though a debtor is insolvent, and his creditor is aware that he is, the creditor may receive payment from his debtor in cash in the ordinary course of business; in other words, a debtor is not ousted from the management of his own estate by the mere fact that he is insolvent, and a creditor is entitled to receive payment of a debt from him, however the money paid to him has been acquired.

I am of opinion, however, that this case turns upon an entirely different principle, and to establish that, we must look at the exact circumstances of the case. The debtor Shaw, being in debt to his landlord, granted him a bill which was dishonoured. The landlord then made an application, which as is usual in such cases bore no date, for cessio under the Cessio Act of 1880. The first deliverance in the petition is dated 28th September 1886, and is in terms of the Act. It bears that the Sheriff "being satisfied from the productions that there is *prima facie* evidence of the notour bankruptcy of David Shaw," requires a copy of the deliverance to be served on the debtor, and the pursuer to publish notice of the petition in the *Gazette*. He further requires the debtor to appear in the Sheriff Court House, on 12th October, for public examination, and, on or before the 6th October, to lodge a state of his affairs in the hands of the Clerk of Court. That deliverance I presume appeared in the *Gazette*. The debtor did not in terms of this deliverance lodge a state of his affairs on the 6th, but on the 7th he entered into communings with certain persons with a view to disposing of his stock. In point of fact he did sell a large portion of the stock, to the extent of over £100. Having received that sum of money, he proceeded to pay it over to the creditor in question. The question here is, was he entitled to do so? I am clearly of opinion that he was not. I should have thought that the question should have been so answered even had the deliverance not expressly ordained the debtor to lodge a state of his affairs on the 6th, but I think it is too clear for dispute that when that day had passed the debtor was not entitled to deal with any part of the estate which should have been entered in the state of affairs. I am therefore of opinion that when the debtor sold his stock, he was acting contrary to the Act. I think it would have been sufficient for the decision of the case if the matter had become litigious, even though the period

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defraud his creditors, or any of them, he makes or causes to be made any gift, delivery, or transfer of, or any charge on or affecting his property.

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for lodging a state of affairs had not passed, for the cessio was a process for distribution, and the creditor was not entitled to do anything to frustrate that object. The matter was *sub judice*, and the Sheriff had power to appoint a person to manage the property if he saw fit. That is enough, I think, for the decision of the case. It might have been different if the creditor had been unaware of the cessio proceedings, but he was perfectly aware of them. He says so himself. He admits that before he obtained payment of his debt he was aware of the application for cessio, and I believe he was aware of the first deliverance. That takes the case out of the authority of *Thomas* and *Coutts*, and therefore, without in any way impugning the doctrine of these cases, I think the Sheriff's judgment should be adhered to.

LORD YOUNG.—I think with your Lordship and the Sheriff that the defenders cannot retain this money, but should be ordered to pay it to the pursuer, who is the trustee in the cessio. At the same time, I cannot say that I am prepared to assent to all the findings in the Sheriff's interlocutor. One finding is, that it is not proved that the debt is due. The decision of that question is perhaps in one view not necessary to the decision of the case, but I decide the case on the assumption that the debt is due. In point of fact, I am inclined to think that that is the case. Another finding to which I am not inclined to assent is the finding that the sale of the stock on 7th October was illegal, *i.e.*, illegal in the sense in which I apprehend the Sheriff used the word, viz., that the seller could not give a good title to the buyer. If a man sells goods and gives a good title to the buyer, the sale cannot be called illegal. I think it would require a revision of the Cessio Act, 1880, to make the sale of any part of the respondent's property illegal after the presentment of the petition and the first deliverance. If every such sale was illegal, the petitioner in a cessio could not come to an arrangement with his debtor to sell part of his estate, pay the debt, and so put an end to the cessio. But, as I have stated, I think this money cannot be retained. The question really is, whether this is within the rule that a notour bankrupt is not at liberty to dispose of his estate to the prejudice of his creditors, or to give any preference to any one creditor over others, or whether it is within the exception,—a very large and important one,—recognised in the two cases your Lordship has referred to. The exception is, that the law as applied by the Court makes exception of payments in cash of debts due in cash. That exception proceeds on a view altogether intelligible, that it is impolitic and inexpedient, because dangerous, to inquire into the history of cash, which is the currency of the realm. Cash passes without inquiry as to its previous history from hand to hand. There is probably more in the remark which the Sheriff says I made in one case, that it would not matter if the money had been stolen, than would strike many people at first sight. The rule that a thief can give a better title to stolen money than he has himself is one of the few exceptions to the rule that a man can give no better title to anything he hands to another than he possesses himself, but it proceeds on the recognition of the inexpediency of all inquiry into the history of cash. The Sheriff says that he assumes that I imply in that statement ignorance on the part of the receiver that the money was stolen. That goes without saying; for if the receiver was aware the money was stolen then the law of reset, and not that of illegal preference, would apply. If the very *corpus* of the stolen money is traced into any person's hands then the original owner can claim it. There is there no case of illegal preference. The money is the property of the robbed man, and if he can trace it he can recover it, not as a debt due, but as being his own property. Here, however, the money was part of a bankrupt estate, which was to be administered among such creditors as had right to it.

I think then the case falls within the rule, but I desire to say nothing, for I have nothing to say, against the law laid down in the two cases referred to, or the consideration on which the Court there proceeded. I limit my judgment here strictly to the facts of the case. The debtor, a notour bankrupt, with a process of cessio depending against him, is advised by his creditor to sell part of his property and pay him his debt. That, I think, is a proceeding which cannot stand. It is an improper proceeding (though I do not characterise it as illegal in the sense I attach to that word), and the creditor who aided and abetted in that proceeding cannot take advantage of it. The distinction is very nice between the rule and the exception. A payment by cash is not inquired into, but if an equal quantity of goods is given in payment that would be inquired into and restoration ordered. There is in the present case sufficient to make the distinction apparent here, but I think the judgment ought to be strictly confined to the circumstances of the case.

LORD CRAIGHILL.—My view on the facts, and the law applicable to them, have been very fully explained by Lord Young. This is a different case from those cited by the defenders, as here we have the defenders aiding and abetting in a sale of stock by the bankrupt in order that the money realised thereby might be given to them. In doing so he did what he ought not to have done, and I think they are not entitled to retain the money. It is not necessary for me to say more, as I entirely agree in and adopt all that has been said by Lord Young.

LORD RUTHERFURD CLARK.—I have had great difficulty in distinguishing this case from those of *Thomas* and *Coutts*, but I daresay the distinction pointed out by your Lordships is sound in law, as it certainly is in equity.

LORD JUSTICE-CLERK.—I agree with Lord Young in thinking that the finding of the Sheriff that the sale was illegal is unnecessary, as well as the finding that the debt was not due. Our judgment should be confined strictly to the circumstances of the case.

THE COURT pronounced this interlocutor:—"Find in fact (1) that on 7th October 1886 David Shaw sold a large portion of the stock of his farm, and on the same day paid to the defenders £101, 9s. 11d. out of the price thereof; (2) that at the date of the sale he was a notour bankrupt and defender in an action of *cessio bonorum* in which an order had been pronounced ordaining him to lodge a state of his affairs by 6th October 1886, which order he failed to obey; (3) that his bankruptcy and the dependence of the said action, and the order pronounced thereon, were known to the defenders when they took payment of the sum: Find in law that the said payment was improperly made, and that the defenders are not entitled to take benefit thereby: Therefore dismiss the appeal: Of new decern in terms of the conclusions of the petition."

CURROR, COWPER, & CURROR, W.S.—PHILIP, LAING, & TRAIL, W.S.—Agents.

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Tay District Fishery Board v. Robertson.

TAY DISTRICT FISHERY BOARD, Complainers (Reclaimers).—*W. C. Smith.*
ANDREW ROBERTSON AND OTHERS, Respondents.—*Sol.-Gen. Robertson—Ure.*

Title to sue—Interdict—Statutory Board—Salmon Fisheries Act, 1862 (25 *and* 26 *Vict. c.* 97)—*Salmon Fisheries Act,* 1868 (31 *and* 32 *Vict. c.* 123).—Under the Salmon Fisheries Acts of 1862 and 1868 Fishery Boards have power to sue for penalties for offences under the Acts, and to apply summarily to the Sheriff for the enforcement of rules and regulations made by them. In a note of suspension and interdict brought by a Fishery Board at common law to prevent persons fishing in a manner alleged to be illegal, *held* that the complainers, being merely a statutory board with statutory remedies, had no title to sue.

Bill-Chamber.
1ST DIVISION.
Lord Lee.
M.

IN August 1887 the Tay District Fishery Board, constituted under the Salmon Fisheries (Scotland) Acts, 1862 and 1868, presented a note of suspension and interdict in the Bill-Chamber against Andrew Robertson and others, fishing-smack owners in Newburgh, Dundee, &c., in which they prayed the Court "to interdict, prohibit, and discharge the said respondents from fishing with or using in the river Tay, from and after the 20th day of August, being the commencement of the annual close time in the said river, until the 15th day of September following in any year, the species of bag-net known as a spirling-net, or any other net of similar construction, attached to a smack, or other boat or vessel, anchored, or otherwise kept stationary, in the said river: Or otherwise, to interdict, prohibit, and discharge the said respondents from using at any time in the said river the said spirling-nets, or any other nets of similar construction, for the purpose of taking salmon, or other fish of the salmon kind, in the said river."

The complainers averred that they had the duty of protecting and preserving the salmon fisheries in the river Tay.

They further averred;—" Immediately after the close of the salmon net-fishing season on the Tay, which takes place on the 20th of August, the respondents have, in the years 1885 and 1886, commenced to use fishing-smacks in the river below Newburgh, ostensibly for the capture of spirlings by means of spirling-nets, and have continued to use these nets until the 14th day of September, being the day on which the river Tweed is closed for salmon-fishing by net. Nearly all of the said smacks have thereafter ceased to fish for about a fortnight, when a certain number have returned to their fishing ground. The proper season for spirling-fishing does not commence until about the beginning of October, as it is only in cool weather that spirling can be conveyed to a distance. During the period from the 20th August to 15th September, large quantities of salmon were consigned, in the years 1885 and 1886, by rail from Newburgh to Manchester, and various other places, and the complainers believe and aver that these salmon were caught by the respondents in the spirling-nets, and that the main object of the respondents in fishing with these nets in the time between 20th August and 15th September was the capture of salmon. Since the close of the salmon net-fishing season on the Tay, on 20th August in the present year, the respondents have resumed the illegal fishing complained of, and on Thursday, 25th August, a large quantity of salmon caught by the respondents in their spirling-nets were landed near Newburgh, and were seized on behalf of the complainers." (Stat. 3) " The nets used by the respondents are about 60 feet in length, with a square mouth about 20 feet wide stretched on two beams at top and bottom, the bottom one having an iron rail attached in order to sink it, and the upper beam is fastened at the water-line across the bow of the smack by iron stanchions extending forward from the ribs

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of the smack, and there are chains at each side connecting the upper and lower beams. The net extends in a long bag tapering to a point, where the meshes are very small, in order to take the smallest of fish along and under the bottom of the smack, and being double the length of the smack, its tapering end reaches for 30 feet beyond the stern of the smack. The nets are usually emptied twice in the twenty-four hours, at the turn of the tide. The smacks of the respondents were anchored for the whole period above mentioned in the open channel of the river, and were stationary except so far as they swung round with the tide, their catch being sent ashore by boats. Their position was in the main channel, where the salmon run, and where few spirlings are to be got." (Stat. 4) "The use of the said nets by the respondents is illegal, both because they are used for the capture of salmon during close time on the Tay, and by parties who have no title whatever to fish for salmon, and also because they are practically fixed nets in the estuary of the river, the placing of which, even in the open season, is illegal."

The complainers pleaded;—(1) The nets complained of being intended for the taking of salmon during the period of time in question, the respondents are not entitled to use them, and interdict should be granted against their use during that period as craved. (2) *Separatim*, The nets being of the nature of fixed engines placed in the river, the complainers are entitled to interdict against their use.

The respondents pleaded, *inter alia*;—(1) The complainers have no title under the statutes mentioned to sue this action.

On 5th September the Lord Ordinary (Lee) refused the note as incompetent.

The complainers reclaimed, and argued;—They could not get a conviction against these respondents under section 15 of the Salmon Fisheries Act, 1868, for having in their possession salmon taken "during the annual close time by any means other than rod or line," between the close of the net fishing on the Tay and the close of the fishing on the latest river in Scotland, in consequence of the decisions in the cases of *Wilsone* v. *Harvey*[1] and *Chalmers* v. *M'Glashan*,[2] and therefore if salmon were taken in these nets, as they alleged was the case, the remedy of interdict was the only one open to them to take. The view of the Lord Ordinary[*] was that under the Fisheries Act of 1868 the board had power to sue for penalties (see sec. 15), but that they had no power under it to sue civil actions, and that therefore this action was incompetent. But the penalties imposed by the Act were very small, *e.g.*, those for putting poisonous matter into the river, and the natural and appropriate remedy was interdict. The penalty imposed by the statute inferred prohibition,[3] and that must be made effectual by interdict. The board had a duty laid on it to protect the fisheries for the good of the public, and the Court would interfere to prevent an act being done which would constitute an offence against the law which the board administered.[4] The offence here was not one merely collateral to the Act, but was directly at variance with it. The remedy of interdict would certainly lie at the instance of proprietors of upper waters on the river, and *a fortiori* it would lie at the instance of a body entrusted with a special duty to protect the whole fisheries. These

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[1] Wilsone v. Harvey, Nov. 13, 1884, 12 R. (Just. Ca.) 12.

[2] Chalmers v. M'Glashan, Feb. 2, 1886, 13 R. (Just. Ca.) 17.

[*] The Lord Ordinary's note was not before the Court.

[3] Bell's Prin. sec. 36.

[4] Stevenson v. Magistrates of Hawick, May 19, 1871, 9 Macph. 753, 43 Scot. Jur. 410; Cooper v. Whittingham, 1880, L. R., 15 Chan. Div. 501, Jessel, M. R., p. 506.

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nets were illegal engines under the Act of 1868, sec. 37,[1] and the board were in a stronger position than proprietors.

Argued for the respondents;—The reclaimers had no title to sue. Their powers with regard to suing for penalties were clearly defined in the Acts of 1862 and 1868, and they could not act beyond the powers there given them. But all the offences for which they were entitled to sue for penalties were offences created by the statutes, and where such was the case, to sue for the statutory penalties was the only competent course open to the board.[2] Under the Act of 1868, sec. 37, the Legislature had recognised the right and title of "proprietors" to sue by action persons using illegal engines for catching salmon, but nowhere was it provided that the board should have a like right and title.

At advising,—

LORD MURE.—The object of the present action is to interdict the respondents from fishing in the river Tay by means of nets generally used for the capture of spirling, but which are said to be used by the respondents in the estuary of the river for the purpose of catching salmon in close time as well as during the open fishing season, and which are alleged to be used in such a way as to amount practically to their being fixed engines placed in the estuary of the river to intercept the fish, and to be on that account illegal.

The action is brought by the complainers as the Fishery Board of the Tay District, constituted under the Salmon Fishery Acts, in name of their clerk, as required by the statute. But although raised by them in that character it is not, as I read it, founded on any alleged violation of any of the rules prescribed by the statutes which they are appointed to administer, or of any of the regulations or bye-laws made by the complainers under the powers given to them to that effect. Neither does it bear to be founded on any express provisions of those statutes, but it is rested on the allegation that the mode of fishing complained of is illegal at common law, and it is substantially such an action as any proprietor of salmon-fishings would have been entitled to bring for the protection of his rights if the statutes under which the complainers act had never been passed.

The Lord Ordinary has refused the note as incompetent, on the ground, as I understand, that the complainers, as pleaded in the first plea in law for the respondents, have no title to sue such an action. The only question therefore which is now to be disposed of is whether that plea is well founded, and the solution of it depends mainly, if not entirely, upon the provisions of the Salmon Fisheries Acts of 1862 and 1868.

By the first of these Acts—viz., the 25 and 26 Vict. cap. 97—these district boards were originally established, and very distinct provisions are in several respects made as to the powers and duties of district boards with regard to the way in which the Act is to be enforced and penalties recovered for the offences specified in it. The more important of these offences are set out in sections 11, 12, and 13 of the Act. But by the 22d section power is given to boards, subject to the provisions of the Act and to the bye-laws made by the commissioners, to make regulations for the preservation of the fisheries in the district, to appoint clerks, constables, water-bailiffs, and other officers, and to prescribe the duties of all persons appointed by them; while by the 25th section power is given to enact that any person committing a breach of any bye-laws or regulations made by them in terms of the statute shall be liable to a specified penalty for every such offence, to be sued for and recovered in the same manner as the penalties incurred under the provisions of the Act itself.

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[1] Quoted by Lord Mure, p. 43.

[2] Wolverhampton New Water-works Co. v. Hawkesford, 1859, 28 L. J. (C. P.) 242, Willes, J., at p. 246; Rex v. Robinson, 1759, 2 Burrows, 800, Lord Mansfield, at p. 803; Vallance v. Falle, 1884, L. R., 13 Q. B. D. 109; Atkinson v. Newcastle and Gateshead Water-works Co., 1877, L. R., 2 Exch. Div. 441.

The mode, again, in which all these penalties are to be enforced is regulated by the 28th section, and this is appointed to be done by petition before the Sheriff, or any two Justices of the Peace in the district, at the instance of the clerk of the district board. And for the further enforcement of these regulations and bye-laws the 29th section expressly provides that "in the event of any person refusing or neglecting to obey any bye-law made by the commissioners, or any regulation made by the district board, the clerk may apply to the Sheriff by summary petition in ordinary form, praying to have such person ordained to obey the same, and the Sheriff shall take such proceedings and make such orders thereupon as he shall think just."

Under the Act of 1868 (31 and 32 Vict. c. 123), additional powers are given to district boards to purchase dams, weirs, &c., by agreement, to remove natural obstructions to the passage of fish, and to borrow money to defray the expenses incurred by them. But in other respects no material change is made in the powers or constitution of the district boards. Several new offences are, however, created by this Act, and by the 30th section the same powers are given to the clerks of district boards to prosecute for those offences as are given to them under section 28 of the former statute; and by the 37th section this important provision is made,—"That any proprietor of a fishery shall be held to have a good title and interest at law to sue by action any proprietor or occupier of a fishery within the district, or any other person who shall use any illegal engine, or illegal mode of fishing, for catching salmon within the district."

Having regard to these various provisions of the statutes, I have come to the conclusion that the Lord Ordinary was right in holding that the complainers had no title to sue the present action. They are a purely statutory board, and can only act under and to the extent of the powers given to them by the statutes by which they were established. The matter of the remedy to be given for things done in violation of the statute, and the question who the parties were who were to have the right and title to enforce those remedies, were plainly under the consideration of the Legislature and duly provided for, as they thought right, when those Acts were being passed. In neither statute, however, is any power given to district boards or their clerks to have recourse to actions at common law of the nature here in question.

In the first statute power is conferred upon them to prosecute for penalties for all offences created by the statute, or enacted in bye-laws and regulations made by the board under the powers given to them by the statute. And they have also under the 29th section of that Act the important right to enforce by petition before the Sheriff obedience to the bye-laws of the commissioners and to the regulations made by the district board for the preservation of the fisheries in the district, but their powers go no further. When the second Act was passed no alteration was made on these provisions, in so far as the right and title of the complainers to take proceedings against offending parties are concerned,

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although that subject must have again been under consideration, because the right and title of the owners of salmon-fishings to prosecute such an action as the present is specifically dealt with in the 37th section, by which the title of such owners to prosecute is expressly recognised and re-enacted, but no such power is given to district boards.

I have assumed in this opinion that the present action does not expressly bear to be rested on any alleged violation of the statutes. It was, however, suggested, in the course of the discussion, that as the first part of the prayer of the note of suspension refers to fishing during close time only, it might be said that this action is a complaint of a violation of the 15th section of the Act of 1868, which by subsection (1) provides a penalty for the offence of taking salmon in close time "by any means other than rod and line." But even in this view the objection to the complainers' title appears to me to be well-founded, and the remedy asked incompetent, because of the rule which I conceive to be settled, that when an offence is created by statute which gives the remedy of a complaint for penalties, the only remedy which can be sustained at the instance of a statutory board is that provided by the statute. In the present case the remedy given is a complaint for the recovery of penalties, or a petition before the Sheriff under the 29th section of the Act of 1862.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The LORD PRESIDENT, LORD SHAND, and LORD ADAM concurred.

THE COURT adhered.

THOMSON, DICKSON, & SHAW, W.S.—WM. B. RAINNIE, S.S.C.—Agents.

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Nov. 16, 1887.
School Board of Neilston v. Graham.

SCHOOL BOARD OF NEILSTON, Pursuers (Respondents).—*C. J. Guthrie—Baxter.*

ALLAN GRAHAM BARNS GRAHAM, Defender (Reclaimer).—*Sir Charles Pearson—Sir Ludovic Grant.*

Superior and Vassal—Casualty—Redemption of Casualty—Act 1469, *c.* 36 —*Conveyancing Act*, 1874 (37 *and* 38 *Vict. cap.* 54), *sec.* 15.—A vassal disponed a piece of pasture ground for building purposes in consideration of a ground-annual. The purchaser before building tendered to the superior the redemption price of the casualties of superiority which were untaxed, calculated on the agricultural rent of the land. The superior maintained that the price ought to be calculated on the annual value of the land as building ground. *Held* that the yearly maill of the subjects at the date, as defined by the Act 1469, cap. 36, was their agricultural value.

2D DIVISION.
Ld. Kinnear.
M.

BY contract of ground-annual, dated 2d February and 23d April 1886, and recorded 13th May 1886, Admiral Fairfax, proprietor of the estate of Fereneze, near Barrhead, conveyed to the School Board of Neilston three quarters of an acre of ground for the purpose of their building a school thereon. The ground had up till Martinmas 1885 been let by him with the adjoining ground for grazing, at £1, 18s. 11d. per acre. When the grass parks were let for the ensuing season at February 1886 the piece of ground in question was not let, and it was staked off as the site of the school.

The School Board became bound by the contract of ground-annual to pay £15 a year for it, being at the rate of £20 per acre.

Fereneze was held by Admiral Fairfax under Allan Graham Barns Graham as superior. The entry of singular successors was untaxed. The School Board being desirous to redeem the casualties of superiority of the

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plot of ground before beginning to build, as provided by the Conveyancing (Scotland) Act, 1874,* and having failed to agree with Mr Graham, the superior, as to the basis upon which the payment fell to be estimated, brought this action against him to have it declared that they were entitled to redeem them upon payment to him of £4, 1s. 11d. It was admitted that the amount they had to pay in order to redemption of the casualties was two and one-half times the highest casualty, one year's rent of the subjects, and also a composition of one year's rent due through their acquisition of the subjects.

The pursuers maintained that the rent of the subjects was £1, 9s. 2d., being at the rate of £1, 18s. 11d. per acre, the grazing rent. This sum of £1, 9s. 2d., by the usual deduction of one-fifth (5s. 9d.), was reduced to £1, 3s. 5d., two and one-half times which amounted to £2, 18s. 6d., which sum, with £1, 3s. 5d. as the composition, amounting in all to £4, 1s. 11d., they tendered.

The defender maintained that the subjects not being used for agricultural purposes, but having been acquired and being used for building, the agricultural rental was not the proper measure of his claim. He stated that the annual worth of the subjects as building ground was at the rate of £24 an acre, or £18 for the three roods in question, but that he was willing to accept £15, the amount which the Board had agreed annually to pay to Admiral Fairfax, as the annual market value, and he therefore claimed £15 as the casualty presently due, and £37, 10s. as two and a-half times the amount of £15, the highest casualty, and was willing to discharge the casualties on payment of these sums.

The defender pleaded;—(1) The subjects not being let for a rent, the actual worth or yearly value of the lands falls to be taken as the basis in calculating the redemption money, and in the circumstances the defender is not bound to accept the sum tendered. (2) The pursuers having, at or about the date of redemption, contracted to pay £15 yearly for the ground, the same must be held to be of at least that value.

The Lord Ordinary (Kinnear) found and declared as concluded for.†

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* Section 15 of the Conveyancing (Scotland) Act, 1874, provides, *inter alia*, as follows:—"In cases where casualties are exigible on occasion of each sale or transfer of the property, as well as on the death of the vassal, such casualties may be redeemed on payment of two and a-half times the amount of the casualty, estimated as aforesaid (*i.e.*, 'as at the date of redemption'), payable on said occasions . . . Provided always that before any such redemption otherwise than by agreement shall be allowed, any casualty which has become due shall be paid."

† "OPINION.—The only question in this case is whether the sum tendered by the pursuers for the redemption of casualties of superiority is sufficient in amount to meet the superior's claim; and the facts upon which that question depends are fully ascertained by the minute of admissions.

"In its actual condition at the time when the question became litigious, the ground would not have yielded more to the proprietor if it had been let for grazing—which was the only purpose for which it was then available—than £1, 9s. 2d. But it is admitted that it is suitable for building, and that the pursuers have acquired it for the purpose of building a school; and although there is no evidence or admission as to the revenue which the pursuers might derive from it if it were occupied with buildings, it is said that it must be assumed that if they were to subfeu, or to grant a long lease for building purposes, they might obtain for it at least as much as £15 a-year, that being the amount of the ground-annual which they have agreed to pay to the former owner.

"These considerations are, in my opinion, irrelevant to the question. The

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The defender reclaimed, and argued;—It was impossible to take the former agricultural value as the "year's maill as the land was set for the time." It had ceased to be agricultural ground, and been dissociated from its former agricultural surroundings before the question arose. It was building land, and the pursuers were willing to pay £15 a-year for it. That shewed its annual value. The Lord Ordinary had misconceived the reference made by the defender to the contract of ground-annual. No doubt its provisions were *res inter alios* as regarded him, but he pointed merely to the fact that it existed as shewing what in fact was the value of the land in the hands of the pursuers. That was a question of fact, and the contract of ground-annual answered it. The cases, and especially *Hill's* case, shewed that the Court would endeavour to get at the annual value as it really was.[1] The fair annual value in this case might be taken to be the amount of the ground-annual, though a higher value might well have been claimed. A ground-annual was just the rent under a building lease. There was no previous instance, doubtless, of such a standard being taken as was now suggested, but that was because the redemption of casualties was of recent introduction.

Argued for the pursuers;—It was not pretended by the defender that there was any instance of the annual value being taken as fixed by such a standard as the pursuers proposed. The agricultural rent was that which had been paid, and was truly, in the words of the Act 1469, c. 36, "the

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measure of the superior's right is stated by Lord Curriehill in *Lord Blantyre* v. *Dunn*, 20 D. 1188. According to the established construction of the enactment, the measure of the composition payable by an entering vassal is the rent payable to him by his tenant in the lands at the time of the entry, if they be then set in lease to a tenant, or the sum for which they might then be let, if 'they are in the possession of the vassal himself.' The superior has no concern with the price paid by his vassal to the former owner, and just as little with the prospective value of the land for building, if it is not actually built upon, or set in lease for that purpose. The obligations of the contract of ground-annual are *res inter alios* to the defender. The vassal contemplates building. The fact that the ground is staked out seems to shew that he intends to build; but he is under no obligation to the superior to carry out his building operations, and the superior has no title to inquire whether he means to build or to subfeu, or to put his land to any other use than that to which in its actual condition it may be applied. I think it established by the admissions, that when the demand for redemption was made,—which for the present purpose must be taken as equivalent to the time of the entry,—the return which might have been obtained for the use of the land for a year was not more than £1, 9s. 2d. But the year's rent must be subject to the usual deductions: and it follows that the sum tendered is the full amount for which the pursuers are liable.

"The defender founded on the case of *Hill* v. *The Caledonian Railway Company*, 5 R. 338, as an authority for taking the price into consideration. But that was a very exceptional case, and the ground stated by the Lord President for taking into consideration the price and the expenditure on the land is quite sufficient to shew that the judgment has no application to such a case as the present. His Lordship says,—'The annual value of this subject cannot be tested in any of the usual ways, because it is impossible to conceive of the subject as the subject of a separate lease in any way whatever; and therefore it becomes indispensable to resort to some other mode of ascertaining what the composition ought to be.'

"But there is no difficulty in supposing the ground in question to be let as a separate subject, and the ordinary rule must therefore be applied."

[1] Hill v. Caledonian Railway Company, Dec. 21, 1877, 5 R. 386; Campbell v. Westenra, June 28, 1832, 10 D. 734; Allan's Trustees v. Duke of Hamilton, Jan. 12, 1878, 5 R. 510; Stuart v. Bulloch, Jan. 14, 1881, 8 R. 381.

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year's maill as the land is set for the time,"* until the alienation to the pursuers. A long building lease or a contract of ground-annual was just an alienation, not a set. The £15 per annum was not what the vassal was to get, but what he paid. The price paid had never been regarded as an element in such a question, except in the very anomalous case of *Hill*, *supra*. The case of *Lord Blantyre* v. *Dunn*, quoted by the Lord Ordinary, was in point. In *M'Laren* v. *Burns*[1] the rent at which the subjects might be expected to let was taken. There was no room to speculate on that, for the subjects had been let.

Lord Justice-Clerk.—This is a question not without difficulty and interest. I think that the Lord Ordinary has taken the right view. The Act on which the superior founds his claim is one which is now of very ancient date, but it is quite clear in its provisions. The claim of the superior is founded on the amount of rent at which the lands are let at the time, and the question is what rent a tenant will give in the existing state of the land. That is not a matter founded on any specialties, but upon what in fact as the market stands is in a reasonable view the rent in the existing condition of the land. That existing condition is agricultural, and the question is whether Lord Kinnear is not perfectly right in holding that the fair agricultural rent is the measure of the superior's right. There may in determining such a question be contingencies as to the land so imminent that they must be taken into account, but this is not one of such cases. I am for adhering to the interlocutor of the Lord Ordinary.

Lord Young, Lord Craighill, and Lord Rutherfurd Clark concurred.

The Court adhered.

F. J. Martin, W.S.—Graham, Johnston, & Fleming, W.S.—Agents.

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D. Macphail & Son, Pursuers (Reclaimers).—*Murray*—*Salvesen*.
Ebenezer Erskine Scott (Archibald John Maclean's Trustee), Defender (Respondent).—*C. N. Johnston*.
Archibald John Maclean, Defender.

Trust for creditors—*Principal and Agent*—*Lease*—*Security*.—A landed proprietor conveyed his whole estates to a trustee for behoof of his creditors, having the day before executed a lease of a farm in his own occupation in favour of the trustee, in security of advances to be made by him under the trust. The lease bore that the stock on the farm, of which the heritable estate mainly consisted, had been sold to the trustee for a price named, which price (it was by separate letter agreed) was not to be paid, but was to be imputed towards payment of the advances. It was also agreed that the truster should manage the farm for the trustee. The ostensible possession and ownership of the farm and stock continued in the truster, who incurred considerable debts in the course of his management. In an action against the trustee for payment of certain of these debts at the instance of tradesmen who had supplied the goods in ignorance of the trust arrangement, *held* (*rev.* judgment of Lord Trayner) that the effect of the deeds was to divest the granter of his estates, that his possession of the farm thereafter was as agent of the trustee, and consequently that the trustee

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* By the Act 1690, c. 20, in connection with the Act 1681, c. 17, the entry of a purchaser under a decree of sale is to be made on the same terms as that of an adjudger. By the Act 1672, c. 19, the entry of an adjudger is to be made on the same terms as that of an appraiser. And by the Act 1469, c. 36, the terms on which an appraiser is to be entered are his "paying the over-lord a year's maill as the land is set for the time."

[1] Feb. 18, 1886, 13 R. 580.

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was liable (to the extent of the trust-estate) in payment of goods supplied to the order of his agent in execution of his agency. Decree therefore *granted*.

On 1st December 1881 Archibald John Maclean of Pennycross, in the island of Mull, heritable proprietor of the lands of Carsaig and others, being in embarrassed circumstances, granted a trust-deed for behoof of his creditors, conveying his whole estates, heritable and moveable, to Ebenzer Erskine Scott, C.A., Edinburgh, as trustee.

On the day before granting this trust-deed—30th November 1881,—Mr Maclean had let the farm of Carsaig (then in his own occupation) to Mr Scott on lease for five years from Martinmas 1881 at a rent of £320 per annum. The lease contained this clause:—" Further, the said Archibald John Maclean hereby sells, conveys, and makes over to the said Ebenezer Erskine Scott the whole sheep stock, cattle, and horses on the lands hereby let, conform to inventory to be made out and signed as relative hereto; in consideration of which sale and conveyance the said Ebenezer Erskine Scott binds and obliges himself to pay to the said Archibald John Maclean the sum of £2500 sterling, payable by instalments at such times as may hereafter be agreed upon, the last instalment being payable not later than 31st December 1885, and at the expiry of this lease the proprietor or incoming tenant shall be bound to take the sheep stock on the lands and pay therefor" at a valuation.

The lease was qualified by the following letter, of even date, from Mr Maclean to Mr Scott:—" Dear Sir,—Considering that I have, of this date, executed in your favour a lease of the farm of Carsaig, by which lease I have made over to you the stock of sheep, &c., on the said farm, and you have become bound to pay to me the sum of £2500 as the estimated value of said stock, and considering that I am about to grant a trust-deed in your favour for behoof of my creditors and for certain other purposes, I hereby undertake and agree as follows:—1st, That the price of the sheep stock shall form part of the trust-estate under the said disposition; 2d, that all advances made by you under the said trust shall, until they amount to the said sum of £2500, in the first place be imputed in payment *pro tanto* of the price of the said stock; 3d, that in the event of said stock eventually proving to be of less value than £2500, the deficiency shall be made good to you by me or out of my estate; 4th, that in the event of your so desiring, it shall be in your power, notwithstanding the terms of the said lease, to renounce the same at Whitsunday in any year, on six months' notice given by you of such intention; 5th, that as it is contemplated that during your tenancy I shall manage the farm on your behalf, and that the proceeds of the same shall be placed to the credit of my trust-estate, no rent shall be payable by you so long as the proceeds are so applied, but on the other hand you shall be entitled to interest on the price of the said stock, so far as advanced and paid by you, and that at the current rate of interest charged by the Scotch banks upon overdrafts. In witness whereof," &c.

Mr Scott's name was entered in the Valuation-roll for 1882 as tenant of the farm, and the trust-deed was recorded, but no other publication of the arrangement was made, and Mr Maclean remained in the possession and management of the farm, ostensibly as proprietor both of the farm and of the stock, &c. thereon, until March 1886, when Mr Scott sent a representative from his office, who took over the management.

On 23d November 1886 D. Macphail & Sons, wholesale and retail merchants, Oban, brought an action against Mr Maclean, and also against Mr Scott, as trustee, for payment of £208, 12s. 9d., being the balance of an account, commencing 8th July 1882, and ending 26th October 1886, for goods alleged to have been supplied by the pursuers to the order of

Maclean, for necessary purposes in connection with the farm, and for the use of himself and his servants in conducting the farm.

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Appended to the summons was this minute of restriction,—"The conclusions of the foregoing summons, in so far as directed against the defender E. Erskine Scott, are intended, and are hereby restricted, to be against him as trustee under the trust-deed mentioned in the summons."

The pursuers averred (cond. 3), that being in ignorance of the arrangements between Mr Maclean and Mr Scott, they were under the impression that Mr Maclean was in possession of the farm, and that he was the owner in possession of the sheep stock, and whole other moveables thereon. "But, on the other hand, the defender Mr Scott maintains that he has been in possession of the said farm, and of the stock and other moveables thereon, since the year 1882, and that his name has been entered in the Valuation-roll of the county as tenant of the farm. In that case, the pursuers aver that the defender Mr Maclean has had the management of the said farm under, and on behalf of, Mr Scott, as trustee foresaid, and has ordered from the pursuers the several articles detailed in the account sued on, for the purposes of the said farm, and for the use of those engaged in the management of it, and that the said account, or at all events the balance remaining due, has thus been incurred on behalf of the defender Mr Scott, as trustee foresaid. . . . At regular intervals, and in particular during the spring and summer of 1886, there was a special representative of Mr Scott, in addition to Mr Maclean, residing on the farm."

Mr Scott alone defended. He answered:—(Ans. 3) "Admitted that the trust-deed here mentioned was granted on 1st December 1881, but was never published, and that the present defender's name was entered in the Valuation-roll as here mentioned. Admitted that, from 1st March last till the sequestration of Mr Maclean, the defender had a special representative residing on the farm. *Quoad ultra* not admitted, and explained that . . . the lease of the farm here mentioned was granted to the present defender, with the view of giving him legal delivery of the moveables on the farm for trust purposes, but the defender has been advised, and is now satisfied, that it was ineffectual for that purpose, and the defender has not interfered with the management of the farm, nor taken any benefit under said lease. Denied that the said account was incurred on behalf or by the authority of the present defender, either as an individual or as trustee foresaid." He then admitted liability for goods supplied by the pursuers after his representative had gone to the farm in March 1886.

The pursuers pleaded;—(1) The pursuers having furnished the goods specified in the account sued for, at least to the extent of the balance remaining due, on the orders and for behoof of the defenders, the pursuers are entitled to decree in terms of the conclusions of the summons, with expenses. (2) The defender Mr Scott being, and having been, in possession of the said farm as trustee foresaid, and the said goods having been ordered, received, and used by him for the purposes of the said farm, the pursuers are entitled to decree against him as trustee foresaid.

The defender pleaded;—(1) The estate of the defender Mr Maclean having been conveyed to the present defender, in trust, for certain purposes prior to the contraction of the debt sued for, and the same not having been incurred by the present defender, either as trustee in the management of the trust-estate or as an individual, he is not liable therefor either as trustee foresaid or as an individual, and should be assoilzied from the conclusions of the summons, with expenses. (2) The said defender not having been in possession of the estate, and not having ordered, received, or used the goods sued for, he is entitled to absolvitor.

Arrestments were used on the dependence.

After the raising of the action Mr Maclean's estates were sequestrated, and Mr James A. Molleson, C.A., was appointed trustee. Intimation of the dependence of the process was made to him that he might sist himself, if so advised, which he did not do.

A proof was allowed. The substance of Mr Scott's evidence in regard to the relation subsisting between him and Mr Maclean is given below.*

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* Mr Scott deponed,—"In November 1881 Mr Maclean applied to me for certain advances. . . . I agreed to make certain advances to him. From the state of affairs it appeared there were a number of pressing debts owing, and the object of my advances was to pay the more pressing claims in order to allow the estate an opportunity of recovering itself. . . . On 30th November 1881 Mr Maclean granted a lease in my favour with reference to the trust-deed. The object of the lease was to enable me, under it, to take possession of the stock, as it was supposed in that way I would get a valid security for my advances. The trust-deed was not made public in any way, except by being recorded—a notarial instrument was recorded. Mr Maclean did not wish it published. He arranged to render accounts periodically, and for the first two or three months, perhaps, he sent me an account-current, with vouchers, but they were in such a condition that I was not able to understand them, and I returned them for the purpose of his preparing more articulate accounts, but these I never received. There was never any balance struck until the year 1886. I went to Carsaig in June 1882. At that time the sheep were gathered together in the fank for the cutting of the lambs, and I saw them, but they were not counted over to me. [Mr Maclean deponed that they were.] I was only there for one night. I gave no authority to Mr Maclean to order the goods the price of which is sued for; and if he had asked me for authority to get goods on credit, I would not have allowed it. . . . There were some sheep sent to Cumbernauld about the end of last October [1886]. They were sent in my name. They were last year's lambs. I paid for them in so far that my advances very much exceeded the value of them. I took over the sheep. Mr Maclean was sequestrated on 26th November last. The trustee has never asserted any right to these sheep, in so far as he himself is concerned, for I think he agrees to the position I took up in regard to them; but he has not abandoned any claim he may have in regard to any other party. I have ascertained that the delivery of the stock under the lease was ineffectual, and I have abandoned the claim to the stock on the farm and to all the personal property upon the estate. Mr Maclean did not consult me at all about the management of the estate, nor about the buying or selling of the produce until 1886. Cross.— . . . It was part of the arrangement that Mr Maclean was to continue in the management, and that things were to go on as before, on the understanding that I was secured by a lease, and the delivery of the personal property—the stock. He continued to manage the farm until March 1886. I made up a state of Mr Maclean's accounts in the year 1886 from information supplied by him. Prior to that I had practically no information in regard to the state of the accounts. It was then I got the vouchers and wages book into my possession. I had repeatedly and urgently asked for accounts to be furnished to me prior to 1886. . . . Mr Maclean had no direct authority from me to order the stores necessary for the carrying on of the farm, but there was a kind of inferred power that he was to order what was necessary. I assumed that he was paying these stores off the income of the property. My lease expired at Martinmas last. . . . My advances have never been recouped. By the Court.— . . . Apart from the taking of the lease and the supposed taking over of the stock, I never performed any act of ownership or management of the estate up till 1886. I never gave myself out publicly as tenant of the place. I knew that goods were being supplied to Mr Maclean, but I thought they were being paid out of the income

On 9th March 1887 the Lord Ordinary (Trayner) decerned against the defender for the sum for which he admitted liability, and *quoad ultra* assoilzied him.*

The pursuers reclaimed.

After the hearing had proceeded some length the Court suggested that there might be a difficulty in granting decree against the defender Scott, as trustee, now that sequestration had been awarded. The pursuers accordingly lodged the following minute:—"*Salvesen*, for the pursuers, stated that he craved leave to withdraw the minute of restriction, and he at the same time undertook that if decree were pronounced for the sum sued for in terms of the conclusions of the summons against the defender E. E. Scott, the said decree would not be enforced personally against the said defender, but would only be made available against the funds and estate secured by the arrestments used on the dependence of this action, and the trust-estate held by the said defender."

Argued for the reclaimers;—The present case was distinguished from those on which the Lord Ordinary founded by the circumstance that here Mr Maclean was completely divested of his estate by the trust-deed and the lease. His possession thereby became Mr Scott's possession, and he himself Mr Scott's manager. Mr Scott, consequently, was liable for the goods supplied to Mr Maclean's order as his principal, though undisclosed.

Argued for the respondent;—The principle of the cases founded on by the Lord Ordinary applied here, for the effect of the whole transaction was simply to give Mr Scott a security for his advances,—at least that

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of the sheep stock, and not having regular accounts of Mr Maclean's management, I was not able to check the accuracy of that impression. I first knew of the account sued for in the summer of 1886 sometime. I am willing to pay everything that has been supplied by Mr Macphail since March 1886, when my clerk went down and took possession."

* "Opinion.—In 1881 the affairs of Mr Maclean having become embarrassed, he applied to the defender, Mr Scott, who agreed to make certain advances to pay Mr Maclean's creditors, or at least those of them who were most pressing. The security afforded to Mr Scott was the trust-conveyance dated 1st December 1881 and the lease dated 30th November 1881, the latter being qualified by the letter of even date with the lease.

"It is proved, I think, beyond dispute, that after the execution of these several writs Mr Maclean remained in the possession and management of his estate just as he had done before until 1st March 1886, when Mr Scott entered on the possession and management. It is said that between the date of the lease and March 1886 Mr Maclean was the servant or manager for Mr Scott. That, I think, is certainly not the case. The trust-conveyance and the lease were intended to create a security for Mr Scott, and had no other purpose. They did not, in fact, create the relation of principal and agent, or master and servant, between Mr Scott and Mr Maclean.

"The goods, the price of which is now sued for (so far as delivered prior to March 1886), were delivered by the pursuers to Mr Maclean on his order, and in reliance upon his credit alone. Mr Scott and his connection with Mr Maclean's affairs were during that period entirely unknown to the pursuers. In these circumstances I am of opinion that Mr Scott is not liable to the pursuers for the price of goods supplied prior to 1st March 1886. The principle on which I proceed is well settled—*Eaglesham* v. *Grant*, 2 R. 960; *Miller* v. *Downie*, 3 R. 548; *Stott* v. *Fender*, 5 R. 1104; *Newcastle Chemical Co.*, 9 R. 110. There was also a case of *Hardie* v. *Cameron*, decided by the Second Division of the Court on 29th May 1879 (but not reported), the facts in which more closely resembled the present case than any of the other cases I have cited, where the same principle was applied. . . ."

was the object, though Mr Scott was now advised that it was an ineffectual security. In no sense, at least, was Mr Maclean Mr Scott's agent. That might appear to be the case on the surface of the transaction, but it could hardly be doubted that if Mr Maclean had paid all Mr Scott's advances and terminated the trust, the lease would necessarily have fallen also.

LORD JUSTICE-CLERK.—This case raises difficult questions, both on the facts and on the law applicable to them. The action is one at the instance of persons who made furnishings to Mr Maclean of Pennycross to enable him to continue his farming operations in a farm which he was in possession of, and the question is, whether Mr Erskine Scott, who held a lease of those lands from Mr Maclean, and also held a trust-disposition for payment of Mr Maclean's creditors, is to be held responsible for the furnishings?

Now, if the conveyance to Mr Scott had been simply a security for advances made by him, or simply a means of paying the creditors of Mr Maclean, I should have thought that the case was substantially ruled by the authorities quoted by the Lord Ordinary. But it appears to me that there is a distinction—and a very vital one—between those cases, which were cases of conveyances granted substantially in security, and without possession following on them, and the present case, which turns simply on this,—that Mr Scott held not only this conveyance in trust, but also a lease from Mr Maclean, who had thus divested himself of possession of the farm, and had further granted to Mr Scott a back-letter expressive of the conditions on which the lease had been granted and was to be held, which stated that it had been agreed between them that Mr Maclean should carry on the farm on behalf of Mr Scott.

It appears to me that when a person having a lease from the proprietor appoints a manager to manage the farm on his behalf, he is responsible for furnishings that are made; and it does not signify in such a case that the articles furnished or the profits of the farm are to go in reality to the manager and not to the tenant, nor that the party who makes the furnishings does not know who is the tenant. That is an entirely different case from those others which were quoted, and for this simple reason, that Mr Scott was the real party in possession—for a lease means possession—and that Mr Maclean did not possess on his radical right of property, but on an obligation to do so on behalf of his own tenant.

It is unnecessary to go into the terms of the lease or of the trust-disposition, because substantially there is no difference of opinion on the effect of either the one or the other. How far under the terms of the lease Mr Maclean could put an end to it by simple payment of his debt may be doubtful, but that question does not arise here. In the meantime it is enough to say that it gave Mr Scott all the privileges which a tenant has, and among them the right to possess instead of the landlord. Accordingly, when Mr Maclean comes to grant the back-letter to which I have alluded, he expressly says that he is to hold on behalf of the tenant. The 5th clause of the back-letter is in these terms,—"As it is contemplated that during your tenancy I shall manage the farm on your behalf, and that the proceeds of the same shall be placed to the credit of my trust-estate, no rent shall be payable by you so long as the proceeds are so applied." The orders therefore which were given by Mr Maclean, and his whole possession, were on behalf of Mr Scott, and accordingly the furnishings which were bought by Mr Maclean were bought on behalf of Mr Scott.

On these grounds, therefore, and without going further into any of the questions which have been mooted and canvassed in the cases that were referred to, I am of opinion that as Mr Maclean, who ordered and received the furnishings in dispute, was the hand—and nothing but the hand—of Mr Scott, Mr Scott is responsible for the debts incurred in obtaining them. The Lord Ordinary has come to a different conclusion, and has referred to cases of dispositions in security and dispositions *ex facie* absolute, but in reality in security. He says that he thinks that here also the lease was truly a security only—that it was merely the form of a lease without any substance in it,—and that as the credit of Mr Maclean was the only thing on which the pursuers proceeded, Mr Scott cannot be held responsible. He says that the relation between Mr Maclean and Mr Scott was neither that of principal and agent nor master and servant. I entirely differ. I think that the relation between the parties was that of principal and agent, and to a certain extent that of master and servant. In other words, any manager appointed by Mr Scott would have been in precisely the same position as Mr Maclean was in giving these orders, and perhaps the best evidence of that is that Mr Scott in the course of these proceedings actually did appoint another manager, who was his agent for some time, and he admits that he is responsible for the orders which that manager gave. Now, I can see no distinction between the case of that manager and Mr Maclean. I am therefore of opinion that the pursuers have a good ground of action here, just as they would have had if the goods had been ordered by the other manager. On the whole matter I think the judgment of the Lord Ordinary ought to be recalled, and decree for the sum sued for pronounced.

LORD YOUNG.—I am of the same opinion. The case is an interesting one undoubtedly, although I do not think it involves any question of principle, but is in reality a question of fact only, namely this, or rather these:—In what relation did Mr Scott stand to the farm in question? and in what circumstances was the debt incurred which is admittedly resting owing?

The action is for an account running from 8th July 1882 to 26th October 1886, the goods being supplied on the order of Mr Maclean (as is averred) "for necessary purposes in connection with the said farm, and for the use of himself and his servants in conducting the said farm, and the said goods were furnished and delivered by the pursuers to the said defender, and were used for the said purposes." It was incumbent on the pursuer to establish that as the foundation of his case, and there is such evidence on the subject that we had no argument to the contrary. I assume therefore that the account was incurred, that that was the nature of it, and that it is still unpaid.

Now, what was Mr Erskine Scott's relation to the farm for the period during which these goods were being supplied? I think it is quite clear that he was creditor in possession, and that the farm was being conducted with a view to enable him to obtain payment of his debt out of his debtor's property. At that period Mr Maclean, the proprietor of the land, was completely divested of the property by a deed dated 1st December 1881, a deed executed in trust, no doubt, but still one which completely divested him, and completely invested Mr Scott. But Mr Scott intending to take the position of a creditor in possession, and in order to obtain payment of his debt, on the day before divesting his debtor of his property, namely, on the 30th of November, obtained a lease from him of the whole estate for a period of years. More than that, he bought from

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his debtor by a proper contract of purchase and sale the whole stock on the farm. So that immediately after the execution of the lease he is the tenant of the farm, and immediately on the completion of the contract of purchase and sale he is the proprietor of the stock and implements, and everything on the farm. And he actually enters into possession by appointing a manager. He is at liberty to appoint anyone as manager who will accept the appointment, and he may very well select his own debtor, as he did. One can easily see reasons for that course. Now, that was the position of matters during the period when the account was being incurred—Mr Scott tenant in possession with his own debtor as his manager.

Well, this is kept secret—I do not suppose for a moment for any discreditable purpose, but from considerations of delicacy towards his client and debtor, Mr Maclean. Of course that is commendable, but we must take care that such delicacy is not exercised to the loss of other people, and what is now aimed at is that Mr Scott, through the position he has come to occupy, is to have his own debt paid preferably to the debts of other people. That is really what it comes to. This case is just a competition between the pursuers, the Messrs Macphail, who furnished the goods between 1882 and 1886, and Mr Scott, as to which of them should get paid preferably.

When the case came originally before us there was this minute upon the record,—"The conclusions of the summons, in so far as directed against the defender E. Erskine Scott, are intended, and are hereby restricted, to be against him as trustee under the trust-deed mentioned in the summons." After the case had been partially discussed, it occurred to some members of the Court—I rather think—and also to the bar, that there might be some inconvenience through the existence of this restriction, and accordingly a minute was lodged on 19th July in these terms,—"*Salvesen*, for the pursuers, stated that he craved leave to withdraw the minute of restriction, and he at the same time undertook that if decree were pronounced for the sum sued for in terms of the conclusions of the summons against the defender E. E. Scott, the said decree would not be enforced personally against the said defender, but would only be made available against the funds and estate secured by the arrestment used on the dependence of the action, and the trust-estate held by the said defender." That makes it clear to demonstration that this is a competition for a preference between Scott and the Macphails. And it is part of Scott's case here that the Macphails were in ignorance of the fact that Mr Maclean had been divested of his property and of possession and was merely Scott's manager. It is so stated boldly on record by Scott in his answers—"Admitted that the trust-deed here mentioned was granted on 1st December 1881, but was never published, and that the present defender's name was entered in the Valuation-roll as here mentioned. Admitted that, from 1st March last till the sequestration of Mr Maclean, the defender had a special representative residing on the farm. *Quoad ultra* not admitted, and explained . . . (2) that the lease of the farm here mentioned was granted to the present defender with the view of giving him legal delivery of the moveables on the farm for trust purposes, but the defender has been advised, and is now satisfied, that it was ineffectual for that purpose." Upon my word I do not know how he should have been so advised. If a man takes a lease and buys stock and puts a man in possession, I think there is abundant delivery. At all events, the stocking which was arrested by this creditor to secure his debt for maintaining the stocking has been removed. This particular creditor has removed them, and sold them as his own.

Now, what is the state of matters which that gives rise to? It is equivalent to Mr Scott saying—"You shall have no claim against me, because you were ignorant that Maclean had been completely divested, and I completely invested—your claim therefore is to be dealt with, not according to the true state of the facts, but according to your knowledge. But, on the other hand, in respect of that true state of the facts of which you were ignorant, my claim, a preference over you upon the stock of the farm, shall hold good." In short, it comes to this, that the true state of the facts is to avail Mr Scott against one who was ignorant of the true state, but not so as to give that ignorant person any corresponding claim against Mr Scott.

Now, I do not think that that is just, or that it can possibly be according to any principle of law. One view or the other must be taken and pursued consistently. Mr Scott may deal with the Messrs Macphail as if the true state of the facts did not exist inasmuch as the Messrs Macphail were ignorant of them. In that view he must regard the stock as not having been withdrawn from the ostensible possession of its ostensible owner, and must look upon Mr Maclean as himself getting supplies from tradesmen for the maintenance of that stock—in short, as the owner in a question with those who make these supplies; or on the other hand, he may deal with the Macphails on the footing of the true state of the facts, and regard Mr Maclean as manager and not as owner, and on that alternative Mr Scott, as the real owner for whose benefit and on whose account Mr Maclean obtained these supplies, must be held responsible for the payment of them. To say that Mr Scott is to take the whole proceeds—the whole fund out of which the debt is to be paid—and not to be responsible for the debt, would in my opinion be to proclaim a dishonest principle. A party who takes such a fund must be liable for the debts which affect it. That is the principle upon which there is liability on the part of anyone who shares in the profits of a company. And if Mr Scott is to take the whole proceeds of the farm and use the stock for his own purposes—that is, for payment of his own debt—shall he be allowed to say that he is not to be liable for furnishings supplied during the time he was owner, and owner for the purpose of paying his debt? I cannot accede to that. Nobody can strip another of all he possesses and invest himself, and then say that anyone furnishing supplies in ignorance of that arrangement is to take the divested debtor and have no claim against the person behind simply because he was ignorant of the arrangement.

On the whole matter I agree that the pursuers must have decree against Mr Scott.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK.—I also think the pursuers are entitled to decree. I think the case presents to us merely a question of fact—the question whether the accounts were incurred by Mr Maclean as agent of Mr Scott. I am of opinion that it is proved by the evidence in this case that this was the relation which subsisted between these two persons, and that Mr Scott therefore is liable as Mr Maclean's principal. That is, I think, sufficient for the decision of the case, and I do not think it necessary to go into any other matters.

THE COURT pronounced this interlocutor:—"Allow the minute of restriction annexed to the summons to be withdrawn, and the minute for pursuers to be received; and having heard counsel for the parties on the reclaiming note, Recall the Lord Ordinary's

No. 15.

Nov. 16, 1887. Macphail & Son v. Maclean's Trustee.

interlocutor, and decern against the defender Ebenezer Erskine Scott in terms of the conclusions of the summons, subject to the conditions set forth in the said minute."

GILL & PRINGLE, W.S.—F. J. MARTIN, W.S.—Agents.

No. 16.

Nov. 16, 1887. Grigor Allan v. Urquhart.

ALEXANDER GRIGOR ALLAN AND OTHERS, Pursuers (Appellants).—*Sol.-Gen. Robertson—Murray.*

ROBERT URQUHART AND OTHERS (Trustees for the Forres, Burghead, and Findhorn Permanent Investment Company), Defenders (Respondents).—*Balfour—Shaw.*

Friendly Society—Assignation of shares in security—Intimation to manager.—D, a member of an investment society (who was also its manager), assigned certain shares of the society standing in his name to a firm in security of an advance of money. No intimation was made to the directors, and no alteration was at the time made in the shareholders' ledger, which was the only register of members kept by the society. In an action brought by the assignees against the society, *held* that the knowledge of D was not equivalent to knowledge on the part of the society, and that therefore the society was not in bad faith in making a payment to D on account of his shares after the date of the assignation, and that the society was not liable to the assignees for the sum so paid.

Question, whether such shares can be the subject of a security for an advance of money.

2D DIVISION. Sheriff of Elgin. I.

BY bond and assignation in security, dated July 1882, Arthur Duffes, solicitor, Forres, granted him to have instantly borrowed and received from Alexander Grigor Allan and others, partners of the firm of Grigor & Young, solicitors, Elgin, the sum of £300, which he bound himself to repay at Martinmas 1883, and in security he assigned to them ten shares standing in his name in the Forres, Burghead, and Findhorn Permanent Investment Company, registered under the Building and Friendly Societies Acts, of which he was manager, secretary, and clerk.

The constitution of the society and the regulations as to transfer of shares appear from the rules quoted below.*

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* "7. *Balance of books and division of profits.*—The books of the company shall be brought to a balance, and the profits ascertained as on the 30th day of May in each year, and the said profits shall be credited in the books of the company to each shareholder according to the number and value of shares held by him, whether he shall hold advanced or unadvanced shares. So soon as the sum standing in the books of the company at the credit of any shareholder shall amount to £25 for each share he or she may hold, the amount of such share or shares if unadvanced shall be paid over to such shareholder, who shall then cease to be a shareholder in so far as regards such paid-up shares, but, if advanced shares, . . . It is, however, specially provided that any shareholder withdrawing before the subscriptions and the profits credited thereon have accumulated to the full amount of £25 per share shall have no claim on the company but for the amount of subscriptions paid by him, and simple interest thereon, in terms of Rule 8th.

"8. *Shareholders withdrawing, sale and transfer of shares.*—Any shareholder not having received an advance of money, or whose advance shall have been repaid, shall be allowed to withdraw from the society on giving written notice to the manager, and shall be entitled to receive, at the end of three months from the receipt of such notice, the full amount of his subscriptions, together with Savings' Bank interest thereon; provided always that it shall appear from the company's stock, as ascertained at the preceding annual balance or by special

The society kept no register of shareholders other than the shareholders' ledger.

At the date of the assignation the amount at the credit of the ten shares was £77, 0s. 10d. Duffes continued to pay his subscriptions to the society till 1885.

On 18th July 1884 Duffes received £100 from the society as part of the subscriptions at his credit.

On 25th November 1885 Duffes altered the heading of his account in the shareholders' ledger so as to read thus:—"Arthur Duffes, solicitor, Forres, now in name of Alex. Grigor Allan, William Charles Young, and James Hutcheson, solicitors, Elgin, for behoof of the firm of Grigor & Young, solicitors, Elgin, conform to assignation intimated to me.—ARTHUR DUFFES, manager, 25th Novr. 1885."

On the same date Duffes gave to Messrs Grigor & Young this letter:—"Messrs Grigor & Young, solicitors, Elgin.—Forres, 25th Novr. 1885.—Dear Sirs,—I acknowledge intimation of bond and assignation by myself as an individual to your firm of fourteen shares* in the Forres, Burghead, and Findhorn Permanent Investment Company, of date 18th July 1882, and recorded 25th November 1885.—Yours truly, ARTHUR DUFFES, manager of the said Forres, Burghead, &c., Company. *P.S.*—The said shares have been transferred to your name.—ARTHUR DUFFES, manager."

In December 1885 Duffes resigned his offices in connection with the society.

In June 1886 Messrs Grigor & Young raised an action in the Sheriff Court at Elgin against Robert Urquhart and Others, as trustees for the company, for payment of £200, or such other sum as may appear to be the amount due in respect of "the ten shares in the said company specified in the condescendence."

The pursuers in their condescendence set forth the bond and assignation in security, and stated that the same was duly intimated, and that the sum of £200 remained unpaid.

They further averred,—(Cond. 4) "The amount due on ten of the said shares as at 18th May 1885, as instructed by the pass-book therefor under the hand of the manager of the company, herewith produced, was £128, 15s. 2d., exclusive of interest since accumulated. When the said Arthur Duffes handed this pass-book to the pursuers he then, and afterwards, stated that it shewed the correct amount due to him on ten shares. It is provided by the rules of said company (No. IV.) that such pass-books shall be issued to the shareholders, and shall be held legal evidence in

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minute of the directors, that such payment shall not exceed the value at the time of such shares so withdrawn; and it is specially provided that, notwithstanding the value of said shares so withdrawn shall, with the profits credited thereon, as by Rule 7th, exceed the amount of subscriptions paid by the shareholder withdrawing, and simple interest thereon as aforesaid, the shareholder so withdrawing previous to his shares being fully paid, as stated in Rule 7th, shall have no farther claim than for said subscriptions and simple interest as aforesaid, or for the value of such shares, should the value be less than said subscriptions and interest. Any shareholder shall be allowed to sell or transfer his shares to any other person, whether a member of the society or not; provided always that in the case of a sale or transfer, a transfer fee of threepence per share shall be paid to the company at the completion of the transfer, over and above the legal expenses of the same, if any, and that all arrears, fines, penalties, or sums otherwise due to the company, shall be paid previous to the transfer being registered. . . ."

* The question came ultimately to refer to ten shares only.

all cases of dispute. The pass-book was delivered to the pursuers about the middle of October 1885."

The defenders stated that Duffes resigned office on 8th December 1885, and that it was not until 14th January 1886 that they recovered the books of the company, and that they then discovered that the shares stood in the shareholders' ledger in the name of the pursuers.

They further averred,—(Stat. 2) "No intimation of said bond and assignation in security has been made to the defenders or to the president, vice-president, and directors of the said company. There was no transference of the shares of the company to the pursuers." (Stat. 4) "On 18th July 1884 a sum of £100 was paid to the said Arthur Duffes in part of his subscriptions at credit of his shares, and the receipt therefor, dated 18th July 1884, and cheque, dated 17th July 1884, p. £100 on the company's bank account, are herewith produced, and referred to. At May 1885 the sum at the credit of the said Arthur Duffes in respect of the said ten shares was £23, 3s. 7d." (Stat. 5) "Since the said Arthur Duffes resigned, it has been found that during the period of his managership he had embezzled funds belonging to the company, amounting as at present ascertained to £168, 11s. 9d., and he is their debtor to that extent, exclusive of interest."

The pursuers pleaded;—"(3) The transfer of said shares being in competent form, and duly intimated to the company, the pursuers are entitled to decree as craved. (4) The alleged payment of £100 to the said Arthur Duffes being *ultra vires* of the company, and in violation of its rules, cannot be pleaded as a set-off against the pursuers' claim. (5) *Separatim,* The said alleged payment not having been duly entered in the books of the company, and not appearing therein at 25th November 1885, cannot be pleaded as a deduction from the balance then shewn by the books to be due. (6) The alleged embezzlement by Duffes, and consequent loss, being due to the unwarrantable, wrongful, and illegal act of the defenders, is not pleadable as a set-off against the pursuers' claim."

The defenders pleaded;—(1) The pursuers not being shareholders of the said company have no title to sue for payment of sums due under shares belonging to, or in name of a shareholder of the company. (2) No intimation of the bond and assignation in security in question having been made to the defenders, or to the president, vice-president, and directors of the said company, the present action is unfounded, and ought to be dismissed, with expenses. (3) The said Arthur Duffes being himself the manager of the said company, while at the same time he was the cedent and debtor of the pursuers, intimation to him alone was insufficient, and such intimation, in order actually to reach the proper parties, should have been made to the defenders, and the president, vice-president, and directors of the company. (4) There having been no absolute sale or transfer of the shares held by Duffes in the said company to the pursuers duly completed, they are not entitled to insist in the present action. (5) The company being creditors of the said Arthur Duffes for a much larger sum than ever stood at his credit in their books in connection with shares held by him, the defenders are entitled to set off both the sums embezzled by him and the sums paid to him against the claim now made by the pursuers in this action. (6) By the rules of the said company, shareholders can only withdraw therefrom on giving three months' written notice to the manager, and this regulation not having been complied with by the pursuers, the present action should in any case be dismissed.

A proof before answer was allowed in which the facts above narrated were proved.

On 9th April 1887 the Sheriff-substitute (Rampini) pronounced this interlocutor:—"Finds that by bond and assignation in security for £300, dated 18th July 1882, and registered in the Books of Council and Session 5th November 1885, Arthur Duffes, solicitor, Forres, conveyed to the pursuers, *inter alia*, fourteen shares of the defenders' company in security of the said advances made by the pursuers to him: Finds that the said assignation was not duly intimated to the defenders: Therefore sustains the defenders' 1, 2, 3, and 4 pleas in law: Dismisses the action, and finds the pursuers liable in expenses."

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The pursuers appealed to the Court of Session, and argued;—The assignation had been sufficiently intimated to the company. The knowledge of the manager was the knowledge of the company,[1] and there was no necessity for further and direct intimation to the directors. The company, therefore, were in bad faith in paying the £100 to Duffes. When the company had put forward a manager with certain duties to perform, the public was entitled to trust to his duties being performed, and one of these duties was to communicate intimations of assignations to the directors. In the ledger, as shewn to Mr Grigor Allan on 25th November 1885, no mention was made of £100 having been paid to Duffes; the £100 still stood to the pursuers' credit. If the facts were not conform to that state of matters, the company must suffer. The intimation was, at all events, good as at 25th November, when the alteration in the share ledger was made. The share ledger was the only register of transfers kept by the company, and in several of the City of Glasgow Bank litigations such an entry had been held good. The pursuers were therefore, at all events, entitled to £23.

Argued for the defenders;—It was admitted no intimation had been made to the directors, and private knowledge on the part of the manager was not an equipollent therefor.[2] He only knew of the transaction in his private capacity, not *qua* manager. He was not entitled to register the assignation unless the company authorised him to do so, and accepted the assignee as a shareholder in the cedent's place. There must be such divestiture as to put the assignee in the cedent's place; there was no *tertium quid*. But the pursuers had not come as shareholders, they merely sued for a money payment. It was a condition precedent to a transfer of shares under the rules that the payment of the full amount due on the shares should be made. This had not been done, and therefore no transfer could legally have taken place.

At advising,—

LORD JUSTICE-CLERK.—This case relates to the assignation of certain shares in a friendly investment society. The cedent was the manager of the society, and had very large powers, for he had in his own person all the official powers of the society. The shares in question belonged to him, and he assigned them in security for advances made to him. There was no formal intimation of the assignation to the society, and no transfer of the shares to the assignees' names on the register of the society. In point of fact, there was no register of transfers. There was a minute of the society permitting members to transfer their shares, but evidently that minute proceeded on the assumption that

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[1] Bell's Conveyancing, pp. 315-317; Watson v. Murdoch, 1755, M. 850; Bradford Banking Company v. Briggs, Son, & Co., 1886, L. R., 12 App. Ca. 29; Murray v. Pinkett, 1846, 12 Clark and Fin. 764; Lindley on Partnership, pp. 684-5; Gale v. Lewis, 1846, 16 L. J. (Q. B.) 119.

[2] Adamson v. Mitchell, 1624, M. 859; Westran v. Williamson, 1626, M. 859; Hill v. Lindsay, Feb. 10, 1846, 18 Scot. Jur. 218.

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transfers were to be registered, though no register was ever opened for their reception. On the whole matter I have serious doubts whether shares in the society were capable of being made security for money advances. I do not express any opinion on that point, but I am clearly of opinion that the assignation in question was never completed by intimation. It is said that the granter of the assignation was the manager of the society, and that, therefore, it was unnecessary that he should intimate the assignation to himself. I do not agree in that view of the case. The fact that the granter was also manager only shews how necessary it was that the intimation should be regularly made. The private knowledge of the manager might have been founded on if a third party had made the assignation, but when the manager himself was the proprietor of the shares assigned the only effect is that no one but himself had an opportunity of knowing that any such assignation had been granted. In the circumstances of this society it was eminently necessary that the assignation should have been regularly and properly intimated. On this ground I am of opinion that this assignation is not effectual.

Lord Young.—The pursuers took an assignation to these shares in security for repayment of borrowed money. That is an experiment such as I think was never before attempted. It is not necessary to decide whether shares in a friendly society can be so assigned as security for a debt, though it is almost impossible to avoid forming an opinion on the question. My own opinion is that they cannot, otherwise than by substituting the creditor in the debtor's place as a member of the society. The defenders here are a friendly society under the Acts, and have a code of laws framed under the Acts with the authority of the statutes. According to these rules the shares of this society are of the amount of £25 each, to be paid up in fortnightly instalments of a few shillings each, and when the payments with profits amount to £25 on each share the member goes out of the society, the £25 being paid to him. Before he has paid up in full he may leave the society on three months' notice, taking the value of his shares at that date, but in that case he can never get more than he has paid with simple interest, but he may get less if the shares are worth less.

He may go out of the society in one other way, viz., by transferring his shares to someone else, but this he can only do after everything due to the society is paid up. I do not see anything in this consistent with the idea of a member making his shares security for a debt. I do not doubt (if there is nothing in the rules inconsistent with it) that if the society holds money immediately payable to a member that member may assign his claim to another, and the money will be payable on the simple doctrine of the assignation by a creditor of a debt due to him. There is nothing of that kind here.

At 18th July 1882, the date of the assignation, there was due, as we find from the pass-book, £75 on these shares. Did the pursuers expect to get more by the assignation than an assignation to that debt? They did not contemplate becoming members of the society, or if they did they failed to do so. Then was that an assignation to sums to be paid in by the debtor subsequent to July 18th? He did pay in such sums in point of fact; did he pay them in for himself as a shareholder, or was it as representing his creditor assignees? Now, in July 1884 he got £100 paid to him. The pursuers here say that that sum was paid to him in fraud of their rights. But the assignation was never intimated, or, if it was, it was certainly not before November 1885. I do not think it was intimated even then. What the pursuers rely on is, that the cedent was manager for the society, and it is said that his knowledge is equivalent to, or imports intimation to the society. Intimation of an assignation is, according to our law, necessary for two purposes; one is to complete the title, the other is to put a debtor in bad faith to pay to anyone other than the assignee. Now, it was not necessary here for the first purpose, but it was necessary for the second. Accordingly, taking that view, the pursuers say that the payment here to the cedent was a fraud. But the cedent here was not only manager of the society, he was also a creditor of the society. But his knowledge was not the knowledge of the society for such a purpose as the assignees maintain. His relation to the society was that of creditor and debtor; how, then, could his knowledge as creditor put the society in bad faith in making this payment? Apply the case to any bank in Scotland. The manager has a large sum at his credit, and in total ignorance that he has done anything to take away his right to claim that money, the bank, at his request, pay that sum to him. Does that put the bank in bad faith? They never knew of any assignation, and yet it is said that as the manager knew of the assignation, his knowledge being the bank's knowledge, the bank must be held to have known of the assignation too. Rational opinion rebels at such a notion, and yet it is the foundation of the pursuers' whole case. On that ground I would disallow the claim.

Then it was argued that the pursuers were shareholders in the society in respect of these shares in November 1885, when it appears an alteration was made in the ledger on the heading of Duffes' account. I do not think that that amounted to a transfer of the shares, or that the pursuers were acknowledged by the society as shareholders. Even if it were held that they were shareholders they would take nothing by it, for they could only hold subject to the payment made to Duffes prior to that. If they were shareholders then they must proceed to pay up what is still due on the shares, or withdraw on notice. But they are not paying up, and they have given no notice to withdraw, and therefore, if they are shareholders, they can take nothing by the action. In any view, I think the pursuers' case fails.

LORD RUTHERFURD CLARK.—I concur. I do not think that this assignation was so intimated as to put the society in bad faith in paying to Duffes. That being so, the interest in the case is diminished to £23. If the pursuers have any right it is as shareholders only, and they have not taken the necessary steps under the rules to become shareholders; whether they could make themselves shareholders at all is, I think, doubtful.

LORD CRAIGHILL was absent.

THE COURT pronounced this interlocutor:—"Find that the assignation founded on by the pursuers was not duly intimated to the defenders: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-substitute appealed against."

TODS, MURRAY, & JAMIESON, W.S.—PHILIP, LAING, & TRAIL, S.S.C.—Agents.

No. 17. DONALD STEWART SUTHERLAND, Petitioner (Appellant).—*Rhind—Baxter.*

WILLIAM LAWRIE BARBOUR AND OTHERS, Respondents.—*Shaw—C. S. Dickson.*

Nov. 17, 1887.
Sutherland v. Barbour.

Property—Common property—Common interest—Alteration of buildings.—The proprietor of a shop in an area and of a dwelling-house above, the latter being on the street level, and both forming part of the same tenement, petitioned the Dean of Guild for authority to bring forward his dwelling-house to the line of the street. The petitioner's title was a disposition to "All and Whole that shop and dwelling-house in . . . together with a cellar in the front area . . . together also with a right in common with" the other proprietors of the tenement "to the *solum* of the piece of ground upon which the foresaid shop and dwelling-house are built." The other cellars in the area were the property of certain of these upper proprietors of the tenement. *Held* that the petitioner was not proprietor of the area, and that the other proprietors were entitled to object to his proposed alterations.

Superior and Vassal—Restrictions on building—Common feuing plan—Loss of plan—Proof—Onus.—A feu-charter, dated in 1825, providing for the erection of a tenement in a town, declared that it should not be in the power of the feuar to make any deviation from or alteration of a plan of the tenement, signed as relative to the feu-charter, "all which it is hereby specially provided may be stopped, demolished, or removed by us or our foresaids, or by any of the feuars of the said street, at the expense of the feuars offending." The tenement was erected in 1826. In 1887 the proprietor proposed to bring forward the front of the tenement to the line of the street by covering the area. Neighbouring feuars, with a title to object, objected on the ground that the proposed alteration was a deviation from the plan, but the plan itself was lost. *Held* that, as it was to be presumed that the existing buildings had been erected in conformity with the plan, the *onus* lay upon the proprietor to shew that the alterations proposed by him were not disconform to the plan.

2D DIVISION.
Dean of Guild Court, Edinburgh.
I.

DONALD STEWART SUTHERLAND, baker in Edinburgh, heritable proprietor of the subjects Nos. 2A, 2, 4, and 6A Claremont Place, Edinburgh, presented a petition in the Dean of Guild Court there for authority, *inter alia*, to bring forward the fronts of these subjects to the street, and in doing so to cover over the sunk areas in front, and to alter the stairs leading to these areas and to the cellars therein.

The petition was opposed by William Lawrie Barbour and others, proprietors of the upper flats of the tenements of which the petitioner's subjects formed a part, on the grounds (1), as regarded the whole subjects except No. 2, that the areas in front of these subjects, which the petitioner proposed to cover over, did not belong in exclusive property to him; and (2), as regarded all the subjects, including No. 2 (the area in front of which was admittedly the petitioner's property), that the proposed alterations were in contravention of the provisions of the feu-charter from which the titles of the petitioner and the respondents flowed.

No. 2A was at the west corner of Claremont Place. It consisted of a small shop and a house on the area level (part of the main-door house No. 2 forming the flat on the street level above No. 2A). The area was entered by a stair at the corner of Claremont Place, and turned the corner into West Claremont Street. It contained cellars, of which the eastmost alone belonged to the petitioner; the others, both those in front of 2A Claremont Place and those in front of 1 West Claremont Street, belonged to the respondent Barbour and others.

The petitioner's title to the property No. 2A Claremont Place consisted of a disposition by the Improved Edinburgh Property Investment Building Society, with consent of William Fraser, in favour of the petitioner, dated July 1878. This disposition conveyed to the petitioner "All and Whole that shop and dwelling-house in the area of No. 2 Claremont

Place, . . . together with the baker's oven behind the foresaid subjects hereby disponed, and the *solum* of the ground on which the said oven is erected, being part of the tenement of land built on the area or plot of ground after mentioned, together also with a cellar in the front area, being the eastmost cellar therein, and immediately next to the stair leading into the area, and a right of access to the roof of said tenement for the purpose of cleaning vents and other purposes, together also with a right in common with the proprietor of the main-door house, No. 2 Claremont Place, and the proprietors of the adjoining tenements to the east to the back-green behind the same, and to the *solum* of the piece of ground upon which the foresaid shop and dwelling-house are built, in common with the proprietors of the subjects above the same, which said tenement, with the back-green pertaining thereto, is part of All and Whole that lot or area of building ground, lying, &c., particularly described in an instrument of sasine &c. [being the instrument of sasine following on the feu-charter set forth in connection with No. 2], together with the pertinents of the said subjects herein disponed: . . . But always with and under the burdens, provisions, obligations, and declarations specified in the foresaid instrument of sasine, dated and recorded as aforesaid, in so far as applicable to the subjects and others above disponed, and also with and under the burdens and declarations specified in a disposition" granted by James Paris, S.S.C., Edinburgh, in favour of Fraser, dated and recorded May 1869, which last-mentioned deed was a disposition of the subjects in favour of Fraser, his heirs and assignees, *inter alia,* "under burden of keeping in repair the pavement in the sunk area and stair leading thereto (my said disponee and his foresaids, and the subjects above disponed, being freed of all share of the expense of keeping up the roof of the tenement of which the said subjects form a part, and the pavement and railings in front of said tenement, the same being to be upheld by the proprietors of the dwelling-houses in the common stair of said tenement)."

The petitioner maintained that under these titles a right of property in the area was by implication conveyed to him, subject only to a right of access in favour of the proprietors of the other cellars, which access his proposed operations (he averred) would in no way impair.

The respondents, Barbour and the other proprietors of flats above No. 2A, were proprietors of the remaining cellars in the area. Barbour's title (and the others were similar) was a disposition by Paris in his favour of "All and Whole that dwelling-house, being the westmost half of the first flat above the street flat of the tenement built at the corner of West Claremont Street and Claremont Place, and entering by the common stair presently numbered 1 West Claremont Street, with a cellar in the area, being the second from the stair leading into said area"; and there was this declaration,—"Declaring always that my said disponee and his foresaids shall be bound to bear one-sixth part of the expense of upholding the roof of the said tenement of which the subjects hereby disponed form a part, common stair, rain, water, and other pipes and drains connected therewith, and railings and pavement in front of said tenement (the pavement in the sunk area, where the foresaid cellar is situated and stair leading thereto, being kept in repair by the other proprietors of said tenement)."

The respondents maintained that the petitioner had not an exclusive right of property in the area No. 2A, or at least that he was not entitled to execute any operations which would have the effect of altering their access to their cellars, which they stated would be the effect of the proposed alterations.

No. 2 Claremont Place was immediately to the east of No. 2A. It

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consisted of a main-door house (including the street flat above No. 2A), and area, with cellars therein, the petitioner being admitted by the proprietor of the whole including the area. The feu-contract, on the restrictions in which the only objection to this part of the petitioner's proposed alterations was based, was granted by Charles Rae and others, Rose's trustees, in favour of James Sutherland, and was dated July, August, and November 1825. It contained, *inter alia,* these clauses:—"And it is hereby specially provided and declared, that the said James Sutherland, and his foresaids, shall be bound and obliged against the term of Whitsunday 1826 to complete the houses to be erected on said area, and that the same shall be in strict conformity in all respects to the plan and elevation adopted for the said area made out by the said Adam Ogilvie Turnbull, approved of by the said trust disponees, and signed as relative thereto, strict conformity to which plan and elevation it is hereby agreed may be enforced as the buildings proceed, by application, when necessary, to the Judge Ordinary of the bounds; and further, it is hereby expressly provided and declared, that the said James Sutherland and his foresaids are, and shall be, strictly prohibited, now and in all time coming, from making shops in the tenements to be erected by him on the said area to enter from Claremont Street, without prejudice nevertheless to their having shops in Claremont Place, if they shall so incline. . . . And, moreover, it is hereby expressly provided and declared, that it shall not be competent to, nor in the power of, the said James Sutherland, or his foresaids, to make any deviation from or alteration of the plan and elevation above mentioned of the said tenement to be erected on the area hereby disponed, nor to erect any buildings of any description upon the background of the said area, . . . all which, it is hereby specially provided, may be stopped, demolished, or removed by us or our foresaids, or by any of the feuars of the said street, at the expense of the feuars offending; which whole burdens, provisions, declarations, and conditions contained in these presents are hereby appointed to be engrossed in the instrument or instruments of sasine to follow hereon, and in all the future transmissions and investitures of the said area or tenements to be erected thereon or any part thereof; and if the same shall not be inserted therein, such instruments of sasine and transmissions shall be *ipso facto* void and null, as if the said writing had never been made or granted."

This title was duly feudalised by instrument of sasine, the restrictions being duly entered in the record, and referred to and incorporated in the titles of all the respondents.

The question under this head was as to whether the alterations proposed by the petitioner were in violation of the plan referred to in the feu-charter. The plan itself had been lost, and each side maintained that the other was bound to produce it,—the petitioner on the ground that as he was admittedly proprietor of the area No. 2, it was for the respondents to shew that what he proposed to do with his property was forbidden by the clauses of restriction in the feu-charter; and the respondents on the ground that as it was to be presumed that the buildings had been originally erected in conformity with the plan, it was for the petitioner to shew that his proposed alterations kept within the limits allowed by the plan.

The question raised in regard to Nos. 4 and 6A was the same in principle as that regarding No. 2A. The details on this head therefore need not be given here.

On 5th May 1887 the Dean of Guild pronounced this interlocutor:—"Finds, with regard to the petitioner's proposed operations at 2A Claremont Place and at 4 and 6A Claremont Place, that these operations are not confined to his own property; and with regard to his proposed operations at 2 Claremont Place, finds that these operations would be an infringement of the conditions of the feu-charter from which the titles of the petitioner and of the respondents flow, and would be injurious to the property of the respondents: Therefore to this extent sustains the pleas in law for the respondents, refuses the warrant craved by the petitioner: Finds the petitioner liable to the respondents in expenses," &c.

The petitioner appealed.

The arguments on the question of the alleged contravention of the feuing plan sufficiently appear from the narrative on that point.

On the question of property in the areas other than No. 2, argued for the petitioner;—But for the circumstance that the respondents had the right of property in certain of the cellars here, it was plain on the authorities[1] that the right of property in the area was in the petitioner, the principle being that, unless there was something in the titles plainly to the contrary, the owner of the ground flat had the property in the *solum* on which the house was built, and also in the sunk area, the other proprietors of the tenement having merely a right of common interest, and in *Johnston* v. *White*[1] a conveyance of the *solum*, in terms almost identical with those here, was held not to alter this presumption of exclusive property in the proprietor of the ground flat. The question, therefore, was, did the circumstance that the respondents had a conveyance in property of certain of the cellars in the area make any difference? It did not. The *solum* on which the tenement itself stood, on the above authorities, was plainly the petitioner's property, and the respondents' property in the cellars gave them no higher right in the area than a servitude of access, coupled with their common law right of common interest. The petitioner, therefore, was not entitled to do anything to impair that right of servitude, nor anything which would be a source of danger to the tenement, but otherwise he might erect such shop-fronts as he pleased on what was his own property.[2] Mere loss of amenity was no valid objection where the objector's title was merely that of common interest.[2]

Argued for the respondents;—The cited cases related to proposals to build either over an area which had been expressly conveyed to the person so proposing,[3] or over an area to which he had an exclusive right of access, with an exclusive right of property in all the cellars in the area.[4] Neither of these elements occurred here, and that difference reduced the petitioner's right from that of exclusive property, subject to a right of common interest in the other part owners of the tenement, to a right of common property with them. The petition ought therefore to be refused.

At advising,—

LORD RUTHERFURD CLARK.—The appellant here, who is proprietor of certain heritable subjects in Edinburgh, asks for authority to bring forward the premises to the street, or, in other words, to build over the area in front of the subjects. The application is opposed by certain of his neighbours, and the Dean of Guild has refused his authority to the proposed alterations. The question is whether that judgment was well founded.

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[1] Johnston v. White, May 18, 1877, 4 R. 721; Barclay v. M'Ewen, May 21, 1880, 7 R. 792; Calder v. Merchant Company of Edinburgh, Feb. 26, 1886, 13 R. 623.

[2] Arrol v. Inches, Jan. 27, 1887, 14 R. 394.

[3] Barclay v. M'Ewen, May 21, 1880, 7 R. 792; Arrol v. Inches, Jan. 27, 1887, 14 R. 394.

[4] Johnston v. White, May 18, 1877, 4 R. 721; Calder v. Merchant Company of Edinburgh, Feb. 26, 1886, 13 R. 623.

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The property of the petitioner consists of three different subjects—(1) 2A Claremont Place consists of a shop and dwelling-house, and a cellar in the front area. There are other cellars in that area which belong to other parties. (2) No. 2 Claremont Place, which adjoins the last mentioned lot, and which belongs entirely to the petitioner, including the area. (3) Nos. 4 and 6A Claremont Place.—These are two shops, and a house and a cellar in the area, but in this area also there are other cellars belonging to the respondent Church and others. The authority which the petitioner desires to obtain from the Dean of Guild is an authority to bring forward his houses to the street, or, in other words, to build over all the areas in front, and his claim to do so rests upon his alleged right to the property of all the areas. I think it was conceded that if he had not the property of all the areas his application is not well founded.

The first thing we must consider is, Has he the right of property in No. 2A Claremont Place? The title of that subject stands thus. There is conveyed to him,—"All and Whole that shop and dwelling-house in the area of No. 2 Claremont Place, with a baker's oven behind the said subjects, and the *solum* of the ground on which the oven is erected, with a cellar in the front area, being the eastmost cellar therein and immediately next to the stair leading into the area, and a right of access to the roof of the tenement for cleaning vents, &c., together also with a right in common with the proprietors of the main-door house No. 2 Claremont Place, and the proprietors of the adjoining tenements to the east to the back-green behind the same, and to the *solum* of the piece of ground on which the said shop and dwelling-house are built, in common with the proprietors of the subjects above the same . . . together with the pertinents of the said subjects." Now, it is plain enough from that description that the *solum* of the area is not conveyed to him *per expressum*, but it is said to be implied from the description. I do not think that we can imply any such right of property, and I do not think that any of the cases referred to support such a contention. There is here a definite description of the subjects conveyed, and these consist only of the shop with the *solum* on which it stands, and do not include the *solum* of the area. There is also conveyed a cellar in the area, but there are cellars belonging to other persons in that area, which I think makes it plain that the petitioner is not entitled to claim a right of property in the area itself.

If we next take the titles of Nos. 4 and 6A Claremont Place, we find that with a similar description there is conveyed the shop with the bakehouse, &c. The description is practically the same as in the case of No. 2A, which satisfies my mind that the petitioner has no right of property in the *solum* of this area also.

I think it is quite plain that the application is not well founded, because the petitioner admits that he is not entitled to build over the areas unless they belong to him. No right less than a right of property could sustain such a claim. That would therefore in my view prevent the appellant succeeding so far as relates to Nos. 2A, 4, and 6A Claremont Place.

The other property is in a different position. It is plain that in this instance the petitioner is the proprietor of the cellars and also of the area, and it may well be that he is entitled to bring forward his house to the street so far as regards this part of the subjects, although he is not entitled to do so as regards the other parts. The respondents object to the proposed alterations on the ground that they would be in contravention of the titles on which he holds his

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property. Referring therefore to the petitioner's title we find this clause,—"And it is hereby specially provided and declared that the said James Sutherland shall be bound and obliged against the term of Whitsunday 1826 to complete the houses to be erected on the said area, and that the same shall be in conformity in all respects to the plan and elevation adopted for the said area made out by the said Adam Ogilvie Turnbull, approved by us and signed as relative hereto, strict conformity to which plan and elevation it is hereby agreed may be enforced as the buildings proceed by application when necessary to the Judge Ordinary of the bounds"; while these conditions are inserted in this and subsequent titles—"And moreover, it is hereby expressly provided and declared that it shall not be competent to, nor in the power of the said James Sutherland or his foresaids to make any deviation from or alteration of the plan and elevation above mentioned of the said tenement to be erected on the area hereby disponed, nor to erect any buildings on the back . . . all which it is hereby specially provided may be stopped, demolished, or removed by us or our foresaids, or by any of the feuars of the said street, at the expense of the feuars offending." This right to stop the erection of any building is given to the other feuars, and there are the same restrictions and obligations in their titles. That being so, there is no doubt that the conditions may be enforced against the petitioner if he proposes to violate them—and it is said that he proposes to violate them—inasmuch as the proposed buildings would not be in conformity with the plan referred to. The petitioner, however, says in answer,—"You cannot tell whether I am violating that plan, because no such plan now exists, and if you wish to enforce it against me you must produce it." I cannot think that that is a sound argument. The house has existed for a long time, and presumably it was built according to the titles on which the property was held. I think that the petitioner must shew that his proposed work is in conformity with the titles, and consequently that he, and not the respondents, must produce the plan. I think, therefore, that the judgment of the Dean of Guild is well founded, and that we should dismiss the appeal and affirm the judgment.

LORD YOUNG and the LORD JUSTICE-CLERK concurred.

LORD CRAIGHILL having been on Circuit at the hearing gave no opinion.

THE COURT adhered.

ROBERT MENZIES, S.S.C.—THOMAS HUNTER, L.A.—CAIRNS, M'INTOSH, & MORTON, W.S.—Agents.

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JAMES ALEXANDER ROBERTSON AND ANOTHER (Mackenzie's Trustees), Pursuers (Respondents).—*Asher*—*Fleming*.

DAVID ROSS, Defender (Appellant).—*Sol.-Gen. Robertson*—*W. C. Smith*.

Retention—*Factor*—*Implied contract*—*Retention of documents*.—A landed proprietor placed documents relating to his estates in the hands of the factor on his estates, to enable him to discharge his factorial duties. Thereafter he granted a trust-deed for behoof of his creditors. The trustees thereunder applied to the factor for the documents, but he refused to give them up till his salary and account for factorial outlays were paid. *Held* that he was entitled to retain the documents on the ground of implied contract.

Meikle & Wilson v. *Pollard*, Nov. 6, 1880, 8 R. 69, *followed*.

Observations on that case *per* Lord Rutherfurd Clark.

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2D DIVISION.
Sheriff of Ross, &c.
I.

In June 1886 Sir James D. Mackenzie of Findon and Mountgerald, in the county of Ross, Bart., granted a trust-disposition in favour of James Alexander Robertson, C.A., Edinburgh, and James Anderson, solicitor, Inverness, for behoof of his creditors, by which he conveyed to them the lands of Findon and Montgerald, with the whole writs, &c., of those estates.

For some years prior to the date of the trust-disposition Mr David Ross, bank-agent, Dingwall, acted as Sir James' factor on his estates, and in that capacity obtained possession of the writs, &c., applicable to the estates.

In September 1886 the trustees under Sir James Mackenzie's trust-deed raised an action in the Sheriff Court at Dingwall against Mr Ross, in which they prayed the Court to ordain the defender to produce a list of all writs, &c., in his hands or under his control belonging to Sir James, or relating to his estate, and on such list being produced, to ordain the defender to deliver them to the petitioners.

The pursuers averred that the writs, &c., were necessary for the due administration of the trust-estate, and that they had suffered inconvenience by the defender's retention of them.

The defender claimed to be entitled to retain the title-deeds, writs, &c., until he was paid an account which he averred to be due to him. The account subsequently founded on consisted solely of sums due to him as salary as factor, and for outlays properly incurred by him in the exercise of his factorial duties.

The pursuers pleaded, *inter alia;*—(1) The pursuers being now in right of the writs, titles, books, and others mentioned, are entitled to delivery thereof, as prayed for.

The pursuers afterwards added the following pleas:—(1) The defender, as factor, having admittedly received rents sufficient to meet his advances as factor, was bound to discharge all burdens affecting the estate out of such rents, before making cash advances to the truster. (2) The defender having made cash advances to the truster, while there were burdens undischarged, must be held to have made them on his own personal responsibility.

The defender pleaded, *inter alia;*—(1) The defender having acquired actual possession of the writs, books, and documents referred to, from the owner thereof, is entitled to retain possession of them until paid the amount due to him under his contract.

On 8th November 1886 the Sheriff-substitute (Crawford Hill) pronounced an interlocutor in which he, *inter alia,* found that the defender was entitled to retain the writs, &c., in his possession until he was paid the balance due to him on his intromissions.*

On appeal the Sheriff (Cheyne), on 11th December following, pronounced this interlocutor:—"Recalls the interlocutor of 8th November last: . . . Finds, as regards the defender's first plea, that the defender is entitled to retain all books and documents that came into his possession in his capacity of factor on the truster's heritable estates until any salary due to him as factor has been paid, and his reasonable factorial outlays have been made good; but that he is not entitled to retain said books and documents in security of cash advances made by him to the truster," and remitted to the Sheriff-substitute to proceed.

It appeared from the accounts produced by the defender that with the exception of £477, 13s. 9d. of outlays in connection with drainage, the

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* In his note the Sheriff-substitute founded on the case of *Meikle & Wilson* v. *Pollard,* Nov. 6, 1880, 8 R. 69.

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account between him and his principal had been settled in the end of February 1885. The defender claimed retention of the books and documents in respect of that sum, and in respect of a balance on general factorial outlays of £1661, 19s. 9d., in all £2139, 13s. 6d. It appeared that during the period from February 1885 to the close of the account, the defender, as factor, had received upwards of £2600 of rents, but the entries on the credit side of the account shewed that he had paid these rents when received into the truster's private bank account.

On 21st March 1887 the Sheriff-substitute sustained the pursuers' second additional plea in law, and decerned against the defender.

On appeal the Sheriff pronounced this interlocutor:—"Recalls the Sheriff-substitute's interlocutor of date 21st March last: Finds that on a proper statement of accounts there is no balance due to the defender *qua* factor on the truster's heritable estates, though the truster is largely indebted to him in respect of cash advances; and having regard to this finding, and to the findings in the interlocutor of 11th December 1886, decerns against the defender in terms of the prayer of the petition."[*]

The defender appealed to the Court of Session.

Argued for the defender;—The case of *Meikle & Wilson* v. *Pollard*[1] was precisely in point. The right of retention of any article handed over for the purposes of the employment rested simply on contract. The person employed was bound to hand over the article deposited with him when the employer fulfilled his part of the contract, viz., the payment for outlays and salary in executing the same, and no earlier.

Argued for the respondents;—The case of *Meikle & Wilson* was one where the person claiming to be entitled to retain documents had done work by means of the material which he retained. Papers and documents of this kind were *extra commercium*, and it was only by the action of the law that even a law-agent could get a lien over them. The law-agent's lien was a creation of the law, and if the lien here claimed was upheld it would place the law-agent in a worse position than anyone else, his right of retention being very limited.[2] A factor could retain goods which he could realise in the market, but papers, title-deeds, &c., were in a different position, and could not be retained even by a law-agent

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[*] "NOTE.—The account prefixed to the affidavit, No. 5 of process, and therein described as an account-current between Sir James Dixon Mackenzie and the deponent (defender), as his factor on the estates of Findon and Mountgerald, undoubtedly bears out the defender's statement, that the rents received by him during the period embraced by it were (with few exceptions) paid by him on the day they were received, or within a day or two thereafter, into Sir James' private bank account; but it also shews that he regularly debited himself with them as received, and then took credit for the same sums on the other side as payments to his constituent. What he now proposes to do is to remodel his factorial account by striking these sums out of both sides of it, treating them in effect as if they had been paid directly to Sir James by the tenants. In my opinion he is not entitled so to do. The rents received must stand in the factorial account as against the factorial outlays; and as there was at the date when the payments to Sir James were made a large unsettled and growing balance of factorial outlays due to the defender, these payments must, in my judgment, be regarded as advances of cash made to Sir James by the defender in his private capacity. This view warrants the finding in the above interlocutor, and is in accordance with the opinion of the Sheriff-substitute, whose interlocutor I have, however, thought it necessary formally to recall, as it sustains a plea which is not happily expressed."

[1] Nov. 6, 1880, 8 R. 69.

[2] Bell's Prin. 1438.

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in security of cash advances, even where he averred that it was matter of express contract that he should have the power so to retain them.[1]

At advising,—

LORD JUSTICE-CLERK.—The question which arises here is not, I think, attended with difficulty. It appears that Mr Ross was factor for Sir James Mackenzie on his Highland estates, and in that capacity he obtained possession of various books and documents for the purpose of his employment. The affairs of Sir James being embarrassed, the pursuers were appointed trustees under a trust-deed for payment of creditors, and they have called on Mr Ross to give up these papers. Mr Ross says that he is ready to restore the documents when his factorial accounts are settled, but that till that is done he is not bound to do so. The question here is, whether the plea is well founded.

The Sheriff has proceeded on a rather special view of the course of dealing pursued by Mr Ross in his factorial duty, apart altogether from the general law of retention. The Sheriff says that the factor had uplifted rents from the tenants, and that if he had applied those rents to the extinction of his claim nothing would now be due to him; but that, instead of doing so, he paid them into the bank account of his principal. He finds, therefore, that this is a claim to retain against a loan of money, which he says—and rightly—is not competent. I do not think that that element enters into the case. The rents were the property of Sir James Mackenzie, and not the property of the factor, and he rightly paid them to the credit of his employer. Whether the factor could have applied them as suggested is a question which does not arise in this case. There is no dispute here that there is a balance due to Mr Ross on his factorial accounts, and we are to decide whether the factor can retain these documents till that balance is paid. This is not a case of hypothec in the true and strict sense of the word, but is a right of retention arising out of mutual obligations under a contract. We had occasion to consider the question in an almost precisely parallel case, viz., *Meikle & Wilson* v. *Pollard* (8 R. 69). That was a case where papers had been placed in the hands of an accountant for the purpose of collecting book debts. A similar plea to that stated here was put forward in that case. We were there very clearly of opinion that the accountant's right to retain the papers was not a right of lien, but a right of retention rising out of the conditions of the contract, one of which was, that the accountant was bound to restore the documents when the employment came to an end, but was not bound to do so until the other party fulfilled his part of the contract. That is precisely the case here. The nature of this claim is precisely the same. I may read two sentences from Lord Gifford's opinion in that case, which very clearly set forth my views in the present,—"I agree that this is not a case of lien. It is simply a case of the retention of a subject put into a person's hands for a special purpose, and resolves itself into a case of the relative duties of parties under a contract. The one party to it is bound to perform his part of the contract just as much as the other. The counterpart here of the duty of the one party to do the piece of business is that the other shall pay the price, and I think that until the latter is done, the party employed need not hand over articles which were put into his hands to enable him to fulfil his part of the contract." That view is sufficient for the disposal of this case.

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[1] Christie v. Ruxton, June 27, 1862, 24 D. 1182, 34 Scot. Jur. 568; Largue v. Urquhart, July 17, 1883, 10 R. 1229.

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LORD YOUNG.—I am of the same opinion. The case is, I think, one of lien, a word which expresses a legal right of retention. The pursuers seek to recover the books and papers specified in their petition, which are averred to be in possession of the defender. These books are the property of the pursuers as trustees for Sir James Mackenzie, whose title they have. The question is thus the same in all respects as if Sir James Mackenzie were suing. The pursuers are entitled to recover any property belonging to Sir James from anyone who has not a lawful right to retain it. These books came lawfully into the hands of Mr Ross on a contract between him and Sir James. He holds them under that contract now, and what he desires is, that his debt under the same contract shall be satisfied before the other parties' right is satisfied by his handing over the books. I expressed more than once during the argument my opinion, that every right to retain property belonging to another, whether you call it retention or lien, must stand on paction express or implied. The owner may make any lawful contract he likes respecting his property. He may pledge it on any terms agreed on between him and the other party to the contract. He may pledge anything which is capable of being put into the possession of another. But the law in the absence of an express contract implies a right of retention in a variety of circumstances. The most familiar instance is where property comes into the possession of another than the proprietor under a contract which creates rights *hinc inde*. The law then implies a right to retain possession until the debts under the contract are paid. The debt, however, must arise out of the contract on which the possession was obtained and is held. That is the explanation of all the ordinary liens. I do not know how else they can be accounted for. The right must proceed from the owner of the property or someone in his right.

It is said that there is something peculiar about books and papers, especially title-deeds,—that they are *extra commercium*. That is rather a difficult idea to follow. The notion is that there is a special law which entitles admitted law-agents to retain deeds—a right which does not exist in other persons. I think that idea is unfounded. The right to retain books and papers which the law allows to law-agents is just the lien implied under the contract on which they possess them.

The idea that papers are *extra commercium* would operate very curiously. Suppose a man sends his charter-chest by a carrier, and the carrier proposes to retain the box and its contents till the carriage is paid. The answer is—No, papers are *extra commercium;* or would the right depend entirely on the fact that the papers were enclosed in a box? It appears to me clear that the carrier would have his lien or right of retention over the papers till his claim was satisfied. The writer's lien is in no way distinguishable from this. I suppose again, if a man deposits his title-deeds with one of those custodiers who advertise now-a-days safe keeping of documents, &c., the ordinary law would apply, and the restoration of the documents would only be ordered when the other part of the contract had been fulfilled. I do not understand the phrase *extra commercium* as applied to papers. Anything is *extra commercium* in this sense, which will not sell in the market, and I do not know that papers will not sell in all cases. On the contrary, if they are old and curious they may fetch large sums.

Now, with respect to a factor, I see no reason why the ordinary law should not apply. If a factor goes out of his factorial business, if for instance he becomes a money-lender, the law will not imply a contract entitling him to retain factorial papers in security of lent money. The law-agents' lien there affords an

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illustration, for it only applies to their ordinary business charges under the contract on which the possession is held. If an express bargain were made that the papers should be retained as security for the loan, the law would give effect to it, but it would not imply such a contract. Why then should the same law not apply to the factor here? He has unsatisfied claims under the contract, and he is asking the law in the absence of express contract to imply his right. We considered that very case in *Meikle & Wilson* v. *Pollard*, and decided in the factor's favour on what we considered the rules of common law. If I thought that decision doubtful, I should not hesitate to go back on it and reconsider it, and if I thought it wrong I should not hold we were bound to follow it. But I am of opinion the case was rightly decided according to the true principles applicable to the matter. The Sheriff-substitute and the Sheriff here were both of opinion that the factor had a right of lien for his charges as factor. The Sheriff pronounced judgment to that effect on 11th December, but he went on to say that the factor was not entitled to retain the documents "in security of cash advances made by him to the truster." I agree there with the Sheriff in his view, but then, I think, he goes quite wrong when he says in effect "you might have paid your account out of the rents, but, instead of doing so, you handed over the whole rents without deduction to your constituent, leaving your account unpaid; the effect of this is that your account must be esteemed to be paid, and you are a moneylender to the amount of it." I think that is extravagant, and therefore I dissent from the Sheriff on the one point on which he differs from the Sheriff-substitute.

On the whole matter I am of opinion that the right of retention here pleaded is lawful, and that the law will imply it in the absence of express contract to the contrary. I am therefore of opinion that the appellant is entitled to prevail.

LORD RUTHERFURD CLARK.—The case of *Meikle & Wilson* v. *Pollard* was cited by the appellant as the authority on which he relied. It is not possible to distinguish that case from the present. I think that I am bound to follow it, and therefore I agree with the judgment which your Lordships are about to pronounce. I think it right, however, to say that, so far as I can judge, the decision in *Meikle's* case was an entirely new departure. If the law laid down there is sound, we should never have heard of the law-agent's hypothec as an exceptional right. We should never have heard of it at all, for there would have been no necessity for its existence. Being bound, however, by the decision in the case of *Meikle*, I agree in the judgment now to be pronounced.

LORD CRAIGHILL was absent.

THE COURT recalled the Sheriff's interlocutor, and assoilzied the defender.

TODS, MURRAY, & JAMIESON, W.S.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

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Nov. 18, 1887.
Stephen v. Anderson.

JOHN STEPHEN STEPHEN, Pursuer (Appellant)—*D.-F. Mackintosh—Fleming.*

ROBERT ANDERSON, Defender (Respondent).—*Balfour—H. Johnston.*

Church—Allocation of seats—Property—Parts and Pertinents.—Where seats in a parish church are allocated to heritors according to real rent, they are parts and pertinents of the property in respect of which they are allocated, and cannot be alienated therefrom.

The seats in the area of the parish church of a landward burghal parish were allocated to the individual heritors of the parish according to real rent. A

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heritor by disposition and assignation assigned her right and interest in her pew with the pew itself, "so far as I have right thereto," to a feuar in the burgh. Thereafter she disponed the property, in respect of which the allocation had been made, together with the parts and pertinents thereof, to a disponee. *Held* that the seat was an inalienable part and pertinent of the property, and that the disponee was therefore entitled to possess and occupy the seat.

1st Division.
Sheriff of Inverness, Elgin, and Nairn.
M.

In June 1885, John Stephen Stephen, B.M., Edinburgh, raised an action in the Sheriff Court of Elgin against Robert Anderson, grocer there, in which he prayed the Court to interdict the defender from entering the sittings in the seat or pew, No. 22, in the area of the parish church of Elgin, and from occupying, using, encroaching, or intruding on the same, or in any other way interfering therewith, so as to prevent the free use and occupation thereof by the pursuer, or others having his authority.

Interim interdict was granted.

The facts of the case, which were not disputed, were as follows:—

By disposition and assignation dated 27th August 1875, Mrs Jane Sutherland or Anderson, Eden House, Elgin, conveyed "all my right and interest in and to the pew numbered 22 of the area of the parish church of Elgin, with the said pew itself, in so far as I have right thereto," to Miss Anne Stephen, residing at Friars House, Elgin, of which she was proprietrix. The pursuer was nephew and heir-at-law to Miss Stephen. Miss Stephen and the pursuer used the seat from the date of the disposition till the raising of the action.

By disposition, dated 8th, and recorded 23d November 1876, Mrs Jane Sutherland or Anderson disponed certain house property in Elgin, of which she was proprietrix, to Robert Anderson, the defender, together with the parts and pertinents thereof.

The pursuer stated;—(Cond. 3) "The defender has, since the death of the said Miss Anne Stephen, without leave of the pursuer, and without any right or title whatever, used and occupied a portion of the sittings in the said seat or pew No. 22, in the area of said church; and the defender refuses to cease said use and occupation, and has thereby encroached upon the use and occupation of the said sittings by the pursuer or others authorised by him, and prevented the pursuer's full and complete occupation thereof."

The pursuer pleaded;—(1) The pursuer as heir-at-law foresaid, having right to the seat in question, is entitled to interdict against the defender as craved.

The defender averred that Friars House was not liable to be assessed for the maintenance or repair of the parish church. He admitted that he had taken possession of the pew, and averred that the pew was conveyed to him under the disposition of November 1876, as an inseparable pertinent of the house property thereby conveyed to him.

He pleaded, *inter alia*;—(1) The pursuer has no title to insist in the action. (2) The pursuer's author not being a heritor liable to be assessed in the maintenance of said church, her alleged right to the seat in question was incapable of descending by inheritance. (3) The said pretended disposition and assignation in favour of Miss Stephen falls to be set aside by way of exception. (4) The pretended disposition and assignation founded on by the pursuer, being illegal and inept, can convey to the pursuer no right to the sitting in question, in respect that the right to same forms a pertinent of the defender's property, and cannot be separated therefrom.

From documents lodged by the parties, it appeared that the parish of Elgin was partly burghal and partly landward. The parish church was rebuilt in 1828, and Lewis Anderson, who was then proprietor of the sub-

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jects conveyed to the defender, was assessed in a portion of the cost of the erection of the church effeiring to the rental or value of the property.

In 1825 a rental of the parish had been made up by assessors appointed by the Sheriff, and in that rental the nett rental of the property in question was assessed at £109, 5s. The assessors in their state of rental made this statement:—"The only deduction which we have judged proper to make from the landward part of the parish is the stipend payable to the ministers, and we have considered it our duty to deduct from the rental of the household property of the parish the sum of 5 per cent as an equivalent for repairs on the said household property."

In October 1828 the sittings in the church were divided among the heritors. The procedure and decreet of division bore,—"The Sheriff-substitute stated to the gentlemen assembled, that in consequence of the petition presented to him by the heritors of the parish and their committee, he had, in terms of the prayer of that petition, appointed various intimations to be made preparatory to dividing the area of the new church amongst the persons who had contributed to the building thereof."

It further appeared that the heritors were called to make choice of seats in the church according to their rentals, and that pew No. 22 was chosen by Mr Anderson as part of the number of seats falling to him.

In the division no distinction was made between the heritors in the burghal and those in the landward districts of the parish.

On this state of the facts, on 27th May 1887 the Sheriff-substitute (Rampini) pronounced an interlocutor in which, after findings in fact, he found in law,—"That in respect of the infeftment following on the disposition in favour of the defender, he has acquired a heritable right in and to the pew or seat in question, and that he is entitled to occupy and possess the same in preference to the pursuer: Therefore recalls the interim interdict formerly granted: Dismisses the petition."

The pursuer appealed to the Court of Session.

Argued for the appellant;—A church seat was not inseparable from the lands in a burghal parish. The Court had recognised that property in church seats was in such parishes *intra commercium*,[1] and the law allowed within burgh a reallocation of seats among heritors *inter se*. The defender's contention involved manifest injustice. According to it even when a parishioner's property ceased to be residential his church seat must remain attached to it, and he might have no seat in the church attached to his new residence, though liable to be rated on it for repairs on the church along with all other feuars.[2] Where the allocation proceeded on the principle of valued rent, as it did in landward parishes, it was admitted that the seat was inalienable. The same rule would be applied to the landward part, but not to the burghal part, of landward burghal parishes. Here the real rent was the basis taken, and that varied the right. Where the allocation is according to real rent the assessments are so also, and a person who built on his feu and was liable to be assessed on the increased value was entitled to proportionate sittings. Constant reallocation was impossible, and the only mode of avoiding the injustice and inconvenience was to hold seats allocated on real rent separable. The mode of allocation here followed was, except with consent of all the proprietors in the burgh, illegal.[2] The burgh, it was decided in

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[1] Ersk. ii. 6, 11; Watson v. Watson, 1760, M. 5431; Farie v. Leitch, Feb. 2, 1813, Fac. Coll.; M'Intosh v. Fraser, Feb. 8, 1825, 3 S. 508; Duff v. Brodie, 1769, M. 9644.

[2] Downie v. M'Lean, Oct. 26, 1883, 11 R. 47; Feuars of Peterhead v. Heritors of Peterhead, June 24, 1802, 4 Paton, 356.

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Downie's case was to be treated as a *unum quid, quoad* assessment for repairs on the church, and the defenders could not point to any case where in a landward burghal parish the burgh was not so treated as well with regard to allocation as to assessment. The difficulty in this case arose from the fact that an incompetent mode of allocation had been adopted in the burghal part of this parish.

Argued for the defender;—This seat was an inalienable pertinent of the defender's property. The parish had been treated in an exceptional though perfectly competent way, and a character had been impressed on the seats which must remain so long as the church remained. The mode of division put the burghal seats in exactly the same position as if they had been allocated to landward portions of the parish. The division made no distinction between lands in one part of the parish and lands in the other. It was admitted that the general mode of allocating seats in burghs was to treat the magistrates as one heritor.[1] In such cases after the area was divided the seatholders did not hold the seats as a part and pertinent of their property, but the course pursued here was competent. There was no legal necessity to apply to the valued rent for assessment; it was competent to go to the real rent, and that was the proper course where it had been resorted to before.[2] There was no hardship here to the pursuer, as he could only, in any view, be liable to assessment if a new church were built,[3] in which case a reallocation would be made. Where the allocation had been made in the ordinary way among landward heritors, seats were a pertinent of the property.[4] A seat could not be let,[5] and *a fortiori* it could not be sold. The magistrates of a burgh when treated as the sole heritor could allocate seats among the burgesses, but then they were in a position analogous to a heritor allocating his own seats among his tenants—they were merely trustees for those who sat in the church.

At advising,—

LORD PRESIDENT.—The pursuer, in the inferior Court, prays for interdict against the respondent interfering with his possession of a sitting, No. 22, in the parish church of Elgin. The title of the pursuer is a disposition and assignation, dated 22d August 1875, by which Mrs Jane Sutherland or Anderson conveyed that pew and the right of sitting there to his aunt, to whom he was heir-at-law. The defender, on the other hand, maintains that this and several other sittings belong to him as proprietor of certain house property in Elgin, which was conveyed to him by the same lady, as part and pertinent of the estate expressly conveyed, and that, as such, it cannot competently be separated from the property. I am of opinion that the defender is right, and I shall explain my reasons very shortly. The area of the parish church was divided in 1828 on the principle that every proprietor in the parish should have a portion of the area allocated to him and his property separately. The landward part of the parish embraced certain properties of large annual value, while the burgh properties were generally smaller, but all proprietors were dealt with on the same footing. The proceedings in the division establish that very clearly. They began with a rental of the parish, as ascertained in October 1825, being made up, and a specific value was put on every subject both in landward and burghal parts of the parish, distinction being made between the rents of lands and houses. The reason for this is brought out very clearly in a note appended by the assessors to the roll. They say that they submit a state amounting to £15,377, 9s. 6d., which they say is a fair rental of the parish. The note goes on to say,—"The only deduction which we have judged proper to make from the landward part of the parish is the stipend payable to the ministers, and we have considered it our duty to deduct from the rental of the household property of the parish the sum of five per cent as an equivalent for repairs on the said household property." That explains the distinction I alluded to. In every other respect the rental is made up in exactly the same way. Mr Anderson, who was then proprietor of the property here in question, was entered at an annual value of £109, 5s.

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[1] Lockhart v. Lockhart, Jan. 24, 1832, 10 S. 243.

[2] Williamson v. Ramsay, 1685, M. 5121; Sinclair v. Magistrates of Kinghorn, 1761, M. 7918; Heritors of Campbeltown v. Rowat, 1775, M. 7921; Feuars of Crieff v. Heritors of Crieff, 1781, M. 7924; Heritors of Forfar v. Carnegy, 1793, M. 7929.

[3] Duke of Abercorn v. Presbytery of Edinburgh, March 17, 1870, 8 Macph. 733, 42 Scot. Jur. 377; Stiven v. Heritors of Kirriemuir, Nov. 14, 1878, 6 R. 174.

[4] Duff v. Brodie, 1769, M. 9644; Peden v. Magistrates of Paisley, 1770, M. 9644; Bruce v. Bruce, June 24, 1873, 11 Macph. 755, 45 Scot. Jur. 466; Gavin v. Trinity House of Leith, June 2, 1825, Fac. Coll., see Lord Craigie.

[5] Duke of Roxburgh (Heritors of Jedburgh), June 1, 1876, 3 R. 728, see Lord President.

A minute of the Presbytery follows on 11th August 1826. In the proceedings of which that is a minute appearance was made for the heritors, in the ordinary sense of the word, and also for the feuars of the town. The gentleman who appeared for them stated that a contract had been entered into for the erection of a new church, and he produced the rental just referred to. The Presbytery then having considered the contract and the roll "unanimously approved thereof, and appointed the contract to be entered into in terms of said minute, and to be extended in due form *quam primum*. The Presbytery also did and hereby do decern against the whole heritors, feuars, and other proprietors of the town and parish of Elgin for the foresaid sum of £6286 sterling contained in said minute of agreement, and appoint the said Mr Patrick Duff to apportion the said sum among the several heritors, feuars, and other proprietors according to their several rents as stated in the rent-roll produced and approved of by the Presbytery." Then follows the usual certificate and application to the Court for letters of horning. This brings it out plainly that Mr Anderson was assessed on his property for his proportion of the expense of building the church precisely as if he had been a heritor in a landward parish, and all the other heritors and feuars were assessed in the same way. In short, the imposition of the assessment was made precisely in the same way as if the parish had been entirely landward.

Then followed the division of the area before the Sheriff-substitute. That functionary, at a meeting at which everybody interested was represented, stated to the gentlemen assembled, that in consequence of the petition presented to him by the heritors of the parish and their committee, he had, in terms of the prayer of that petition, appointed various intimations to be made preparatory to dividing the area of the new church amongst the persons who had contributed to the building thereof, and then called upon the heritors in the order of their interests to come forward and choose their family seats. Upon that follows the choice by heritors, including proprietors in the burgh, and the leading heritor, the Earl of Fife, chose his sittings, seventeen in all, and then the others in like manner. Mr Anderson chose the seat No. 22 in the area. The Sheriff then called on the heritors to take their choice of the remaining seats, and accordingly the Earl of Fife began and was followed by the others, amongst them by Anderson, who chose four seats in the gallery. He thus got one seat in the area and four in the gallery, and he had contributed a sum in proportion to the value of his property to the building of the church.

Now this decision was carried out as if there had been no burgh in the parish at all. I have not heard it contended that that is an illegal proceeding. It appears to me perfectly legitimate, and it is a course which is often followed in similar cases. We must, therefore, take it that the division was lawfully made. What, then, is the result with regard to the sittings? I do not think that is doubtful, because, according to Erskine, they are parts and pertinents of the estate in respect of which the allocation is made. They are also inseparable parts of the estate, for the obvious reason that if they could be sold to a stranger the consequence would be that the inhabitants of the property would be deprived of their right of occupying seats in the parish church. It does not matter what the extent of the property may be. The people who are to sit in the Earl of Fife's sittings are much more numerous, no doubt, than those who are to sit in right of Mr Anderson, but the principle is the same. Proprietors both large and small hold sittings, not absolutely in property, but in trust for themselves and the persons on their estates, and therefore it is that sittings cannot be disjoined from the properties, because if they were it would be a breach of trust on the part of the proprietors. I am very clearly, therefore, of opinion that this seat was an inseparable pertinent of the property to which it was attached at the time the church was divided.

No doubt there is another way in which a church may be divided in such a case as the present, viz., by treating the magistrates of the burgh as one heritor representing the interests of the whole inhabitants. When the area is so divided obviously the right or interest acquired by any one inhabitant is of a very different kind to what we have here. In that case no individual property has any sittings attached to it, and therefore the same rules cannot apply. The only party in the burgh to whom sittings are allocated is the corporation, and they may use their discretion, having received an adequate share, in subdividing the sittings among the inhabitants. There a different rule must be applied. That is one perfectly legitimate way of dividing the church, and the way adopted here is the other legitimate way. It seems to me, therefore, that the disposition and assignation on which the pursuer relies is good for nothing, because it would have the effect of separating an inseparable part and pertinent from the property to which it belongs. On the other hand, the defender here, as the disponee infeft of Mr Anderson, possesses this sitting No. 22 as part and pertinent of his estate. I have, therefore, come to the same conclusion as the Sheriff, though I cannot adopt his grounds of judgment.

LORD MURE.—We have had a full reference to all the authorities applicable to this case, and I quite concur in the conclusion at which your Lordship has arrived. If the question had arisen with regard to a purely landward parish, there could be little doubt that the defender was entitled to undisputed possession of this sitting in the church. It is settled in such cases that the sitting could not be separated from the property to which it was allocated. It passes as a pertinent of the property without any express grant. No doubt there are

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special cases in partly landward and partly burghal parishes where the magistrates of the burgh, under a particular arrangement, are owners of a part of the area of the church for the benefit of the town, and in such cases different rules may be applicable; but under the circumstances in which this seat was allocated to Anderson the division was made according to the rules applicable to purely landward parishes, and every heritor has his seat specially allocated to him. The seat is attached to the property, and the property carries the seat with it.

Lord Adam.—The solution of this question is to be found in what Mr Balfour said, that a right to a seat in a parish church is a pertinent of the property in land to which it is allocated, and that it cannot be separated from the land. I understand that that is the law with regard to landward parishes, in fact it was not disputed that that was the law until late in the argument advanced by the Dean of Faculty.

Here, though the parish is partly burghal, the whole was treated in the allocation as if it was purely landward. The seats were allocated in respect of the land held by the heritors, and such a course was perfectly legitimate. I think, therefore, that the same rules must be applied as if the parish had been altogether landward. It was argued by the Dean that the principle of non-alienation does not apply, even in landward parishes, where the assessment is put on real rent. There is no authority for that proposition that I know of. Though such a result might be desirable it could not be reached by the Court, and would require legislation. I therefore concur in the judgment proposed. I am authorised to state that Lord Shand concurs in the judgment.

Lord Shand was absent at the advising.

The Court dismissed the appeal.

Boyd, Jameson, & Kelly, W.S.—Philip, Laing, & Trail, S.S.C.—Agents.

No. 20.
Nov. 18, 1887.
Alston v. Macdougall.

Mrs Jane Alston, Pursuer (Reclaimer).—*Darling*—*G. W. Burnet.*
James Macdougall, Defender (Respondent).—*Guy.*

Process—Summons—Commencement of action.—Held that the date of the commencement of an action is the date of the execution of the summons.

Process—Execution by registered letter—Citation Amendment Act, 1882 (45 *and* 46 *Vict. c.* 77), *sec.* 3.—*Held* that when a person is cited in an action by the posting of a registered letter in terms of sec. 3 of the Citation Amendment Act, 1882, the date of posting is the date of execution.

1st Division.
Lord Fraser.
M.

Mrs Jane Alston, matron of the Cowglen Fever Hospital, Pollokshaws, raised an action of damages for alleged slander against James Macdougall, a member of the Parochial Board and Local Authority of the parish of Eastwood and of the management and sanitary committees of those bodies, by which committees the Cowglen Fever Hospital was managed.

The slander was alleged to have been uttered at a meeting of the parochial board and local authority on 3d January 1887.

The summons was signeted on 3d March, and was served by registered letter, in terms of sec. 3 of the Citation Amendment Act, 1882.* The

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* Sec. 3 enacts, that in any civil action any summons "may be executed in Scotland by an officer of the Court from which such summons . . . was issued, or other officer who, according to the present law and practice, might lawfully execute the same, or by an enrolled law-agent, by sending to the known residence or place of business of the person upon whom such summons . . .

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letter was registered between 5 and 6 P.M. on 3d March, and could not reach the defender on that day.

In these circumstances the defender pleaded (2) that the action was excluded in respect that it had not been commenced within two months after the cause of action had arisen, as required under sec. 118 of the Public Health Act, 1867.*

On 15th June 1887 the Lord Ordinary (Fraser) sustained that plea, and dismissed the action, with a finding as to expenses.†

The pursuer reclaimed, and argued;—The action was commenced within two months of the cause of action having arisen. The commencement of an action was the signeting.[1] At all events the summons was executed within the statutory two months. It was posted

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is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation, ... a registered letter by post containing the copy of the summons or petition or other document required by law, in the particular case, to be served with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation."

* Sec. 118 enacts,—"The local authority and the board shall not be liable in damages for any irregularity committed by their officers in the execution of this Act, or for anything done by themselves in the *bona fide* execution of this Act, and every officer acting in the *bona fide* execution of this Act shall be indemnified by the local authority under which he acts in respect of all costs, liabilities, and charges to which he may be subjected, and every action or prosecution against any person acting under this Act on account of any wrong done in or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen."

† "OPINION.— . . . But the second plea in law for the defender, which is, that 'the present action should be dismissed, in respect that it is excluded by section 118 of the Act 30 and 31 Vict. cap. 101,' must be sustained. This section provides that 'the local authority and the board shall not be liable in damages for any irregularity committed by their officers in the execution of this Act, or for anything done by themselves in the *bona fide* execution of this Act; and every officer acting in the *bona fide* execution of this Act shall be indemnified by the local authority under which he acts, in respect of all costs, liabilities, and charges to which he may be subjected; and every action or prosecution against any person acting under this Act, on account of any wrong done in or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen.' Now, has the present action been commenced within two months after the cause of action has arisen? The Lord Ordinary is of opinion that it has not. The cause of action originated on the 3d of January 1887 by the speech of the defender at the meeting of the local authority. The summons in this action was signeted on the 3d of March 1887. It was not served by a messenger-at-arms, the pursuer contenting herself with the more easy and economical, but, at the same time, perfectly competent, way of serving the summons by a registered letter. This letter was registered between the hours of five and six P.M. on the 3d of March, the last day of the two months. Now, it could not reach the defender on the same day, and it was for that kind of case that subsection 2 of section 4 of the Act 45 and 46 Vict. cap. 77, was enacted, which says that 'the *induciæ* or period of notice shall be reckoned from twenty-four hours after the time of posting.' Therefore the time of notice must be reckoned in the present case from the 4th of March 1887, and consequently more than two months elapsed before the commencement of the present action, and therefore it must be dismissed."

[1] Stair iv. 3, 20; Ersk. iii. 6, 3; Aitken v. Dick, July 7, 1863, 1 Macph. 1038, 35 Scot. Jur. 596.

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on the last day of the period, and even though it did not reach the defender till next day that was sufficient. Further, the words of the statute were quite unambiguous—the act of posting constituted a valid citation, and it could not be doubted that an action had been commenced when it had reached that stage. Subsection 2 of section 4 of the Act, which was quoted by the Lord Ordinary, merely gave a longer *induciæ* in the case of a summons served by post, because of the longer time a summons so served took to reach a defender.[1]

Argued for the defender;—To hold that signeting constituted the commencement of an action would defeat the limitation, because a summons might be signeted on the last day of the two months, and then be kept without further steps being taken in it for a year and day. With regard to the execution, the summons was dated on the day on which it was signeted, and the execution would bear to be of the same date, but under subsec. 2 of sec. 4 of the Act it only came into force "twenty-four hours after the time of posting."

Lord President.—Two points are decided in the Lord Ordinary's interlocutor. The action is said by the pursuer to have been commenced within two months after the cause of action had arisen, because the summons was signeted within that time. The Lord Ordinary held that signeting is not the commencement of an action, and in that decision I entirely concur. It runs through all the cases that the word "commencement," used as it is here, means the time at which the defender was cited, and, therefore, it is impossible to sustain the plea that signeting is the commencement of an action.

But there is another question raised, and that refers to execution. The question is whether the summons was not executed within two months of the cause of action having arisen. The cause of action arose on 3d January; was the summons executed within two months of that time? What took place is sufficiently proved by the warrant of execution. A letter containing the summons and other particulars required by the statute was posted on 3d March. Now, the 3d section of the Citation Amendment Act, 1882, enacts that any summons may be executed by an officer of Court as under the old law, "or by an enrolled law-agent, by sending to the known residence or place of business of the person upon whom summons, warrant, or judicial intimation is to be served . . . . a registered letter by post containing the copy of the summons . . . . with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation." It appears to me that these words of the statute are not ambiguous; they distinctly provide that the posting of a letter shall constitute legal and valid citation. Giving, then, fair effect to the words, I cannot resist the conclusion that citation on 3d March was valid citation of the defender. The word "posting" is not ambiguous, for as soon as a letter is put into the post-office it is in the keeping of the postmaster-general, and is beyond reach of recall. This construction is supported by the terms of schedule 1 of the Act, which gives a form of execution, "executed . . . by posting on last . . . at the post-office of . . . with citation subjoined." The only answer to that view (and it satisfied the Lord Ordinary) is founded on section 4, subsection 2, of the Act. "The *induciæ* or period of notice shall be reckoned from twenty-four hours after the time of posting." The Lord

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[1] Charleson v. Duffes, June 10, 1881, 8 R. (Just. Ca.) 34; Dunlop v. Higgins, Feb. 24, 1848, 6 Bell's App. 195, A. S., July 6, 1831.

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Ordinary seems to think that that is inconsistent with the notion that posting constitutes legal and valid citation. It seems to me that there is no inconsistency, and that the two sections are in complete harmony. I see the reason easily enough for giving longer *induciæ* to a defender when citation is by letter, because of the time which must elapse between the posting and the receipt of the letter. I therefore think the defender here was well cited.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

THE COURT recalled the Lord Ordinary's interlocutor, in so far as it sustained the defender's second plea in law and dismissed the action, and remitted to him to proceed.

ROBERT EMSLIE, S.S.C.—F. J. MARTIN, W.S.—Agents.

No. 21.

Nov. 18, 1887.
Grant v. Cowe.

JOHN L. GRANT AND OTHERS (Cowe's Executors), First Parties.—*Goudy.*
PETER COWE, Second Party.—*G. W. Burnet.*

Succession—Legacy—Direction to trustees to pay on event happening which did not take place.—By codicil to his will a testator left a legacy of £500, "which is to be handed over along with or at such time as legacies mentioned in clause D of this will are paid or handed over." The legacies in clause D were contingent on the testator surviving his mother, an event which did not occur. *Held* that the terms in which the direction was expressed did not import a condition into the legacy, and that the legatee was therefore entitled to payment.

1st Division
B.

HENRY COWE, Glasgow, died on 30th March 1881, leaving a holograph deed of settlement, dated 10th December 1879, and two codicils, dated respectively 7th January and 8th September 1880. Mr J. L. Grant, Aberdeen, and two others were executors under the deed.

The will was divided into four parts, headed A, B, C, and D. By clause A a liferent of his whole property was left to his mother.

By clause B, which was subsequently recalled, certain special legacies were bequeathed.

By clause C, which commenced with these words, "Should I, Henry Cowe, die before my mother, Hannah Watson, my property which she has had the liferent of is, after her death, is to be governed and divided as follows," the liferent of his property was to go to his sister in the event of her surviving him and his mother, and there were directions as to the disposal of the fee after her death.

Clause D was only to take effect in the case of the testator surviving his mother. There were under this head various bequests of money, &c.

By the codicil of 8th September 1880 the following bequest was left:—"In addition to any legacy mentioned in this will by which he may be left any property, of whatsoever kind, to Peter Cowe or his next of kind (as designated in a previous clause of this codicil), I leave the sum of five hundred pounds stg. (£500), which is to be handed over along with or at such time as legacys mentioned in clause D of this will are paid or handed over."

The testator was survived by his mother, who enjoyed the liferent of the property till her death in 1886.

The legacies and provisions contained in clause D of the will having thus lapsed, a question arose whether the legacy bequeathed to Peter Cowe in the codicil was payable, or whether it fell along with the provisions of clause D.

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on the last day of the period, and even though it did not reach the defender till next day that was sufficient. Further, the words of the statute were quite unambiguous—the act of posting constituted a valid citation, and it could not be doubted that an action had been commenced when it had reached that stage. Subsection 2 of section 4 of the Act, which was quoted by the Lord Ordinary, merely gave a longer *induciæ* in the case of a summons served by post, because of the longer time a summons so served took to reach a defender.[1]

Argued for the defender;—To hold that signeting constituted the commencement of an action would defeat the limitation, because a summons might be signeted on the last day of the two months, and then be kept without further steps being taken in it for a year and day. With regard to the execution, the summons was dated on the day on which it was signeted, and the execution would bear to be of the same date, but under subsec. 2 of sec. 4 of the Act it only came into force "twenty-four hours after the time of posting."

Lord President.—Two points are decided in the Lord Ordinary's interlocutor. The action is said by the pursuer to have been commenced within two months after the cause of action had arisen, because the summons was signeted within that time. The Lord Ordinary held that signeting is not the commencement of an action, and in that decision I entirely concur. It runs through all the cases that the word "commencement," used as it is here, means the time at which the defender was cited, and, therefore, it is impossible to sustain the plea that signeting is the commencement of an action.

But there is another question raised, and that refers to execution. The question is whether the summons was not executed within two months of the cause of action having arisen. The cause of action arose on 3d January; was the summons executed within two months of that time? What took place is sufficiently proved by the warrant of execution. A letter containing the summons and other particulars required by the statute was posted on 3d March. Now, the 3d section of the Citation Amendment Act, 1882, enacts that any summons may be executed by an officer of Court as under the old law, "or by an enrolled law-agent, by sending to the known residence or place of business of the person upon whom summons, warrant, or judicial intimation is to be served . . . . a registered letter by post containing the copy of the summons . . . . with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation." It appears to me that these words of the statute are not ambiguous; they distinctly provide that the posting of a letter shall constitute legal and valid citation. Giving, then, fair effect to the words, I cannot resist the conclusion that citation on 3d March was valid citation of the defender. The word "posting" is not ambiguous, for as soon as a letter is put into the post-office it is in the keeping of the postmaster-general, and is beyond reach of recall. This construction is supported by the terms of schedule 1 of the Act, which gives a form of execution, "executed . . . by posting on last . . . at the post-office of . . . with citation subjoined." The only answer to that view (and it satisfied the Lord Ordinary) is founded on section 4, subsection 2, of the Act. "The *induciæ* or period of notice shall be reckoned from twenty-four hours after the time of posting." The Lord

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[1] Charleson v. Duffes, June 10, 1881, 8 R. (Just. Ca.) 34; Dunlop v. Higgins, Feb. 24, 1848, 6 Bell's App. 195, A. S., July 6, 1831.

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Ordinary seems to think that that is inconsistent with the notion that posting constitutes legal and valid citation. It seems to me that there is no inconsistency, and that the two sections are in complete harmony. I see the reason easily enough for giving longer *induciæ* to a defender when citation is by letter, because of the time which must elapse between the posting and the receipt of the letter. I therefore think the defender here was well cited.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

THE COURT recalled the Lord Ordinary's interlocutor, in so far as it sustained the defender's second plea in law and dismissed the action, and remitted to him to proceed.

ROBERT EMSLIE, S.S.C.—F. J. MARTIN, W.S.—Agents.

No. 21.

Nov. 18, 1887.
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1ST DIVISION
B.

HENRY COWE, Glasgow, died on 30th March 1881, leaving a holograph deed of settlement, dated 10th December 1879, and two codicils, dated respectively 7th January and 8th September 1880. Mr J. L. Grant, Aberdeen, and two others were executors under the deed.

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The testator was survived by his mother, who enjoyed the liferent of the property till her death in 1886.

The legacies and provisions contained in clause D of the will having thus lapsed, a question arose whether the legacy bequeathed to Peter Cowe in the codicil was payable, or whether it fell along with the provisions of clause D.

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A special case was therefore submitted to the Court, to which the executors of Henry Cowe were the first parties and Peter Cowe the second party.

The following question was submitted for the opinion and judgment of the Court:—"Are the parties of the first part bound to make payment of said legacy of £500 as a valid and subsisting legacy?"

Lord President.—This singular settlement is divided into four parts, distinguished by the letters A, B, C, and D. The part A conveys the testator's whole property, "whether real, fictitious, moveable, heritable, or personal," in liferent to his mother. That provision has never been recalled. The provisions of part B are all recalled, and therefore the will consists of part A and of parts C and D, which are said to constitute alternative wills—one to receive effect if the mother survived the testator, the other if she predeceased him. She did survive her son, and therefore D does not receive effect. Part C is therefore the only part of the will, which in the circumstances which have arisen falls to have effect given to it. There is, however, a codicil, the last bequest of which is thus expressed,—"In addition to any legacy mentioned in this will by which he may be left any property, of whatsoever kind, to Peter Cowe or his next of kind (as designated in a previous clause of this codicil), I leave the sum of five hundred pounds stg. (£500), which is to be handed over along with or at such time as legacys mentioned in clause D of this will are paid or handed over."

Taken by themselves, these words present no difficulty, but the legacies "in clause D of this will" can never be handed over, because they are only to be given if the testator survived his mother. What, then, is the effect of the words? I cannot spell out any condition as being attached to the bequest of £500; the words seem to me to be merely in the form of a direction to trustees to pay the bequest along with or at such time as those given in part D. If we look at the words as merely importing such a direction to the trustees, I do not think that the mere impossibility of carrying out the direction operates as a destruction of the bequest. Speaking generally, I cannot think that where there is a direction as to the time of payment and a difficulty arises as to the direction being carried out, that is subversive of the bequest, if it is made in clear terms. Therefore in whatever way you construe the words "hand over," I do not think they can destroy the bequest.

Lord Mure concurred.

Lord Adam.—The words of gift here are clear, and I do not think that any condition is imposed on it. The latter part of the clause is nothing but a direction to the trustees, and I do not think that any direction, however difficult it may be to carry it out, will operate to destroy a clearly expressed bequest. I therefore think that the period of payment was the date of the mother's death.

Lord Shand was absent.

The Court answered the question in the affirmative.

Adam & Sang, W.S.—R. Bruce Cowan, W.S.—Agents.

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Nov. 23, 1887.
Magistrates of Tain v. Murray.

MAGISTRATES OF TAIN, Pursuers (Reclaimers).—*Balfour—Sir Charles Pearson—Begg.*
W. H. E. MURRAY, Defender (Respondent).—*D.-F. Mackintosh—J. P. Grant.*

Salmon-fishings—Division of, where ex adverso of adjoining properties—Property—Marches.—In a question as to the boundary between salmon-fishings *ex adverso* of two seaboard properties, circumstances in which it was *held* that a stream which at low water divided the foreshores of the properties unequally did not constitute a natural boundary between the salmon-fishings so as to displace the ordinary legal rule of division applicable to such cases in the absence of prescriptive possession.

1ST DIVISION.
Lord Trayner.
B.

BY crown-charters, dated in 1612 and 1671, the burgh of Tain was in right of certain subjects therein described, bounded on the north-west by the Dornoch Firth, on the north-east by the open sea, and on the south-east at low water by the Fendom Burn or Inver Channel, which at high water formed an estuary called Inver Bay, with the salmon-fishings *ex adverso* of these subjects.

Captain W. H. E. Murray of Geanies was infeft in certain subjects, called the lands of Arboll, and others, with the salmon-fishings *ex adverso* thereof, lying to the south-east of the above-described lands belonging to the burgh of Tain, and separated from them by the Fendom Burn or Inver Channel or Bay.

On the western side of the Fendom Burn or Inver Channel were the lands of Morrichmore, which were commonty lands belonging, *inter alios*, to the burgh of Tain, Captain Murray, and Mr MacLeod of Cadboll. The foreshore of the Morrichmore extended several miles in length, with an average breadth of about a mile from high to low-water mark on the north-west side. The lands of Morrichmore were not contiguous to any of the lands belonging to the burgh of Tain in the vicinity.

The burgh of Tain having claimed right to the salmon-fishings *ex adverso* of the Morrichmore, and alleging that the exercise of this right was being interfered with by Captain Murray or his tenant, brought this action of declarator against Captain Murray and his tenant to have the boundaries of the fishings defined. They asked to have it found that "the legal boundary or march between the salmon-fishings belonging to the pursuers in the estuary or sea adjacent to All and Whole the lands of Morrichmore, in the county of Ross, also belonging to the pursuers, on the one part, and the salmon-fishings belonging to or claimed by the defender in the estuary or sea adjacent to All and Whole the lands of Arboll, or part thereof, also belonging to or claimed by the defender, on the other part, is the *medium filum* of the Fendom Burn and Inver Channel at low water, as delineated with a red line laid down on the copy Ordnance map produced herewith, or such other line as shall be found to be the legal boundary or march between the said respective salmon-fishings in the course of the proceedings to follow hereon."

It was admitted that neither party had any grant of the foreshore, and that there was no possession which could be appealed to by either party as instructing their rights.

The pursuers averred, *inter alia*,—(Cond. 7) "The Fendom Burn is a large stream formed by the confluence of a considerable number of burns. In ordinary spring tides the sea runs up it for 3¼ miles above the western march of the defender's lands (the march nearest to the Morrichmore). At low water the channel of the Fendom Burn at the said march is 246 feet in width, and too deep to be forded. In order to cross from the defender's lands to the Morrichmore at low water, it is necessary to take a boat out by sea, or, passing entirely off defender's lands on to those of others, to proceed up the stream to a ford situated at fully half a mile's distance from the nearest march of defender's lands, and to travel back from that ford upwards of a mile on the lands of Morrichmore or the foreshore in order to reach the fishing-ground and the nets. This ford is available only at low water, the depth at high water being from 8 to 10 feet, according to the state of the tides. At no state of the tide is it possible to pass by land or ford from the defender's lands to the Morrichmore or the Whiteness Sands, except by passing through the lands of other proprietors; and when the ford above mentioned is not available, on account of the state of the tide, this involves a detour of several miles. The statement in answer with reference to the character of the Fendom Burn and the Inver Channel, and the ascent of fish, is denied. Explained that only at the sand bar at the mouth of the channel are the sands ever shifted by the action of storms, and that taken one year with another they resume the normal position shewn on the Ordnance map."

The defender answered,—" Admitted that in ordinary spring tides the sea runs up the said channel for 3½ miles beyond the western march of the defender's lands opposite to the Morrichmore, Mr Robert Bruce Æneas MacLeod of Cadboll being the proprietor of a portion of the conterminous lands of Inver. Denied that the Fendom Burn is properly speaking a fresh-water stream at all, but explained that it is a water-course by which the superfluous water from the Morrichmore and the adjoining lands drains in ordinary weather into the head of the Inver Channel or Bay, and that in drought it is totally dry. Under no conditions is it practicable for the ascent of fish of the salmon kind, nor have they ever been found there. The said Inver Channel is therefore merely an indentation of the coast (a large part of it being on the foreshore *ex adverso* of the defender's lands), in which the water is entirely salt at all states of the tide. The retention of water in the said channel being assisted by a sand bar at the mouth thereof, and the bed of the bay being composed of soft sand, the course of the channel at low water is constantly changing. After very high tides the channel has been noticed to alter its course by several hundred yards, and its configuration now is entirely different from what it was when the plan produced by the pursuers was made by the Ordnance Survey in 1872." The defender further stated that he was willing to accept a line laid down on a plan produced by him as the western boundary of his right of exclusive salmon-fishing *ex adverso* of his lands of Arboll, as distinguished from that *ex adverso* of the lands of Morrichmore, reserving to himself right to vindicate his share of the fishings *ex adverso* of the commonty at any time thereafter. This line was in the direction of a perpendicular drawn at right angles to the straight line of coast.

He pleaded, *inter alia*;—(2) All parties not called. (4) Upon a sound construction of the defender's titles, and the possession that has followed thereon, he is entitled to be assoilzied from the conclusions of the summons. (5) The line of march contended for by the defender being the true and lawful line of march of the defender's exclusive right of salmon-fishing, decree ought to be pronounced accordingly.

Subsequently, in order to meet the defender's second plea, a supplementary action was brought against the Lord Advocate as representing the Crown, and Mr MacLeod of Cadboll, for any interest they might have as common proprietors of the lands of Morrichmore, or of the salmon-fishings *ex adverso* thereof, but neither of them appeared to defend.

Thereafter, on 20th July 1886, the Lord Ordinary (Trayner) remitted to Mr George Miller Cunningham, C.E., " to consider the statements of parties on record with the plans produced, and to inspect the locality;

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and having met with and heard the parties or their agents, to report upon the pursuers' statements contained in the seventh article of the condescendence, and the defender's counter statements in answer thereto, with special reference to the boundary lines claimed by the respective parties, and to lay down on a copy of the Ordnance Survey map such line or lines, on any principle tending to elucidate or illustrate the question in dispute, which may be suggested by either party, or which the reporter may deem proper; and directs the reporter to accompany his plan with such explanations as he may think necessary or useful."

Under this remit Mr Cunningham reported on 17th December 1886.*

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* The report bore,—" . . . I beg to report with particular reference to the pursuers' statements contained in the seventh article of the condescendence and the defenders' counter statements in answer thereto in the first of the conjoined actions, that the defender's lands of Arboll lie to the south-east of the pursuers' lands of Morrichmore, and are separated therefrom at high water by Inver Bay, and at low water by the channel of that bay.

"The Fendom Burn is a very small stream running into the head of Inver Bay, the head of bay being about a mile and a-half from the western march of the defender's lands. A short distance further up at South Pitnellies the burn is little else than a mere ditch; it does not appear to the reporter to be in any sense of the word a salmon river.

"The Fendom Burn from its source to where it enters the bay is about four miles in length following the sinuosities of the stream, and of this length it is tidal for about a mile and a-half.

"At low water the width of Inver Channel opposite the western march of the defender's lands is about 246 feet, but whether it can be forded depends on the state of the tide. On the 18th of August last the depth of water in the channel opposite the defender's march was at low water two feet six inches.

"I have prepared a plan extending from the village of Inver to where Inver Bay joins the Dornoch Firth, shewing the position of the channel on the 18th of August last, and the depth of water at various points along it, marked in feet and inches as it was at low water on that day.

"It will be seen that at the bar, or where it joins the Dornoch Firth, the water was just six inches deep, and for a distance of 400 yards up the channel it did not exceed at any place one foot in depth. Further up it got deeper, varying from one to eight and nine feet. I may mention that the tide on 18th August was said to be an exceptionally low one, and the depth of water at low water of spring-tides may therefore sometimes be a foot or so more than marked.

"The range of the tide on the above date was eleven feet five inches. By the Admiralty chart the range of ordinary spring tides is eleven feet.

"The depth of water at the bar is at low water almost the same as at the village of Inver, and the practicability of fording the channel at either place depends entirely on the state of the tide. When Inver Bay cannot be forded at any point, no doubt a long detour would be necessary to get from the lands of the defender to those of the pursuers, unless by using a boat to cross Inver Bay.

"At the request of the pursuers I have marked on the Ordnance map in blue and lettered A B the ford referred to by them as 'a ford situated at fully half a mile's distance from the nearest march of defender's lands.'

"No doubt this ford would be generally used by anyone coming down the road leading directly to it from the main road on the south; it is, of course, only available at or about low water. But the channel can be forded equally well at other points between that and the Dornoch Firth, and the reporter himself forded it in a cart on 7th August last at two places below the village of Inver.

"I have at the request of parties laid down in blue on the Ordnance six-inch map the course of the Inver Channel as on the 18th of August last. It will be seen that it has changed very considerably since the date of the Ordnance

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The Lord Ordinary (Trayner), on 10th June 1887, pronounced an interlocutor, finding and declaring "that the legal boundary or march between the salmon-fishings belonging to the pursuers in the sea adjacent to the lands of Morrichmore, in the county of Ross, on the one part, and the salmon-fishings belonging to the defender in the sea adjacent to the lands of Arboll, on the other part, is in a line laid down by Mr George Miller Cunningham, C.E., marked A B, and coloured red on a copy of the Ordnance Survey map, signed by the said George Miller Cunningham, and dated 17th December 1886, and 17th May 1887, and decerns." *

Survey in 1872; but there is nothing remarkable in that, as the whole bay being of sand the action of wind and tide must bring about frequent changes.

"I was asked by the pursuers to define 'the *medium filum* of the channel of the Fendom Burn and Inver Bay at low water.' I have accordingly drawn a dotted blue line down the centre of the Inver Channel as it was on 18th August last. I do not consider that channel to be the Fendom Burn, because in my opinion the Fendom Burn terminates where it enters Inver Bay, about a mile and a quarter above the village of Inver. . . .

"I have also laid down on the Ordnance map a dotted red line, indicating what I think very fairly represents the general outline of the coast along a considerable portion of the Dornoch Firth at the place in question. I find that the line so laid down is a segment of a circle having a radius of two and a-half miles, and I have drawn from the centre of that circle a strong red line to the west boundary of the lands of Arboll, and therefore a line at right angles to the direction of the circumference of the circle at that point; and if I am right in the conclusion which I have formed regarding the matters dealt with in this report, I would respectfully submit that the line so drawn should form the western boundary of the fishings of Arboll.

"With reference to this last paragraph, the agents for the pursuers write to me, of date 22d ult.:—'We do not, in the meantime, criticise the principle you propose to adopt in drawing the boundary line between the respective fishings of the parties, that being a matter of law which the Court will require to decide. But on the assumption that your principle is the correct one, we beg to point out to you a fact which appears to us to affect materially the general outline of the coast. The pieces of ground named on the Ordnance map Innis More and Innis Bheag, together with the intermediate ground, are part of the Morrichmore, and not part of the foreshore merely. It is only in very exceptionally high tides, such as may not occur in any one year, that these pieces of ground are covered with water, and when this does occur the Morrichmore is flooded also. We request you to be so good as inquire and report as to this, and, whatever conclusion you may arrive at, to lay down on the Ordnance map such a line as, on your principle, will be in accordance with the fact, or assumed fact.'

"Whether the pieces of ground or foreshore marked on the Ordnance map Innis More and Innis Bheag, together with the intermediate ground, form parts of the lands of Morrichmore, belonging to the pursuers, is not for me to determine. Innis More and Innis Bheag are pure sandbanks, surrounded by water at high water of all ordinary spring tides, and covered with water at exceptionally high tides; the 'intermediate ground' referred to is unquestionably foreshore. The principle I have adopted cannot apply where I am asked to include what, in the most favourable view for the pursuers, can only be considered as two islands and a very large amount of foreshore, and I am therefore unable to draw the line required."

Subsequently, on 17th May 1887, a second remit having been made to him, Mr Cunningham lodged another report bearing that Innis More and Innis Bheag, referred to in the letter of the pursuers' agents quoted above, were completely surrounded by water, even at the lowest tide.

* "OPINION.— . . . The pursuers' contention that the *medium filum* of the Fendom Burn and Inver Channel should be adopted as the boundary line proceeded upon the averment that the Fendom Burn and Inver Channel (at all times

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The pursuers reclaimed, and argued;—The Lord Ordinary had gone wrong in fixing a boundary other than the natural boundary. The principle introduced by Mr Cunningham was a novelty. He admitted that he had not taken the average straight line of coast. The question was from what point was the sea line to start, and the answer to that question depended on the matter of fact, what was foreshore and what was not. The shore on the west side of the burn being connected with the lands of Morrichmore by permanent physical connection, it was all foreshore. The right of salmon-fishing was an accessory right to be exercised at various stages of the tide, from the highest to the lowest, and it was only when the tide was out that one could tell what was foreshore. When the tide was out, there was a distinct physical feature separating the defender's fishings from those of the pursuers. The Fendom Burn and Inver Channel were sufficiently marked and sufficiently permanent to make a satisfactory boundary. One result of the Lord Ordinary's judgment was that the defender was thereby found entitled to overleap the natural boundary of river and sea, and to have a right of fishing in places which he could reach only by passing through the property of others. It did not affect the pursuers' case that there were no salmon in the burn. The previous cases[1] did not apply, as no question of the physical separation of the lands had been raised in any of them.

The respondent argued;—The boundaries of salmon-fishings ran from high-water mark, and in any case the boundary proposed by the pur-

practically the same in line and direction) afforded a natural boundary between the properties of the parties respectively, and should therefore be accepted where it reaches the sea as the point from which the boundary line of their respective fishings should be drawn seaward. The ascertained facts, however, do not coincide with the pursuers' statements.

"From the report of Mr Cunningham it appears that the Fendom Burn is not at all of the character alleged by the pursuers; that it terminates where it flows into the Inver Channel at a considerable distance from the sea, and does not there form any boundary between the properties of the parties; while the Inver Channel cannot be regarded as a boundary at all, its character and line being subject to great and frequent changes through the effects of sea and wind.

"There being, therefore, no natural boundary which can be appealed to in aid of the solution of the present question, and no possession on the part of the pursuers proved or offered to be proved which could throw light upon the rights of parties, it appeared to me that the only-mode which could be adopted to fix the boundary line which the pursuers desire to have fixed was that which was followed in *M'Taggart* v. *Macdouall* (5 Macph. 534). I called the reporter's attention to that case, and desired him to lay down a boundary line between the fishings of the parties on the principle there adopted and since approved (*Keith* v. *Smyth*, 12 R. 66). Mr Cunningham did not find it possible to follow exactly the mode adopted in *M'Taggart's* case, on account of the difficulty (arising from the natural contour of the coast line) in obtaining any straight line which would represent the average line of coast. But he suggests a line of boundary which appears to be as favourable for the pursuers as any they could get, unless it were a perpendicular line dropped seaward from the mouth of the Inver Channel. This line (from the mouth of Inver Channel) is, in my view, for several reasons, a line to which the pursuers are not entitled. I adopt, therefore, the line suggested by Mr Cunningham, and find that to be the boundary between the fishings of the parties."

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[1] Campbell v. Brown, Nov. 18, 1813, F. C.; M'Taggart v. Macdouall, March 6, 1867, 5 Macph. 534, 39 Scot. Jur. 274; Laird v. Reid, March 14, 1871, 9 Macph. 699, 43 Scot. Jur. 336, and July 18, 1871, 9 Macph. 1009; Keith v. Smyth, Nov. 7, 1884, 12 R. 66; Stewart Gray v. Flemings and Richardson, Jan. 9, 1885, 12 R. 530.

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suers was a most fluctuating one, the Fendom Burn being a mere ditch for some distance above where it entered the sea. The principle of *M'Taggart's* and the other cases[1] fell to be followed. It might be true that the reporter had not exactly followed these, as he had not adopted an average straight line of coast from which to drop his perpendicular, but he explained that that was not practicable. The fact that he had taken that course was rather against the defender's interest, but the latter was content that it should be as the reporter had fixed it.

Lord President.—The pursuers and the defender who has the only substantial interest in the question at issue—viz., Captain Murray of Geanies—are the owners of certain lands on the south shore of the Dornoch Firth, and have also each of them a grant of salmon-fishing in connection with their lands,—these fishings being expressed in the grant to be *ex adverso* of the lands possessed by each. There is no boundary of any kind to be found in the titles as between the fishings belonging to each party, and there is no possession which can be appealed to as defining and fixing the boundary. Accordingly, the point which we have now to determine is whether the line which is claimed by the pursuers in their summons as the boundary between their fishings and the defender's is consistent with the right of each party to the fishings *ex adverso* of their lands.

The pursuers' claim is that the legal boundary or march between their fishings and those of the defender is "the *medium filum* of the Fendom Burn and Inver Channel at low water as delineated with a red line laid down on the copy Ordnance map," produced with the summons. The circumstances of the case have been very sufficiently brought out by the reporter to whom a remit was made by the Lord Ordinary, and they are very few in number. The Fendom Burn runs into what is called Inver Bay, which is an indentation on the southern shore of the Dornoch Firth, but which appears to be almost entirely dry at low water, and we are informed by the reporter that it is "a very small stream running into the head of Inver Bay, the head of bay being about a mile and a-half from the western march of the defender's lands." "A short distance further up," the reporter adds, "the burn is little else than a mere ditch." It also appears that before this burn enters the head of Inver Bay, it does not form the boundary between the lands of the pursuers and the defender, because the lands of the defender do not extend up that length. Between his lands and those of the pursuers there intervene certain lands belonging to Mr MacLeod of Cadboll, and accordingly until the burn reaches Inver Bay it is in no sense the boundary between the lands of the two parties. But it is said that after it does reach the bay either it or the Channel of the Bay,—by whichever name we call it,—forms the boundary between the salmon-fishings of the two parties. It is necessary to see what would be the effect of a decerniture in terms of the declaratory conclusion of the summons. It would certainly have this effect, that it would cut off from the defender's salmon-fishings a very considerable portion of the foreshore which according to the ordinary meaning of language lies *ex adverso* of his lands. The ordinary run of the bed of the Fendom Burn is from south to north. It runs from south to north until it reaches the Dornoch Firth, but in the course of its passage through Inver Bay where at all states of the tide the fresh water of the stream is largely mixed with salt, the channel takes sudden turns, and at one place it bends sharply east, and interposes itself between the lands of the defender and the water of the Dornoch Firth. It is said by the pursuers that that natural boundary must be fixed as the boundary between the fishings of the two parties although the result is to cut off from the defender's fishings a large portion of fishing ground which naturally belongs to him,—and which would undoubtedly be his otherwise. That is a very startling result.

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[1] *Supra*, p. 87.

But when we come to consider what sort of a boundary the pursuers seek to establish, we find it is a boundary which is not likely to be permanent. Since the Ordnance Survey map was prepared in 1872 we know that it has proved to be of a quite shifty nature. Tide and wind and other circumstances may change it at any time, so that the water may find its way by a straight course to the sea instead of by the present line. So that instead of this suggested boundary being a natural one, it is one of a very uncertain character. I am, therefore, of opinion with the Lord Ordinary and the reporter that it is not a boundary which can be adopted. I think we ought to adopt the ordinary course, and fix the boundary on the same principle as in the cases of *M'Taggart* v. *Macdouall* and others.

The reporter has not precisely followed the rule of *M'Taggart's* case, because he has not laid down a straight line defining the average line of coast. The line he has laid down is a segment of a circle, and from the centre of the segment he has projected a perpendicular to the west boundary of the defender's lands. If the pursuers had had any interest to challenge that result, I should have been inclined to remit the matter back to the reporter to lay down a line in accordance with the rule of *M'Taggart's* case. But the pursuers have no such interest. Their interest is to have the line fixed a great deal further east, and if they fail to obtain that, the line which the reporter has adopted is more favourable to them, and less so to the defender, than a line in accordance with the recognised rule of the cases to which I have referred. The defender does not press this point,—and it does not appear to be very material to him to do so. The important point is that there is nothing in the so-called artificial boundary which the reporter has adopted to interfere with the general rule of law which must be followed where there is no boundary in the title, and no possession to interpret the boundary. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Mure.—I concur. I think that the Lord Ordinary and the reporter have done right in rejecting the boundary which the pursuers ask should be laid down between their fishings and those of the defender; and I agree with them in the opinion that upon the facts as disclosed there is no natural boundary which can with justice to the interests of all parties be taken as the line separating the one fishing from the other. It is clear from Mr Cunningham's report that the stream in question is a very small one, and that its channel is of a very shifting nature after it becomes mixed with the salt water of Inver Bay. It forms in no sense a permanently fixed boundary. That being so, I agree with your Lordship that in such circumstances an artificial line fixed in conformity with the rule which was established in the case of *M'Taggart* v. *Macdouall* should be taken as the boundary when that can be done. It is true that the reporter has not exactly followed that rule, but as in the circumstances explained by your Lordship the pursuers have no interest to insist upon that,

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and the defender does not press it, I think we should adhere to the Lord Ordinary's interlocutor.

Lord Adam.—Both parties in this case hold a grant of lands with the salmon-fishings *ex adverso* of these lands. The lands in question are situated on the shore of the Dornoch Firth; they are at no part contiguous to one another, at least upon dry land,—the inlet of Inver Bay intervening between the left boundary of the one subject and the right boundary of the other. *Prima facie*, where neighbouring proprietors have rights of salmon-fishing *ex adverso* of their lands, the proper mode of defining these rights is by drawing a line seawards perpendicularly to the straight line of shore on the property of each, and it is not disputed that that rule is to be given effect to in this case as regards the foreshore on the left bank of this channel. It is further not disputed that if there is no natural boundary the foreshore claimed by the pursuers is *ex adverso* of the defender's lands, and if that be so it cannot be *ex adverso* of the pursuers' lands also. It is clear that it cannot be *ex adverso* of both properties, so as to belong to both parties alike, and accordingly the pursuers claim to have the boundary fixed upon another ground. It is said that the Fendom Burn and the Inver Channel constitûte a natural or physical boundary between the two fishings. I do not say that the ordinary rule by which boundaries are fixed in the case of *ex adverso* grants of fishings must not sometimes bend to physical facts. But I am satisfied that this feature is not to be found in the present case. The Fendom Burn and channel is not a well-defined stream, and its course is so varying through the foreshore that it does not possess these natural or physical features which can be allowed to interfere with the ordinary rule which defines the rights of proprietors of fishings *ex adverso* of their lands.

Lord Shand was absent.

The Court adhered.

Morton, Neilson, & Smart, W.S.—Macandrew, Wright, & Murray, W.S.—Agents.

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Nov. 23, 1887.
Gay v. M'Gill.

John Gay, Appellant.—*Ferguson.*
Thomas M'Gill, Respondent.

Election Law—County Franchise—Service Franchise—Soldier—Representation of the People Act, 1884 (48 *and* 49 *Vict. c.* 3), *sec.* 3.—A soldier who has, in respect of his position in the army, lived in separate apartments in barracks for the qualifying period, is entitled as a servant of the Queen to be enrolled in the register of voters as tenant of a "dwelling-house."

Held further, that commissioned officers who each had the exclusive occupation of a bedroom for the qualifying period, but took their meals in a mess-room, to which they had a common right, were also entitled to be placed upon the roll of voters.

Registration Appeal Court. Sheriff of Lanarkshire. B.

At a Court for the Registration of Voters for the Partick division of the county of Lanark, held at Maryhill on 8th October 1887, John Gay, sergeant-major, Maryhill Barracks, claimed to be enrolled as a voter in that division "as tenant of house in Maryhill Barracks in virtue of service."

Thomas M'Gill, a voter on the roll, objected on the ground that "Gay was not tenant of the premises founded on in the manner required by the statute, but simply the occupier in respect of his service as a soldier in the British army, and therefore was not entitled to the franchise."

The Sheriff-substitute (Spens) rejected the claim, holding "that the occu-

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pation of premises in barracks by a soldier on duty could not be regarded as tenancy in the sense of the Act of Parliament."

Gay took a case for appeal.

The facts stated were that "Gay, in respect of his position in the British army, had occupied exclusively separate apartments by himself and family in Maryhill Barracks for more than a year prior to the 31st July 1887, and was still in the occupancy thereof—it being the rule to provide married men whose families reside with them in barracks with rooms for their exclusive use."

The question of law stated in the case was:—"Whether a soldier who has lived in separate apartments in barracks for the qualifying period is entitled to be put upon the roll as tenant of a house in virtue of the Representation of the People Acts?"

The Sheriff-substitute stated that in the event of his decision being reversed, the names of fifty-one other soldiers, as to whom the facts were the same, would fall to be added to the roll.

He further stated that there were four claimants whose claim he had excluded on the same ground as Gay's, but as to whom the facts were that they were commissioned officers having each the exclusive occupancy of one bedroom but who took their meals in a mess-room, to which they had each a common right.

Argued for the appellant;—The case fell within the words of the Statute of 1884 (quoted in Lord Mure's opinion, *infra*). He was in the employment of the Queen, and had in virtue of his employment a "dwelling-house" of which he had exclusive occupancy. Further, soldiers in the like position had been entered in other Registration Courts, and the point was concluded by the authority of the *Crieff* case,[1] and by English decision.[2]

No appearance was made for the respondent.

Lord Mure.—The question stated in this case is a short and simple one. It depends on the 3d section of the Representation of the People Act, 1884, which provides that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed, for the purposes of this Act and the Representation of the People Acts, to be an inhabitant-occupier of such dwelling-house as a tenant."

Under that clause of the statute these persons claim to be enrolled on the ground that by virtue of their employment they have the occupation of rooms in Maryhill Barracks, and that that entitles them to be enrolled as inhabitant-occupiers in the sense of the Act.

The admitted facts are that the appellant Gay, in respect of his position in the British army, had occupied exclusively separate apartments by himself and family in Maryhill Barracks for more than a year prior to 31st July 1887, and was still in occupancy thereof—it being the rule to provide married men whose families are allowed to reside with them in barracks with rooms for their exclusive use. This, then, is the position of this man. He is in the employment of the Queen, and occupies exclusively separate apartments in the barracks, and was still in occupation of them when the Sheriff came to consider his claim at the Registration Court. That being so, I am unable to see any ground for holding that the case of a man so situated does not fall within the provision of the statute I have quoted. I think the appellant comes within the express

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[1] Ballingall v. Menzies, Nov. 26, 1886, 14 R. 127.

[2] Atkinson v. Collard, Nov. 5, 1885, L. R., 16 Q. B. D. 254.

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words of the statute, and that the claim should have been admitted. The Sheriff says that he "rejected the claim, holding that the occupation of premises in barracks by a soldier on duty could not be regarded as tenancy in the sense of the Act of Parliament." But the Act itself says that a man in the employment of anyone, who inhabits a dwelling-house in virtue of the employment, is deemed an inhabitant-occupier as a tenant. At one time a difficulty was felt, as in the *Crieff* case last year, from the fact that rooms only, and not a house in the ordinary sense, were the subjects of occupation. But the Act of 1884, by sec. 7 (subsec. 4), gives an interpretation of the expression dwelling-house as meaning "any house or part of a house occupied as a separate dwelling." I think, therefore, that the Sheriff's judgment should be recalled, and the claimant held entitled to be enrolled. In the *Crieff* case last year we were referred to the authority of an English decision. I have referred again to the volume cited to us then, and find that in England a claimant was admitted in precisely the same circumstances as we have before us here.

I understand that your Lordships are of opinion, as I am, that there is no room for distinction as to the case of the four officers referred to in the second part of the case.

LORD CRAIGHILL.—I concur.

LORD KINNEAR.—I also entirely concur. I think the case is decided by the case of *Atkinson* v. *Collard* in the Queen's Bench Division, to which your Lordship has referred.

THE COURT sustained the appeal, recalled the Sheriff's judgment, and remitted to him to enrol the appellant and the other claimants named in the case.

ANDREW ROSS, S.S.C.—Agent.

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Nov. 26, 1887. Lemon v. Wallace.

ALEXANDER LEMON (Inspector of Eastwood), Pursuer (Respondent).—*J. C. Lorimer—Guy.*

JAMES WALLACE (Inspector of St Nicholas), Defender (Appellant).—*J. C. Thomson—Shaw.*

Poor—Settlement—Proof—Parish Register.—In an action of relief of a pauper's aliment brought against one of the two parishes in which a town was situate, it was proved that the pauper was born in the town in 1811. The only evidence that the pauper was born in the defender's parish was an entry of the birth and baptism in the Register of Births and Baptisms kept for that parish, and an entry in a register of baptisms kept by the minister of a chapel of ease within the parish. *Held* that there was sufficient proof that the pauper had been born in the parish.

1ST DIVISION. Sheriff of Aberdeen, Kincardine, and Banff. M.

ISABELLA M'FARLANE having become chargeable as a pauper in the parish of Eastwood, this action was raised at the instance of the inspector of poor of that parish against the inspector of poor of the parish of St Nicholas or City Parish, Aberdeen, as her birth parish, for the amount expended on her relief.

M'Farlane had never acquired any residential settlement. The pursuer averred that the pauper had been born in the parish of St Nicholas or City Parish, Aberdeen (one of the two parishes in which Aberdeen is situated), in the year 1811, being the daughter of Andrew M'Farlane, soldier in the Fifeshire Militia, which was then quartered in Aberdeen, and that she had been baptised there on 11th April 1811.

The defender denied the pursuer's averments, and further, in any view, disputed liability for advances prior to 14th June 1882, the date when the particulars of the pursuer's claim were sent to him, although he admitted that formal notice of chargeability had been sent in 1877.

The following summary of the evidence in the case is taken from the note to the Sheriff-substitute's (Brown) interlocutor:—"(1) I hold there is legal evidence that the pauper was the daughter of Andrew M'Farlane, a weaver, who was in the Fifeshire Militia, and of his wife Janet Mackie. The pauper herself said so, the regimental documents produced shew that there was an Andrew M'Farlane, a weaver, in that regiment between the year 1807 and 1813, and the baptismal certificate * produced proves that spouses of the above names had a daughter baptised in Aberdeen on 11th April 1811, a date corresponding with the age which the pauper assigned to herself. There is the further corroborative evidence of the witness Mrs Scott, who was acquainted with the pauper's parents, and states their history in connection with Aberdeen, the father more particularly being a weaver and militiaman. (2) I also hold it to be by sufficient evidence established that the Fifeshire Militia was embodied and stationed in Aberdeen from about August 1810 until March 1812. It is a more doubtful point, but I also consider it to be proved, that that regiment occupied the barracks during their residence in this city. . . . (3) If the identity of the pauper as the daughter of Andrew M'Farlane of the Fifeshire Militia is made out, it is undoubtedly proved by the extract above referred to, and by the register of baptisms in the handwriting of the Rev. Mr Paull of the College Church, afterwards of Tullynessle, spoken to by his son, Mr Paull, advocate, Aberdeen,† that the pauper was baptised in the parish of St Nicholas."

The Sheriff-substitute (Brown), on 12th February 1887, found that the pursuer had failed to prove that the pauper was born in the defender's parish, and assoilzied him.‡

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* That certificate was:—"Aberdeen, 11th April 1811.—Andrew M'Farlane, soldier, Fifeshire Militia, and his spouse, Janet Mackie, had a daughter born named Isabella, baptised by the Rev. James Paull in presence of Janet Bogie and Mrs Smith."

† Mr Paull deponed,—"I know it is a tradition in the family that my father acted as chaplain to the forces. I produce a record of baptisms in Greyfriars' parish made by my father. The entries are in his own handwriting. I find in this book, under date April 1811, an entry in the following terms:—'Andrew M'Farlane, Fifeshire, daughter.' From this word 'Fifeshire' I infer that that is the record of the baptism of a soldier's child. There are several other entries of a similar kind."

‡ "NOTE.— . . . Beyond these three propositions [referring to the three propositions narrated above] I am unable to find anything that can be said to fall within the category of proof. They no doubt in themselves present an unusual combination of circumstances; and there are other facts from which the probability of the pursuer's case may be very forcibly argued. There is evidence that a certain proportion of the wives and married soldiers lived in the barracks, and I impute the same rule to militiamen in residence; and apart from any special reasons assigned for it, I think there is an inherent probability resting on the gregarious habits of soldiers, that married men unable to find quarters in the barracks would look for them in the immediate neighbourhood. But disturbing elements here cut into the case, with the result, as it seems to me, of placing the pursuer within the action of the principle, which is a rule at once of logic and of law, that when the circumstances of a case are explicable by either of two hypotheses, these are mutually destructive, and neither can receive effect. The following facts may be referred to in illustration of this position. The register of baptisms kept by the Rev. Mr Paull is really only a congregational record, and accordingly it contains numerous entries of persons residing out of the parish of St Nicholas, but resorting to the College Church

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On appeal the Sheriff (Guthrie Smith) recalled his Substitute's interlocutor, found it proved that the pauper had a birth settlement in the parish of St Nicholas, and gave decree for £37, 5s. 8d.*

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from the adjoining parish of Old Machar. It is a well-settled principle of evidence that a baptismal register proves nothing beyond the fact of baptism; and that indeed was strongly emphasised by the present Lord President, in the case of *Beattie* v. *Nish*, 5 R. 775, where he rejected a statement of the place of birth occurring in a certificate of baptism as any evidence that the birth took place as stated; but here the inconclusiveness of the register for anything but baptism stands established, not only by presumption but proof. The pursuer urges the tradition in Mr Paull's family of his father's connection as chaplain with the forces; but that is a consideration which seems to me to tell quite as much in favour of the defender; for, within reasonable limits, that would be an inducement to soldiers to take their children for baptism to his church, in whatever parish they resided. Even on the assumption that the Fifeshire Regiment occupied the barracks, and that none of the troops were in billets, the residence of the pauper's father within the parish of St Nicholas, he being a married man, is only a matter of more or less probability. But the distinct weight of the evidence appears to me to be, that married soldiers who had not accommodation provided for them in the barracks were not placed under any military restriction as to where they should find quarters; and there is nothing, therefore, to make it an unreasonable supposition, destructive of the hypothesis on which the pursuer's case is built, that the pauper's father resided out of the parish of St Nicholas. Another counter probability in favour of his case is urged by the defender, on the evidence that the pauper's father was a weaver, and that this industry was mainly prosecuted in Hardgate, and other districts situated within the parish of Old Machar,—the suggestion being that he eked out his scanty pay as a militiaman by following his own civilian calling, and probably out of the parish of St Nicholas. . . . But without entering further upon the details of the evidence, it appears to me to be impossible, with reasonable certainty, to affirm that the pauper was born in the parish of St Nicholas; and that entitles the defender to prevail. . . . ."

* "NOTE.—I cannot help thinking that in this case the Sheriff-substitute has been too strict. The time has gone by for evolving legal riddles out of the work of relieving the poor. It is a business of a very practical kind, and while no parish is to be held liable for advances without reasonable evidence that the pauper truly belongs to it, it is really too much to expect inspectors to be able to trace as exactly as if they were claiming some rich succession the early history of the unfortunate persons who, in their old age, and after spending often a wandering life in the humblest ranks of society, find an asylum in the poorhouse. The only interest the public have in the question is, that it shall be made reasonably certain that the pauper was born in the parish somewhere, where or in what particular spot is of no moment, unless, as curiously enough has sometimes happened, the house is exactly on the line which divides two parishes.

"The pauper Isabella M'Farlane applied to Eastwood for relief in October 1877; she was then sixty-six years of age, and, according to her own declaration, her father's name was Andrew M'Farlane, who was in the militia in Aberdeen; her mother's name was Janet Mackay or Mackie, and she had always believed that she was born in the city of Aberdeen. The defender observes that this statement does not prove much, for the city of Aberdeen is a wide term, and although in 1811, when the pauper was born, the barracks were occupied by the Fifeshire Militia, and there was in it a soldier of the name of Andrew M'Farlane, who is abundantly identified as the pauper's father, it by no means follows that being a married man he would live in the barracks, and if not in the barracks, who can tell that he did not live outside of the parish of St Nicholas altogether? Old Machar parish was then indeed not so populous a part of Aberdeen as it is now; but it is not proved that the pauper was not born there. I think that the practical answer to this ingenious reasoning is, that this would have involved a considerable walk to and from the barracks, and

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The defender appealed to the Court of Session.[1]

At advising,—

LORD PRESIDENT.—In this case we have very elaborate opinions from the Sheriff-substitute and the Sheriff-principal, the one holding that the pursuer has not made out his case,—viz., that the pauper was born in the parish of St Nicholas,—and the other holding that the pursuer is entitled to a judgment in his favour. I can hardly say that the Sheriff has a clear opinion that the pursuer's case is proved, for he seems to hold that something short of legal evidence is all that is required in order to make the parish of settlement liable to the relieving parish in a case such as the present. I cannot agree with that opinion. If a relieving parish seeks to make the parish of birth liable, the pursuer in such an action must establish that liability as matter of fact by competent legal evidence. It is simply a jury question. I differ, therefore, from the Sheriff in the first paragraph of his note.

But I am satisfied that the Sheriff has come to a right conclusion, and although the case is a narrow one, that there is sufficient evidence to justify the decision against the parish of St Nicholas. The pauper was undoubtedly born in Aberdeen, and if it were not that Aberdeen consists of two parishes,—viz., St Nicholas and Old Machar,—there would be an end of the case. Accordingly the question resolves itself into this, whether the pauper was born in the parish of St Nicholas or of Old Machar, and that question has to be determined in a case where the latter parish is not represented. But there is no doubt a preponderance of evidence in favour of the view that the pauper was born in the parish of St Nicholas, and I do not think there is any evidence whatever to the effect that she was born in Old Machar parish. There is no evidence that the mother of the pauper was ever in the parish of Old Machar in her life. If there had been anything to shew that she had been living there that fact might have given rise to some doubt. But all that we know is that the father of the pauper came to Aberdeen as a private in the Fifeshire Militia, which was quartered there,

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the probabilities are that M'Farlane lived either at or near the scene of his occupation. [Then followed a narrative of the two entries from the two registers narrated above.]

"It is true that an entry in a baptismal register proves nothing but the fact of the baptism; and if the entry bears that the child was born in another and distant parish, it has been rejected as proof of the place of birth, because the registrar must have got his information on that point at secondhand. This was so held in the case of *Beattie* v. *Nish*, which is referred to by the Sheriff-substitute (5 R. 775). But in that case the Lord President pointed out wherein the probative value of such an entry consists when the place of birth is the matter in issue. 'It will be presumed,' he said, 'in the general case, from the terms of the entry in such a register that the child baptised was born in the parish.' It is, however, a presumption only, or, as has been said in an English case, the register of baptism *per se* is not evidence of the place of birth. If the child were then very young, the register would be presumptive evidence that it was born in that parish where it was baptised; but if the child were not then young, the circumstance of its having been baptised in a particular parish would afford no presumption that it was born there (*R.* *N. Petherton*, 1826, 5 B. & C. 508). Applying these principles to the evidence adduced by the pursuer, I think it is reasonably certain, in the absence of any circumstances leading to a contrary inference, that the pauper was born in the parish of St Nicholas. . . ."

[1] *Authorities cited.*—Beattie v. Nish, March 19, 1878, 5 R. 775; Hay v. Murdoch, Jan. 19, 1854, 16 D. 364, 26 Scot. Jur. 172; Inspector of Lady v. Inspector of St Cuthbert's, Nov. 20, 1873, 11 S. L. R. 78.

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prior to the alleged date of the pauper's birth. The barracks in which the regiment apparently lodged were in the parish of St Nicholas. Again, as I have already said, neither the father nor the mother are shewn ever to have been in Old Machar at all. In these circumstances, there are two pieces of evidence adduced. One is the register or list of baptisms kept by the Rev. Mr Paull, then minister of the College Church, a *quoad sacra* chapel in the parish of St Nicholas, in which he enters the pauper as being baptised by him. That is a piece of evidence tending to shew that the parish of St Nicholas was the parish in which the pauper naturally fell to be baptised, and therefore that in all probability she was born there. But it is suggested on the other hand, and with some reason, that the two parishes were so nearly connected with one another that it was not an uncommon thing for the minister of St Nicholas Parish to baptise children born in Old Machar; and therefore that if the register is evidence it is very imperfect evidence, for it merely proves the fact that the pauper was baptised by a minister in St Nicholas parish.

But there is another register, which is perhaps of greater materiality as regards the matter in dispute, viz., the register of births and baptisms for the City Parish of Aberdeen. This book is now deposited in the Register Office. It has been produced, and we have examined it, and it bears to be a register of births as well as of baptisms. The words of the entry in the register are as follows:—"Aberdeen, 11th April 1811.—Andrew M'Farlane, soldier, Fifeshire Militia, and his spouse, Janet Mackie, had a daughter born named Isabella, baptised by the Rev. James Paull in presence of Janet Bogie and Mrs Smith." That is a distinct affirmation to the effect that the daughter, *i.e.*, the present pauper, was both born and baptised in the parish of St Nicholas, which is the same as the City Parish of Aberdeen. It seemed to me to be doubtful whether this register was one both of births and baptisms, but on examination the opinion I have formed is that it cannot be treated as anything else than what it calls itself. It is to be observed that it is the defender's book, and it is very difficult for them to escape its effect. It is really very like the writ of the parish, and ought to be conclusive.

In this respect the present case differs essentially from that of *Beattie* v. *Nish*, in which the register appealed to was the register of another parish, which bore that the pauper in question was born not even in the parish, but in an adjoining one. Of course that statement could not be given effect to, because there were no means of ascertaining the sources of information of the person who kept the register. But when the person who keeps the register says that the child was born and baptised in the parish to which the register applies, it is a very different matter, and I think it is very difficult to escape from the conclusion that the proof of the facts sought to be established is complete.

I accordingly agree with the Sheriff's judgment, although for the reasons I have already stated I am not prepared to put my judgment upon the same ground in law as the Sheriff has done.

LORD MURE.—I cannot adopt the view which the Sheriff has laid down in his note, that in poor-law cases the facts may be held to be established by something less than legal evidence. For it appears to me that in all cases,—whether dealing with the poor-law or not,—the facts on which the judgment is based must be distinctly proved. But, while I differ from the Sheriff upon this, I concur in the result at which he has arrived, and in the opinion of your Lordship.

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And I do not know that I should have thought it necessary to say more, had it not been for the reference which has been made to the case of *Beattie* v. *Nish*, as an authority adverse to the view which the Sheriff has here taken. I do not think that it is. The pauper in the present case was admittedly born in Aberdeen. The father, who was in the militia, came there with his regiment, which was quartered in the barracks at the time of the birth of the child. There is no evidence as to whether the father lived in or out of the barracks, which were in the city parish of St Nicholas. But there is an entry in the register of births and baptisms for that parish to the effect that the child, the present pauper, was baptised by Mr James Paull, who was then the minister of a chapel in the City Parish. And it is proved by Mr Paull, a son of Mr James Paull, that there is an entry in a private record of baptisms kept by his father to the same effect. These entries appear to me to lead strongly to the inference that the child was born of parents who were living in the parish, because the evidence of the entry in the City Parish register is the evidence of the defender's own books; and as there is no evidence to the contrary, and none to shew that the parents of the pauper ever lived in Old Machar, I concur with your Lordship in the opinion which you have expressed. It is in this matter of the entry in the defender's own register that this case differs essentially from that of *Beattie*. The reason why we rejected the entry in the parish register in that case was that it was contained, not in the register of Old Luce, which was the parish sought to be made liable, but in the register of Portpatrick, which was at a considerable distance. I was, on that ground, clearly of opinion in the case of *Beattie* that the proof had failed.

LORD ADAM.—The Sheriff-depute seems to think that poor-law cases relating to pauper settlements are to be decided upon a different footing from other cases. He says in his note,—"The time has gone by for evolving legal riddles out of the work of relieving the poor." That may be very good advice to parochial boards, but if parochial boards choose to evolve legal riddles, and bring them before the Court, the Court must solve them, and I know of no other way in which they can do this than by applying to them the ordinary principles and practice applicable to all cases. Does the Sheriff mean that we are to admit evidence in these cases which would not be admissible in other cases, or that we are entitled to betake ourselves to surmise and conjecture instead of confining ourselves to the legal and rational presumptions which arise from proved facts? If that is the Sheriff's meaning, I totally differ from him. We must, I think, adhere in these cases as in others to the well-known principles of the law of evidence. It is no doubt true that, looking to the somewhat remote dates to which we have to go back in these cases, and to the fact that the persons concerned belong for the most part to the poorest classes of the community, and that they leave few or no traces behind them in the shape of writing, the evidence to be had is sometimes very scanty. It may be also that in the absence of direct proof we may have to betake ourselves to presumptions more frequently than in other cases. But that is what would be done in any case where better evidence would not be looked for.

There does not seem to me to be any difficulty in dealing with this case. It raises the simple issue of fact whether it is proved that the pauper was born in the parish of St Nicholas? That issue falls to be decided by the ordinary rules of evidence. The evidence is narrow, but it appears to me to be sufficient. The pauper was undoubtedly born in the town of Aberdeen. The town consists

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of two parishes—the parish of St Nicholas and the parish of Old Machar. In which of these two was the pauper born? I think it is proved that the pauper's father was quartered in the barracks of Aberdeen, which are situated in the parish of St Nicholas, in the year 1811, but I do not think that that fact helps the pursuer much, because it is not proved that his wife resided with him. I think that it is more probable than otherwise that, whether the husband lived inside the barracks or not, his wife lived out of them—it is very likely she lived in the neighbourhood and in the parish. But that is conjecture. There is, however, an important item of written evidence which has been appealed to, viz., the register kept by Mr Paull of the College Church, now Greyfriars' Parish Church, but I do not think it helps the pursuer much. If it had been a parish register it would have been very important. The College Church, however, in those days was a mere chapel of ease, with no territory attached to it, and as Mr Paull was the chaplain of the Fifeshire Militia that sufficiently accounts for the child having been baptised by him altogether irrespective of the fact whether the child was born in St Nicholas or Old Machar. That register, therefore, goes a very little way towards proving the pursuer's case. But the other register, an extract of which has been produced, is very different. It is the City Parish Register of Births and Baptisms, the City Parish being the parish of St Nicholas. Perhaps it is not altogether free from criticism, for it is open to the observation that under date April 11, 1811, it bears to record the fact of the child's baptism by Mr Paull, which, however, did not take place till the 14th, three days afterwards. That excludes the notion that it was written up from day to day. But having looked at the register, and in view of the fact that the date is not material, I see no ground for doubting its authenticity. If it is to be taken to be, as it bears to be, and I do not see why it should not be, a register of births as well as of baptisms, I think it would have proved the birth of the child in the parish. But it is said by the defender to be only a register of baptisms, and taking it to be so, I think it is enough. I think that if it is proved by the appropriate register that an infant was baptised in a particular parish, that raises a legitimate presumption, in the absence of any proof to the contrary, that it was born there, and in this case there is not a particle of evidence that either the pauper or her mother ever was in the parish of Old Machar, which is the only other possible parish. In the absence of any competing testimony, I am quite prepared to give effect to the presumption in question.

The case of *Beattie* v. *Nish*, in which my interlocutor in the Outer-House was reversed, has been referred to. The present is a very different case. The register was referred to there for the purpose of proving an extrinsic fact, viz., that the child in question was born in a different parish some twenty years before. But the register of another parish is not the appropriate evidence of such a fact. Here we are appealing to the register for the purpose of proving a fact for which the register is the appropriate evidence.

Lord Shand was absent.

The Court pronounced this interlocutor:—"Of new, find in terms of the findings in fact contained in the interlocutor of the Sheriff of date 12th April 1887: Refuse the appeal: Adhere to the interlocutor appealed against, and decern."

F. J. Martin, W.S.—Andrew Urquhart, S.S.C.—Agents.

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ARCHIBALD MACAULAY, Pursuer (Respondent).—*A. J. Young—Gunn.*
THE SCHOOL BOARD OF NORTH UIST, Defenders (Reclaimers).—*Murray—Boyd.*

Reparation—Illegal imprisonment—School Board—Malice.—A father was convicted of failure to educate his children upon a complaint at the instance of the compulsory officer of a School Board, and in default of payment of a fine was sentenced to three days' imprisonment, and was imprisoned accordingly. The conviction was quashed by the Court of Justiciary on the ground that neither a certificate under the Act of 1872, nor a sufficient attendance order under the Act of 1883, had been produced to the Sheriff-substitute. The father then brought an action for damages against the School Board, but set forth no specific averments of malice. *Held* that the error having been committed by a public board in the performance of their duty it was necessary for the pursuer to set forth malice, and action *dismissed* as irrelevant.

Question (*per* Lord Rutherfurd Clark) whether malice can competently be averred of a public board.

(SEE *Macaulay* v. *Macdonald*, June 3, 1887, 14 R. (Just. Cases) 43.)

2D DIVISION.
M.

Archibald Macaulay, crofter, North Uist, was, on 11th April 1887, charged in the Sheriff Court at Lochmaddy at the instance of Archibald Macdonald, compulsory officer of the School Board of North Uist, with a contravention of the Education (Scotland) Acts, 1872 to 1883, in so far as he had for a period of at least one month immediately preceding the date of the complaint, without reasonable excuse, failed to provide elementary education for his children Flora and Jessie, and had failed to secure their regular attendance at school, after receiving due warning of said failure, "whereby the said Archibald Macaulay is liable to a penalty not exceeding 20s., with expenses, or to imprisonment, not exceeding fourteen days, or to have an attendance order pronounced, all in terms of said Acts."

The Sheriff-substitute (Webster) convicted Macaulay, and fined him 5s., with the alternative of three days' imprisonment.

Macaulay was imprisoned, and brought a suspension, but before a warrant of interim liberation could be obtained he had suffered the term of imprisonment imposed.

The High Court of Justiciary, on 3d June 1887 (14 R. (Just. Cases) 43), suspended the conviction on the ground that neither a certificate under the Act of 1872 nor a sufficient attendance order under that of 1883 had been produced to the Sheriff-substitute.

Macaulay then raised an action for damages against Macdonald, the compulsory officer, Donald Dott, the clerk to the School Board, and also against the School Board and the individual members thereof.

The pursuer, after setting forth the proceedings in the Sheriff Court and in the Court of Justiciary, made the following averments against the School Board, against whom alone the case ultimately came to be insisted,—(Cond. 6) "The foresaid proceedings were grossly unjust, illegal, and oppressive, and were entered upon recklessly and in utter disregard of criminal procedure and the provisions of the Education Acts, and were malicious and without probable cause. The pursuer's said child Flora had been unwell and could not attend school, and by section 11 of the Education Act of 1883 illness is recognised as a reasonable excuse for non-attendance. The other child, Jessie, had just attained five years of age, and could not safely be trusted to go to school alone, there being no road between the pursuer's house and the school, and the weather prevailing at the time being wild and boisterous, and during part of the time snow was lying on the ground. The compulsory powers of said Acts are only applicable to children between the ages of five and fourteen who have contumaciously or after repeated warnings refused or failed to attend

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school, and after an 'attendance order' has been issued and disregarded." (Cond. 8) "The proceedings which are complained of were authorised by the said School Board, and the illegal prosecution and imprisonment of the pursuer were due to, and the consequence of, the instructions which they incompetently issued. They did not give the pursuer due warning in terms of said section; they did not present a complaint to the Sheriff and obtain the 'attendance order' as a condition precedent to instituting the foresaid proceedings, nor did they inquire whether the pursuer had any reasonable excuse for the non-attendance of his children at school before instituting said proceedings."

The pursuer pleaded;—(1) The pursuer having been injured in his feelings, reputation, and character by the defenders' said illegal and unwarrantable proceedings, he is entitled to reparation and *solatium* as libelled. (2) The defenders having in the foresaid circumstances acted maliciously and without probable cause, and the pursuer having suffered injury thereby as set forth, is entitled to decree as libelled.

The defenders pleaded, *inter alia*;—(1) Averments of the pursuer are irrelevant.

On 16th November the Lord Ordinary (Lee) assoilzied the individual defenders from the conclusions of the action so far as directed against them personally, and approved of the following issue for the trial of the cause:—"Whether on or about the 22d day of April 1887 the defenders, the School Board of the parish of North Uist, wrongfully and illegally caused the pursuer to be tried and convicted before the Sheriff Court at Lochmaddy as a person who had contravened 'The Education (Scotland) Acts, 1872 to 1883,' by having, without reasonable excuse, failed to discharge the duty of providing efficient elementary education for Flora and Jessie Macaulay, two of his children, and having failed to secure the regular attendance of said children at school after receiving due warning of said failure, and to be adjudged therefor to forfeit and pay the sum of 5s. of penalty, and, in default of immediate payment, to be imprisoned in the prison of Lochmaddy for the period of three days, and subsequently to be imprisoned, under said sentence, for the said period, to the loss, injury, and damage of the pursuer?"*

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* "OPINION.— . . . As to the issue against the School Board, it was maintained on the authority of *Rae* v. *Linton* (2 R. 669) that the pursuer must undertake in the issue to prove malice and want of probable cause. To sustain this contention would be to deny the pursuer all remedy for the wrong complained of, unless he can prove malice on the part of the corporation. My opinion is, that the law gives the pursuer a claim for reparation against the School Board, if he proves that the imprisonment which he suffered was wrongful and illegal, and was caused by a mistake for which the School Board is responsible. His case on record is that the sentence and imprisonment were caused by the board wrongfully praying for, in the complaint which they authorised to be instituted, and wrongfully taking from the Sheriff and enforcing, a sentence inflicting a penalty, and, in default of immediate payment, adjudging him to be imprisoned for three days. The mistake of the Board, according to the pursuer's allegations, was that they failed to take the preliminary steps necessary to justify a prosecution for penalties or imprisonment. They have not certified, and it did not appear that they were in a position to certify, in terms of sec. 70 of the Education Act, that the pursuer had been grossly, and without reasonable excuse, failing to discharge the duty of providing elementary education for his children. This may have arisen from inadvertence. If their statements are correct, they would have been entitled to grant such a certificate in respect of the pursuer's failure to appear when summoned before them, as they say he was, to give explanation. But it was essential to justice, in a case involving imprisonment, that the preliminary steps should be taken. They do

The defenders, the School Board, reclaimed, and also gave notice of motion that the Court would be moved to vary the issue adjusted by adding the words "and maliciously and without probable cause" after the words "wrongfully and illegally."

Argued for the defenders;—(1) The mistake here was not the mistake of the School Board but of the Sheriff, who had proceeded to pronounce sentence of imprisonment *de plano* instead of, as he might have done under the prayer of the complaint, pronouncing an attendance order only. (2) Even if the mistake was that of the School Board, it was a mere error of procedure by a public body acting in discharge of a public duty. It was not a fundamental error. The case was not ruled by *Bell* v. *Black and Morrison*, founded on by the Lord Ordinary, where the error was fundamental, and malice must therefore be put in issue;[1] but the averments here were not sufficiently specific to support such an issue.[2]

Argued for the pursuer;—(1) The error was plainly that of the School Board, who, if they had not pronounced the sentence, had prayed for it, and had taken advantage of it. (2) The error, further, was more than a mere matter of procedure. The omission to take the preliminary steps affected the sentence fundamentally. Consequently malice need not be put in issue.

Lord Craighill.—This is a case of some interest and importance, both to the individuals concerned and to the public. The pursuer is Archibald Macaulay, against whom the School Board of North Uist thought it necessary to bring a complaint, through their compulsory officer, the ground of complaint being that he had failed to do his duty under the Education Acts in not sending two of his children to school for more than a month. The Act of 1872, section 70, authorises such proceedings, but upon one condition, namely, that a written certificate be granted by the School Board setting forth that the parent had failed in his duty of providing elementary education for his children, and this condition was not observed in the present instance. There is another course of proceeding, authorised by the Act of 1883, which provides that when a parent neglects this duty the School Board may ask the Sheriff to pronounce an attendance order requiring the parent to fulfil his duty. It seems that there is a form of complaint in use which prays alternatively, first, for the imposition of a penalty, then for a sentence of imprisonment, and lastly for an attendance order. That seems to me a very dangerous form of complaint, as it may be used, as it was here, as the means of getting a sentence of imprisonment pronounced without the preliminary condition of obtaining an attendance order being fulfilled. In the present case the accused was sentenced to a penalty of 5s., and failing payment to imprisonment for three days, and unfortunately, although the sentence was in the end quashed, it had already been carried into effect by imprisonment for the full period which had been imposed.

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not appear to have been taken, and if, as alleged, they were not taken, the pursuer is entitled to an opportunity of shewing, whether there was malice or not, that his sentence was wrongful, and that the mistake did him an injury, for which he is entitled to reparation.

"I think that the decision in *Rae* v. *Linton* is not applicable to such a case; and that the case of *Bell* v. *Black and Morrison* (3 Macph. 1026) and the observations of the Lord Chancellor in the case of *Pringle* v. *Bremner* (5 Macph. (H. L.) p. 55) support the pursuer's contention that the words 'wrongfully and illegally' are sufficient."

[1] Rae v. Linton, March 20, 1875, 2 R. 669.

[2] Beaton v. Ivory, July 19, 1887, 14 R. 1057.

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Now, no doubt these proceedings were wrong, and what the pursuer says is, that as there was a wrong there must be a remedy, but I do not think that it necessarily follows that the pursuer on account of the wrong is entitled to have the particular remedy which he asks on the present occasion. I think the pursuer overlooks the fact that the School Board were fulfilling a duty which was imposed on them by the statutes, although they took a wrong course of procedure to carry out that duty. That being so, is it to be said that because an error of procedure has been committed, the School Board are on that account to be held liable in damages? I think not. It is not enough to say that the proceedings were illegal and irregular. It is not as if the School Board had no duty at all in the matter. They had a duty, though there was an irregularity in the way they carried it out. The mere allegation of irregularity therefore is not enough. I think the pursuer must allege malice and want of probable cause on the part of the School Board, and, with respect to malice, must set forth facts and circumstances sufficient to warrant the Court in coming to the conclusion that there was malice. There are no such averments on this record, and therefore I think that there is no issuable matter, and I propose, if your Lordships agree with me, that we should dismiss the action.

Lord Rutherfurd Clark.—This is a question of some nicety. The School Board of North Uist instituted certain proceedings under the Education Acts of 1872 and 1883, in which they obtained a conviction against the pursuer of the present action. These proceedings turned out to be irregular, and were quashed by the Court of Justiciary. The question is whether by reason of that irregularity the pursuer is entitled to recover damages from the School Board, when the only thing that is alleged against the Board is that in the exercise of what they believed to be their public duty they obtained this irregular conviction. If a statute puts a power into any man's hand, and that man uses the power, he must, in the general case, take care that his use of the power is in exact accordance with the manner provided by the statute; if it is not, he may be liable in damages for the misuse of the statutory power; and if there had been no other element in the case than this, the present action might probably have been held to be relevant. But I am disposed to think that a public body like this School Board, acting in the exercise of what they believe to be their statutory powers, are not to be held liable in damages merely because certain proceedings which they carried out—not in the least in their own interest, but entirely in the interest of the public—turn out to be irregular. I rather think that is the safer conclusion, and I am inclined to adopt it. I therefore think that the issue as it stands cannot be maintained.

But it is said that there is a case of malice on record against the defenders. I have doubts whether malice can be alleged against a public board of this kind. I doubt whether a school board can be malicious. But assuming that it can—and I rather think that I must so assume, looking to the way in which the case was presented at the bar—it seems to me that this record is irrelevant. I am not one of those who lay great stress on the necessity for having specific averments of malice in cases of this kind, but if it be the duty of the pursuer of an action such as this to set forth in detail the grounds on which he says the malice of the defender is to be inferred—and there is a considerable body of authority to that effect—I think it is out of the question to say that there is anything in this record to shew that the defenders acted maliciously. I therefore agree in thinking that the action should be dismissed.

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Lord Justice-Clerk.—I entirely concur. I think the School Board were in this matter fulfilling a public function in the public interest. They committed a technical error and mixed up two remedies which are essentially distinct, but there is nothing in that to render them liable in damages, because what they did they did as public officials and in good faith. I therefore think they are privileged.

As regards the allegation of malice, I do not go into the question of how far malice may be alleged and proved against a corporation such as this School Board. That is an abstract question which I do not think it necessary to consider here, for I am very clearly of opinion that on this record there is nothing whatever alleged to shew that the defenders here did not act in perfect good faith. I agree in thinking that we should disallow the issue, and dismiss the action.

Lord Young was absent.

The Court disallowed the issue, and dismissed the action.

Whigham & Cowan, S.S.C.—Tods, Murray, & Jamieson, W.S.—Agents.

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Mrs Ann Fraser or Campbell, Pursuer (Respondent).—*Balfour—Craigie.*

Donald Campbell, Defender (Reclaimer).—*Asher—Baxter.*

Succession—Words importing a bequest of heritage.—By antenuptial contract of marriage a husband conveyed to A, his intended wife, his whole household furniture and plenishing and the liferent use of a cottage, which belonged to him, along with the half of a plot of garden ground attached to it. He further took his heir bound to pay the wife an annuity of £15 out of certain other heritage belonging to him. He further gave his wife "full power and liberty, by *mortis causa* deed, to test upon and divide and apportion among my lawful children, whether by my first or this intended marriage, . . . my whole means and estate, . . . and to that end I hereby appoint the said A to be my executrix, with power to give up inventories of my estate, and all other powers competent to an executrix; and I hereby leave and bequeath my whole means and estate to her as executrix foresaid." The husband died intestate shortly afterwards, leaving children by a former marriage only.

In an action of declarator brought by the widow against the testator's heir-at-law to have it found that the pursuer was entitled to make up a title in trust to the heritable property, and that the defender, who was in possession, was bound to remove therefrom, *held* that the terms of the will did not express or imply an intention on the part of the testator to convey the heritage to her.

Question whether the widow's power of apportionment covered heritage.

1st Division.
Lord M'Laren.
M.

Donald Campbell, baker, Callander, and his wife, Ann Fraser, entered into an antenuptial contract of marriage, dated 7th January 1882, which was in the following terms:—"In contemplation of which marriage the said Donald Campbell hereby gives, assigns, and dispones to the said Ann Fraser, if she shall survive him, the whole household furniture and plenishing . . . that shall belong to him at the time of his death, . . . and, further, the said Donald Campbell hereby assigns and dispones to the said Ann Fraser, in case she shall survive him, the liferent use and enjoyment of the cottage in which he at present resides, called Lorne Cottage, with full power to her to uplift and receive the rents payable from any portion thereof during all the days and years of her life, or to retain the same in her own possession; and it is hereby declared that as the cottage was built upon a piece of ground belonging to me, on which houses had already been erected, and no allocation of the ground has taken place, it is hereby declared that one-half of the garden ground at the back shall belong to and be liferented by the said Ann Fraser, along with Lorne

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Cottage; and further, the said Donald Campbell hereby binds and obliges himself, his heirs, executors, and successors whomsoever, without the necessity of discussing them in their order, to content and pay to the said Ann Fraser, in the event of her surviving him, for and towards her aliment, a free liferent annuity of £15 sterling, . . . and which annuity of £15 a-year, before provided to the said Ann Fraser, shall be payable and upliftable by her out of and from the rents of the shop and bakehouse situated in the property belonging to me in Main Street, Callander; and the said Donald Campbell hereby further gives to the said Ann Fraser full power and liberty, by *mortis causa* deed, to test upon and divide and apportion among my lawful children, whether by my first or this intended marriage, and my friends, in such shares as she may think proper, my whole means and estate, in the event of my death without having left any settlement regulating the disposal thereof, and to that end I hereby appoint the said Ann Fraser to be my executrix, with power to give up inventories of my estate, and all other powers competent to an executrix; and I hereby leave and bequeath my whole means and estate to her as executrix foresaid; and which provisions above written, conceived in favour of the said Ann Fraser, she hereby accepts in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she, *jure relictæ* or otherwise, could ask, claim, or demand from the said Donald Campbell or his heirs, executors, and representatives, by and through his death, if she shall survive him . . ."

Donald Campbell died on 1st April 1882, within three months after this marriage. There were no children of that marriage, but he left issue by a previous marriage, viz., a son, Donald Campbell, and two married daughters.

He left the following heritable properties, viz., (1) Lorne Cottage, Callander, and (2) the tenement in Main Street, Callander, which was burdened with the annuity of £15 to his widow. He left no personal estate beyond his household furniture. In 1875 his son had married, and at that date the father made over his business and trade utensils, and also the house and bakery in the Main Street house, to him. The son thereafter carried on the bakery, and, along with his father, up to the date of the second marriage, occupied the house.

On 10th March 1887 the widow brought an action against the children of the previous marriage, in which the conclusions were for declarator,—(1) that the above antenuptial contract of marriage "gave to the pursuer full power and liberty, by *mortis causa* deed, to test upon and divide and apportion among his lawful children, whether by his first marriage or by the marriage between him and the pursuer, and his friends, in such shares as the pursuer might think proper, his whole means and estate, in the event of his death without leaving any settlement regulating the disposal thereof; (2) that the said deceased Donald Campbell died on or about 1st day of April 1882 without leaving any such settlement, survived by the pursuer"; and (3) that on the death of her husband the pursuer was entitled to be infeft in trust in the heritable property left by the deceased, and that the defender, Donald Campbell, was bound to remove therefrom.

The defender, Donald Campbell, who alone defended the action, pleaded, *inter alia*;—(5) The defender being heir-at-law of the deceased Donald Campbell is entitled to the subjects described in the summons.

The Lord Ordinary (M'Laren) found and declared in terms of the first two declaratory conclusions, and *quoad ultra* assoilzied the defender.*

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* "OPINION.—I am of opinion that, under the antenuptial contract founded on, the right claimed by the pursuer of this action does not arise. The clause founded on begins by giving the pursuer, the wife, full power and liberty to test upon and divide and apportion among the husband's lawful children, whether by his first or the intended marriage, and his friends, in such shares as she might

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The defender reclaimed, and argued;—The words "means and estate" did not necessarily include heritage. They required construction, just as

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think proper, his whole means and estate, in the event of his death without having left any settlement regulating the disposal thereof, and that power is applicable to heritable and moveable estate. In the same deed the wife is given a liferent of one of the two heritable properties in Callander which belonged to the husband, the disponer. Now, there is, in my apprehension, nothing to indicate that these words, purporting to give a power of appointment and division, import any larger interest or right given to the wife than in their strict meaning they convey. I think it is a power of appointment, and nothing more, that is given to Mrs Campbell under the clause. But I quite assent to the argument for the pursuer, that whatever is necessary to the due execution of that power by the donee is implied in the contract of marriage. I think that in the contract there is implied the necessary machinery for enabling the lady to make up a title as trustee, if such title were necessary to enable her to exercise the power; because, under the recent Conveyancing Statute, words in a deed purporting to deal with heritable property, which if used with reference to moveable property would entitle the donee to receive and apply it, are to have the same effect with reference to the heritable estate that is associated with the moveables in the conveyance. Accordingly, in the series of decisions that have followed upon these statutes, it has been held that conveyances in trust, although not expressed in the form of *de presenti* transfers, may be the ground of adjudication, or, for the execution of a notarial instrument, in virtue of the facilities given by the Conveyancing Act for the testamentary disposal of landed property. But the real question here is, whether the antenuptial contract contains any evidence of an intention on the part of the husband, or an expectation on the part of the wife, in consequence of the husband's words, that she should be the trustee of his heritable estate. If she is trustee, she may make up a title in the form contemplated by the conclusions of the action. If she is not a trustee, then the action falls. Now, nothing can be more clear than that the donee of a simple power of appointment may execute the appointment without being vested in the estate, and therefore it is not at all necessary to the fulfilment of the husband's obligation that his wife should be vested in his estate. I think she may have all the control that it was intended she should have over the estate, by executing the power in the terms in which it is given, And further, there is nothing, so far as I can see, in the other averments of the record, which appear to interfere with or militate against the capacity or power of the wife to execute a deed of division. As regards one of the subjects, she is the liferenter, as the fee is undisposed of, except through this power. As regards the other subjects, there was some arrangement made by the husband in his lifetime in favour of his eldest son, which apparently terminated at his death, and the eldest son is now possessing that property on the title of apparency. But if the pursuer should think fit to exercise the power of appointment, which I think is a testamentary power coming into effect upon her death, then the result is, that the obligation created by the marriage-contract will devolve upon the husband's heir. He is bound to fulfil his father's obligation, and therefore he must either make up his title, and convey to the persons in whose favour the deed is executed, or he must submit to their making up a title at their own hands, in one or other of the forms which are now provided by statutory enactment for that purpose. While, therefore, I do not doubt that the pursuer is well founded in the substance of the claim which she asserts, I think she is wrong in the mode she has taken to assert it.

"In what I have already said regarding the interpretation of this antenuptial contract, I have been assuming that, in so far as the deed gives the power, it is a power to divide and apportion heritable estate as well as moveable estate. But it is not a question under the Conveyancing Acts at all. I have considered these Acts with reference to the pursuer's contention, that she is entitled to expede a title to these lands in her own name. I have decided against her on

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the words "residue of my estate" did.[1] Looking to the terms of the deed, it seemed that the husband was under the idea that he had disposed of the heritage before he executed the marriage-contract. The pursuer's contention involved this, that the conveyance to her covered the house, out of which it was also provided that the heir was to pay her an annuity of £15. That result shewed how inconsistent the pursuer's construction of the deed was. Further, "dispone" was the word used in the deed when heritage was being dealt with. The pursuer was the mere donee of a power which did not imply a trust. The Lord Ordinary ought to have dismissed the action; that was the logical result to which his judgment led.

Argued for the respondent;—The word "executrix," as used in the marriage-contract, really meant trustee.[2] The words "means and estate," unless restricted by the context, included both heritage and moveables.[3] Here there was no difficulty, because before the words "means and estate" were used in the deed, both heritage and moveables had been dealt with. The words "to that end" were important, and connected the whole previous provisions of the deed with the direction to his "executrix," and the bequest to her of his "whole means and estate." The deed was really both a settlement and a marriage-contract.[4] The trust purposes were first declared, and then the trustee was nominated, as had happened in other cases.[5] Under the deed the pursuer might apply the rents to her own purposes, or they might accumulate in her hands and be tested on along with the moveables. Nothing vested in the heir-at-law until the pursuer's death,[6] and if she pleased she might cut him out altogether.[7]

LORD PRESIDENT.—It appears to me that if the Lord Ordinary is right in the opinion expressed in his note, his proper course was to dismiss the action. The first two declaratory conclusions of the summons import nothing more than that the marriage-contract contains certain words, and that the husband died on the 1st April 1882 without leaving any other settlement. The first conclusion cannot be made the subject of a decree of declarator, because it simply repeats the language of the deed, and the second conclusion merely narrates a matter of fact. The Lord Ordinary is against the pursuer upon the other conclusion, and the first two being as I have said unnecessary, and I think irrelevant, the plain result of his Lordship's opinion is that the action ought to be dismissed.

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the ground that there is not such an indication of intention that she should be vested in the estate in her lifetime as would satisfy the requirements of the Conveyancing Acts.

"But, in the interpretation of powers of disposal, technical language is not necessary, nor was it ever necessary; and if I had been dealing with this language in a deed executed before the passing of the Acts 1868 and 1874 I should equally have held that in a marriage-contract where heritable as well as moveable estate is regulated a power to test upon the granter's whole means and estate is a power to test upon heritage.

"The result will be that the pursuer, according to my judgment, is entitled to decree in terms of the first and second declaratory conclusions, and that the defender is entitled to absolvitor from the third conclusion."

[1] Urquhart v. Dewar, June 13, 1879, 6 R. 1026.

[2] Ainslie, &c. v. Ainslie, Dec. 8, 1886, 14 R. 209.

[3] Urquhart v. Dewar, 6 R. 1026 (Lord Mure, p. 1037); M'Leod's Trustee v. M'Luckie, June 28, 1883, 10 R. 1056.

[4] Act 31 and 32 Vict. cap. 101 (Titles to Land Consolidation Act), sec. 20; Act 37 and 38 Vict. cap. 94 (Conveyancing Act, 1874), sec. 27.

[5] Robb's Trustees v. Robb, May 14, 1872, 10 Macph. 692, 44 Scot. Jur. 383.

[6] Bryson's Trustees v. Clark, &c., Nov. 26, 1880, 8 R. 142.

[7] Act 37 and 38 Vict. cap. 37.

As regards the subject of the Lord Ordinary's note, I entirely agree with the view he expresses, that there is no appearance in the deed of any intention on the husband's part to give his wife a title to the heritage. It must be kept in mind that the deed is drawn by a conveyancer. It is not like some wills which we have lately had before us where under the recent Conveyancing Acts the testator has been allowed very great latitude in conveying heritage in words which technically would not be understood to do so.

In the earlier part of the deed there is a conveyance to the lady of the household furniture, and there is a clause by which the husband assigns and dispones to his wife a liferent of a cottage called Lorne Cottage, and it is declared that as regards the garden ground at the back of the cottage one half of it is also to be liferented by her,—shewing plainly that the other half was not intended to belong to her. There is also given to the wife an annuity in the form of an obligation binding the husband, his heirs, executors, and successors whomsoever to content and pay his widow a free liferent annuity of £15 out of the rents derived from the Main Street property. So far as we have gone, there appears to be no room for doubt or dispute. The lady was to have the furniture, a liferent of the cottage in which she and her husband lived, and also of one half of the garden ground, but not of the other half, and an annuity of £15 a-year payable out of the other heritable estate, viz., a shop and bakehouse in the town of Callander.

We must now look at the rest of the deed, and if possible read it consistently with the first portion of it. Following the directions I have named, I do not think it is necessary to determine whether the power of apportionment and division applies to the heritable as well as to the moveable estate. That question is not raised in the present action. The next point of the deed, which does require construction, is this,—"And to that end I hereby appoint the said Ann Fraser to be my executrix, with powers to give up inventories of my estate, and all other powers competent to an executrix; and I hereby leave and bequeath my whole means and estate to her as executrix foresaid." In the first place, these words do not import an absolute bequest, but a bequest in order to enable her to exercise the power which was given to her as executrix foresaid, and in no other capacity whatever. It is further said that, because general words of conveyance are used, therefore under the recent Conveyancing Acts heritage is included, but that is not so if such a reading is quite inconsistent with the rest of the deed. Further, if the pursuer's contention be correct, does the general conveyance to her embrace the portion of the estate which is to be liferented by her in terms of the earlier provisions of the deed? The two things are utterly inconsistent, and I have come to the conclusion without the slightest hesitation that the conveyance to the pursuer is a conveyance of the moveable estate only.

How far that result may limit and restrict the power of apportionment above mentioned, we do not decide. It is enough for us to hold in this case that the bequest does not apply to heritage.

LORD MURE.—The construction and effect of the recent Conveyancing Act, as explained in the leading cases, do not appear to me now to admit of question, provided the clear intention of the granter, as disclosed in the deed under consideration, is to make a bequest of heritage as well as of moveables. My opinion in the case of *Urquhart* (6 R. 1026) has been referred to as in favour of the construction here concluded for by the pursuer. But, on looking over that opinion, I see that I guarded it by saying that if there was a clear intention to

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be gathered from the other parts of the deed to the effect that the general words of bequest were not intended to include heritage, then they could not be held to do so. I, no doubt, came to a different conclusion in that case from the rest of the Court; but that was in respect of the terms of the deed, which I thought sufficient to indicate an intention to convey heritage. In the present case, I do not think there are any such words to be found in the deed.

LORD ADAM.—I think the question which is at the bottom of this case is whether the husband when he leaves and bequeaths his "whole means and estate" to his wife intended that they should embrace heritable as well as moveable estate. The words are in themselves sufficiently large to embrace both, and perhaps if they stood by themselves the presumption would be that they did embrace both. But when we find that the words in question are used in connection with a gift to her as executrix,—perhaps a presumption arises the other way. But however that may be, we must construe the deed as a whole, and applying that test I think it is clear that the husband did not intend to bequeath to his wife heritage as well as moveables. His intention was to leave his heritable estate to his son and heir with a liferent of a portion of it to his widow. I do not think he intended to put it in the power of his widow to turn his son the defender, Donald Campbell, out of the premises in Main Street, Callander, which he had occupied for a long time as a bakehouse. It appears to me that to construe the words "means and estate" as including heritage would be wholly inconsistent with the provisions which are contained in the early part of the deed. For instance, if it had been meant that the widow should have the fee of Lorne Cottage, we should have expected that the fee would have been given to her in the same clause of the deed which gives her the liferent, more especially as the deed is prepared by a professional man. The next clause is still more important, and makes the matter absolutely clear. The defender is there placed under an obligation, as his father's heir, to pay the pursuer an annuity of £15 out of the Main Street property. If the pursuer's contention is correct, that would be an obligation upon the person who was not proprietor of the subjects to pay an annuity to the person who was proprietor of the subjects out of which it was to be paid. That reading leads to a *reductio ad absurdum*. But further, it appears to me to be clear from the whole provisions of the deed that the words "means and estate" were meant to extend to moveable estate only, and not to include heritage.

LORD SHAND was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and dismissed the action.

FODD, SIMPSON, & MARWICK, W.S.—JAMES GAVIN, L.A.—Agents.

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Dec. 2, 1887.
Scottish Drainage and Improvement Co. v. Campbell.

SCOTTISH DRAINAGE AND IMPROVEMENT COMPANY, Pursuers (Reclaimers).—*Gloag—Low.*

REVEREND J. P. CAMPBELL, Defender (Respondent).—*Wallace.*

Right in security—Drainage improvements—Personal action against possessor of subjects—Scottish Drainage and Improvement Company Act, 1856 (*Act* 19 *and* 20 *Vict. cap. lxx*).—*Held* that the Scottish Drainage and Improvement Company's Act of 1856 imposes no personal liability upon a landowner to whom advances are made under that Act, and that a personal action against such landowner for payment of the annualrent charge is incompetent.

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1st Division.
Lord M'Laren.
M.

In the years 1875 and 1877 the Reverend John Cameron, minister of the parish of Urquhart, Inverness-shire, applied to the Scottish Drainage and Improvement Company, incorporated under their Acts of 1856 and 1860, for loans for the improvement by drainage, &c., of his glebe. The applications having been submitted in terms of the above Acts to the Inclosure Commissioners for England and Wales, and the improvements executed, the Commissioners thereupon, on 8th November 1877, delivered to the Company two absolute orders charging the fee of the glebe with the annual payments of (1) £16, 8s. 8d., and (2) £8, 10s. 7d., each payable in half-yearly instalments for twenty-five years.

The first of these orders was in these terms:—"The Inclosure Commissioners for England and Wales, in pursuance of the Scottish Drainage and Improvement Company's Acts, do, by this absolute order under their hands and seal, charge the fee of the lands mentioned in the schedule annexed hereto with the payment to the Scottish Drainage and Improvement Company, their successors and assignees, of the yearly sum of £16, 8s. 8d., payable half-yearly, on the 15th day of May and the 11th day of November in every year, for the term of twenty-five years, and being a proportionate repayment, according to the table annexed, of the capital sum of £245, 5s., with interest at £4, 10s. per centum per annum, the first half-yearly payment to be made on the 15th day of May 1878."

Mr Cameron paid these half-yearly instalments till his death in 1880. He was succeeded as minister of the parish by the Rev. John P. Campbell, who entered into possession of the manse and glebe.

In 1887 the Drainage Company raised an action against Mr Campbell for payment of the instalments or rent charges due since Martinmas 1884, he having paid them from 1880 until then.

The defender stated that it was in ignorance of his rights he had paid the instalments from 1880 to 1884, and maintained that there was no personal obligation upon him under the Company's Acts to do so. He further stated that the expenditure in question had not increased the annual value of the glebe, which was only of the value of £10.

The pursuers pleaded, *inter alia*;—(1) The defender, as minister of the parish of Urquhart, being in possession of the glebe thereof, is liable to make payment of the rent charges sued for. (2) The rent charges sued for being a preferable burden on the glebe, the same are payable by the minister for the time being of the parish, and the pursuers are entitled to decree against him therefor as sued for, with expenses.

The defender pleaded, *inter alia*;—(2) There having been no contract between the defender and the pursuers, he is not personally liable, and should be assoilzied, with expenses.

The Act of Parliament founded on was the Scottish Drainage and Improvement Company's Act, 1856 (19 and 20 Vict. cap. lxx).

The Lord Ordinary (M'Laren), on 15th June 1887, found that the pursuers had no personal claim or right of action against the defender, and assoilzied him.*

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* "OPINION.—This is an action at the instance of a company constituted for the purpose of advancing money for the improvement of lands, against the incumbent of a rural parish, claiming payment of eight half-yearly instalments of a charge upon the glebe for improvement debt incurred during the tenancy of the previous incumbent.

"The defence (so far as relevant) is that the charge is not a debt personally affecting the defender, and that the pursuers can only recover their instalments by real diligence directed against the lands secured by the charge. The defence appears to me to be well founded, having regard to the terms of the deed

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The pursuers reclaimed, and argued;—The question was whether the pursuers had a personal claim against the defender for the rent charges. The terms of the absolute order provided only a real security, but the 61st

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libelled, and the private Acts of Parliament which regulate the powers and rights of the company.

"The deed libelled is called an absolute order, and is in the form of schedule (C) of the Company's principal Act. It declares that the Inclosure Commissioners for England and Wales (who under the Act have certain quasi-judicial functions), 'do, by this absolute order under their hands and seal, charge the fee of the lands mentioned in the schedule annexed hereto with the payment to the Scottish Drainage and Improvement Company, their successors and assignees, of the yearly sum of £ , &c., for the term of , &c.'

"In this order the important words evidently are the words 'charge the fee of the lands.' The word 'charge' is not one of the customary technical terms which are used by the conveyancers of this part of the United Kingdom, and I am not aware that the word has been the subject of judicial interpretation in Scotland. But if the Judge is entitled to use his knowledge of the English language as a guide to the interpretation of such expressions, it is my opinion that a charge on the fee of lands means nothing more than a real security unconnected with personal obligation; in other words, a real burden on the lands. If, in the absence of any authorised interpretation of the term, I am at liberty to consider the probable intention of the Legislature, I may say that I think it is very unlikely that Parliament should authorise the minister of a parish to enter into obligations connected with the improvement of the glebe in such terms as would be personally binding on his successors. I will add that the Act authorises advances to be made on the security of entailed estates in Scotland, and that in my opinion it is unlikely that Parliament intended that such debts should be personally binding on succeeding heirs of entail.

"Apart from personal obligation, the pursuers have an excellent security for their advances; because I observe that by section 52 their advances are to have priority over all other incumbrances, existing or future, except charges of the like nature. Again, I observe, it is most improbable that the Legislature would have granted preferential rights to this company if the company was also to have the rights of a creditor in a bond and disposition in security against the person in possession.

"Section 49 of the principal Act authorises the execution of charges, in the form of the schedule, by the Drainage Commissioners, but it does not define the nature of the security to be constituted. The pursuers, as I understand, rest their case mainly on the provision of section 61, which provides that such charges may be recovered 'by the same means and in like manner as any feu-duties, or rent, or annualrent, or other payment out of the same lands, would be recoverable in Scotland.' Now, as I read this clause, the expression 'may be recovered,' at the beginning of the section is grammatically and logically connected with the words 'out of the same lands' near the end of the section; and this connection is in no way disturbed by the reference to feu-duties, rents, and annualrents in the intervening part of the sentence. The company are to have all the remedies against the heritable estate which are competent to superiors or creditors in obligations of annualrents; but it is not said that they are to have a remedy against the person. We know that the remedy against the person is very different in the two illustrative cases. The superior's remedy is against the entered vassal; the remedy of the creditor in a ground annualrent is against the debtor and his heirs. It can hardly be supposed that Parliament intended to give a concurrent right of relief against heirs of the debtor and also against successors in the estate. But it is quite possible that the company were intended to have every remedy against the estate which is known to the law; and in this view the enumeration of different kinds of real securities in this section becomes intelligible. There being no conclusions for real diligence, it follows that the defender is entitled to absolvitor."

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section* made a personal action competent, for feu-duties and rents might be recovered in that manner, and by that section the company had the same remedies. The Lord Ordinary's construction of that section was erroneous; if the words "out of the lands" had occurred at the end of the clause it would have been different, but occurring where they did they were merely descriptive of the kind of payments introduced in the section by way of illustration. The 13th section of the Rutherfurd Act, 1848 (11 and 12 Vict. cap. 36), by which an heir having obtained decree for expense of improvements might grant a bond of annualrent, provided a like remedy with the present. It was quite likely that the Legislature should have provided a personal remedy in a case where the annual value of the glebe was enhanced by the improvements. By the 38th section of the Act no one could be called upon to pay more than the enhanced value of the subjects, and only after a certificate by the Commissioners. The intention to make the landowner personally liable for the rent charge was also clear from the 68th section.†

The respondent's argument sufficiently appears from the Lord Ordinary's note and the opinions of the Judges.[1]

Lord President.—The pursuers in this action are a company which was constituted for the purpose of advancing money for the improvement of land by drainage and otherwise. The defender is the present minister of the parish of Urquhart, in Inverness-shire, and the object of the action is to recover the arrears of certain annual charges, being the amount of money advances expended upon the glebe of the parish following upon applications made therefor by his predecessor in 1875 and 1877. The document constituting the ground of action is what is called an absolute order, made by the Inclosure Commissioners for England and Wales, under authority of the Act of Parliament constituting the Drainage Company, and the charge is precisely in terms of the schedule appended to the statute. It bears,—"The Inclosure Commissioners for England and Wales, in pursuance of the Scottish Drainage and Improvement Company's Acts, do,

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* The 61st section was,—"Every charge on land by virtue of this Act may be recovered by the Company, or the person for the time being entitled to the same, by the same means and in like manner, in all respects, as any feu-duties, or rent, or annualrent, or other payment out of the same lands, would be recoverable in Scotland."

† Sec. 68.—"Every landowner on whose land a charge shall have been made under this Act, and every heir of entail, or of destination, or liferenter, and other person having a limited interest in the land so charged, shall, as between such person and the persons next entitled to succeed, be bound to pay the yearly or other periodical payments of such charge which become payable during the continuance of his interest, and in case he be in the actual occupation of or entitled to an apportioned part of the rents and profits of such land up to the time of the termination of his interest, shall also be bound to pay an apportioned part of the yearly rent or other periodical payment of such charge which becomes due next after the termination of his interest proportioned to the time which elapsed between the day for the previous payment and the day of such termination: Provided that any such person entitled to succeed, and becoming entitled in possession, shall not be liable to pay any arrears of the charge remaining unpaid at the time of his succession or right to succeed, exceeding the amount of one year's payment of such charge: Provided also that the amount paid by such person in respect of such arrears, and any costs occasioned by non-payment thereof, shall be a debt from the person who, in the first instance, ought to have paid the same, or from his estate, heritable or moveable, to the person who paid the same, and shall be recoverable accordingly."

[1] *Authority cited.*—Royal Bank v. Gardyne, May 13, 1853, 1 Macq. (H. of L.) 358.

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by this absolute order under their hands and seal, charge the fee of the lands mentioned in the schedule annexed hereto with the payment to the Scottish Drainage and Improvement Company, their successors and assignees, of the yearly sum of £16, 8s. 8d., payable half-yearly on the 15th day of May and the 11th day of November in every year, for the term of twenty-five years, and being a proportionate repayment, according to the table annexed, of the capital sum of £245, 5s., with interest at £4, 10s. per centum per annum, the first half-yearly payment to be made on the 15th day of May 1878." That is the whole document, and it constitutes a valid charge or incumbrance upon the glebe of the parish.

The present action is brought for the purpose of recovering the amount of the annual charges from the present incumbent. It is a purely personal action, and is not in any way a proceeding for the purpose of enforcing a charge against the lands—the question being, whether such a personal action is competent.

In the first place, it appears very clear on the face of the document, which is termed an absolute order, that no personal obligation is laid upon anyone. It is nothing but a charge upon the land, and therefore, in so far as the document itself is concerned, there is no room for doubt. But it is said that notwithstanding the terms of the charge, which alone constitutes the debt against the glebe, there are clauses in the Act of Parliament which give the Company authority to sue the existing possessor of the land in a personal action for the amount of the annual charge as it accrues. The charge itself is provided for by the 49th section, and the nature and extent of the security are fixed by the 52d section, which provides that it is to "have priority over every other then existing and future charge and incumbrance whatsoever upon or affecting such lands, except feu-duties, ground-annuals, and other charges incident to tenure, teinds, and any charges created or to be created under any Act authorising advances of public money for drainage, and any charges previously created under the provisions of any Act of Parliament authorising the charging of lands with the expense of and incident to the improvement of lands by or under the sanction of the Inclosure Commissioners respectively, if any." There is thus provided for the Company a very good security, ranking very high among the securities which may affect an heritable subject. But, so far as these clauses are concerned, there is no mention of or reference to anything of the nature of a personal obligation.

But it is said that the 61st section creates a personal obligation of the nature contended for. Before adverting to the terms of that section I think it right to say that where a security is constituted by a form contained in an Act of Parliament which in itself creates no personal obligation against anyone, it would require very clear language in other portions of the statute to extend the nature of the obligation, so as to give a right to enforce it by personal action against the possessor of the lands. One would expect to find the personal obligation expressed in the document itself. Keeping that in view, the words of the 61st section are,—"Every charge on land by virtue of this Act may be recovered by the Company, or the person for the time being entitled to the same, by the same means and in like manner, in all respects, as any feu-duties, or rent, or annualrent, or other payment out of the same lands, would be recoverable in Scotland." Undoubtedly this section deals with the mode of recovery of charges upon land. But it is not concerned with anything else. It does not profess to create any new obligation or to extend the obligation

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created by the absolute order. The means and manner which are referred to are the means and manner by which certain other things, such as feu-duties, &c., are recoverable—but recoverable "out of the lands." These are the very words of the section. The latter part of the section enacts that the charge may be recovered by the same means and in the like manner as any feu-duties are recoverable out of the lands, or any rent or annualrent or any other payment are recoverable out of the lands. The means and manner are the means and manner by which, according to the law of Scotland, a charge can be recovered out of the land itself and nothing else. The construction I put upon the clause is that all real diligence shall be competent to the Company, but no other form of diligence, and certainly not action or diligence against the person.

I therefore think the Lord Ordinary's interlocutor ought to be adhered to.

Lord Mure.—I have come to the same conclusion. As your Lordship has pointed out, the charge is here made upon the fee of the lands; and in these circumstances, unless some provision to the contrary is to be found in the other clauses of the Company's Act, such a charge does not warrant a personal action against the holder of the land over which the security has been granted; and I agree with your Lordship that it would require very distinct provisions to that effect to justify the pursuers' contention. There is no doubt some little difficulty created by the terms of the 61st section, from which it might, in one reading of it, be argued that it was intended that the Company should have all the remedies for recovering their advances which a superior has for recovery of his feu-duty. And it was argued that as the payment of feu-duty may be enforced by personal action against the vassal in possession, a personal action was also competent in the present case. On reading the clause carefully, however, it does not appear to me that it must necessarily be held to bear that construction, and I agree with your Lordship in the view you have taken of its meaning.

Lord Adam.—Your Lordship in the chair has exactly expressed the opinion I have formed, and I have nothing to add.

Lord Shand was absent.

The Court adhered.

Ronald & Ritchie, W.S.—Menzies, Coventry, & Black, W.S.—Agents.

No. 28.

Dec. 3, 1887.

Stewart v. Stewart.

Thomas Stewart, Petitioner.—*J. C. Thomson—W. G. Miller.*
Mrs Jane M'Cubbin or Stewart, Respondent.—*Ure.*

Husband and Wife—Aliment—Amount.—In an action of separation and aliment against a husband, he agreed by joint minute to pay to his wife £250 per annum as aliment for herself and the two children of the marriage, who resided with her. The agreement was given effect to in an interlocutor granting decree of separation. Three years later he presented a petition to have the aliment restricted. His income having been ascertained to amount to £430 per annum, and his wife having no means of her own, the Court *restricted* the aliment to £150 per annum, although the husband had failed to prove that his income was less than at the date of the agreement.

1st Division.
B.

In an action of separation and aliment by Mrs Jane M'Cubbin or Stewart against her husband, Thomas Stewart, a hatter in Glasgow, the Lord Ordinary (Lee), on 28th February 1884, pronounced decree of separation:—"And in respect of the joint minute for the parties, decerns and

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ordains the defender to make payment to the pursuer of the sum of £250 per annum as aliment for herself and for the maintenance of Mary and Jane, the two children of the marriage between the pursuer and defender, who reside with her, payable said aliment in advance during the joint lives of the pursuer and defender, at the terms, in the proportions, and with the interest specified in the conclusions for aliment."

The sum of £250 was fixed as aliment by joint minute between the parties entered into subsequent to proof being led, but before the interlocutor was pronounced,—the amount being adjusted on the understanding that it was to cover the maintenance of the two children, who resided with Mrs Stewart.

In May 1886, Stewart presented a petition to the First Division of the Court to have the amount of aliment restricted, alleging that when the joint minute was adjusted he was sanguine that his income would increase,—otherwise he would not have consented to give so much as £250; that owing to the depression of trade, and other circumstances, his business had been unsuccessful, and he had made heavy losses, in consequence of which he had not paid the aliment due at or since Whitsunday 1886. He suggested £52 as a fair and reasonable amount of aliment.

Mrs Stewart denied that the petitioner's income had suffered the alleged reduction, and submitted that the application should be refused.

The Court, on 3d July 1886, remitted to Mr Moore, C.A., Glasgow, to inquire into the circumstances of the parties, and report.

On 31st October 1887, Mr Moore reported that the pursuer carried on a cash sale business as a hatter and hosier in three shops in Glasgow, his income therefrom being approximately about £200 per annum; that his income apart from his business was about £230 per annum; and that Mrs Stewart appeared to have no means other than her allowance from the petitioner.[1]

Lord President.—The peculiarity of this case seems to me to be that the husband consented to aliment his wife at the rate of £250 per annum, and that this agreement was given judicial effect to. He has not succeeded in proving that his income is less now than it was then. At the same time we are bound to give effect to the report which is before us, and which establishes the fact that the petitioner's present income does not exceed £430. In these circumstances, the opinion of the Court is that the alimentary allowance should be reduced to £150 per annum.

Lord Mure and Lord Adam concurred.

Lord Shand was absent.

The Court pronounced this interlocutor:—" Restrict the aliment to be paid by the petitioner to his said wife to £150 per annum as from and after Martinmas 1887."

Dove & Lockhart, S.S.C.—J. P. Bannerman, W.S.—Agents.

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[1] *Authorities cited.*—Lang v. Lang, Oct. 27, 1868, 7 Macph. 24, 41 Scot. Jur. 17; Wotherspoon v. Wotherspoon, Oct. 30, 1869, 8 Macph. 81, 42 Scot. Jur. 40; Macmillan v. Macmillan, July 20, 1871, 9 Macph. 1067, 43 Scot. Jur. 598; Symington v. Symington, March 20, 1874, 1 R. 871; Hay v. Hay, Feb. 24, 1882, 9 R. 667; Graham v. Graham, July 19, 1878, 5 R. 1093; Jameson v. Jameson, Feb. 20, 1886, 23 S. L. R. 402; Williamson v. Williamson, Jan. 27, 1860, 22 D. 599.

JOHN LOGAN, Pursuer (Respondent).—*Balfour—Young.*
HUGH M. LEADBETTER, Defender (Reclaimer).—*D.-F. Mackintosh—H. Johnston.*

No. 29.

Dec. 6, 1887.
Logan v. Leadbetter.

Arbitration—Lease—Waygoing crop—Reference to man of skill—Power to take evidence.—In a reduction of a decreet-arbitral following upon a reference to two men of skill as arbiters under a lease as to the value of a waygoing crop, the pursuer averred that parties were not heard, that only one of the arbiters had seen the crop after it had been cut, and that no evidence had been led as to its value. *Held* that no relevant ground for reduction had been stated, and action *dismissed.*

Observed that it would have been incompetent to lead evidence.

1st Division.
Lord M'Laren.
M.

JOHN LOGAN was tenant of the farm of Legerwood, Berwickshire, under a lease which expired in 1886, when he was succeeded in the farm by Hugh M. Leadbetter. In Logan's lease there was the usual clause to the effect that at its expiry the waygoing crop should be delivered over "either to the proprietor or to the incoming tenant as the proprietor shall fix, upon valuation by two persons of skill to be mutually chosen, or by an oversman to be appointed by them in case of difference in opinion, and the arbiters shall fix the time for valuing the crop, and the price that shall be so fixed by them shall be payable to the outgoing tenant according to the custom of the county, or if any doubt shall arise then according to the judgment and decision of the said mutually chosen valuators or oversman."

By submission entered into in May 1886 between Logan on the one hand and Leadbetter and Mr John Lowson junior, the proprietor of the farm, on the other, various claims between the two parties were submitted to two arbiters mutually chosen. *Inter alia,* the sum to be paid to Logan by Leadbetter for the last year's crop was submitted.

In the course of the arbitration the arbiters issued various notes of award—that dealing with the waygoing crop being issued on 29th April 1887. Logan took exception to it on various points, and on 3d June following he lodged specific objections to it, asking to be allowed to prove that the deduction proposed to be made from the value of the crop for bad weather was too high, and that the prices allowed for the oat and barley crops did not represent a fair value, &c.

The arbiters met on 10th June, and the minute of their meeting bore,—"The arbiters, after consulting the oversman, who has been present at all their meetings, resolved to refuse Mr Logan's motion for proof on the ground that they already know from their own experience the whole facts that could be submitted, and that it is therefore unnecessary." On 17th June they issued a decreet-arbitral determining the questions at issue.

Logan thereafter brought this reduction of the decreet-arbitral, calling Leadbetter and the proprietor as defenders, and alleging, *inter alia,*—(Cond. 8) "During the whole proceedings of the reference no written claims for the parties were given in or ordered, and parties were not heard. No proof was led as to their respective claims. The inspection made by the arbiters was not such as could enable them to ascertain and fix fairly and accurately the value of the crops. Only one of the arbiters saw the crops after being cut, and the other was therefore wholly unable to judge of their value, or of the amount of deduction that should be made."

He pleaded;—(1) The proceedings in the said submission and reference having been irregular, and the arbiters having acted in a wrongful and unjust manner, the said decreet-arbitral ought to be reduced. (2) In respect that the matters referred to the arbiters required investigation, and that they wrongfully and unjustly decided thereon without evidence tendered by the pursuer, the said decreet-arbitral ought to be reduced, or

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at least ought to be reduced in so far as it relates to the value allowed for the said waygoing crop.

The defender Leadbetter, who alone lodged defences, pleaded;—(1) The statements of the pursuer are not relevant to sustain the conclusions of the summons. (2) The reference in question having been expressly to men of skill to make a valuation, they were not bound to allow the parties to lead evidence, and particularly to lead evidence on the points mentioned by the pursuer in his objections of 3d June 1887, nor were they bound to hear parties, and their procedure has therefore been competent and regular, and their award is valid.

The Lord Ordinary (M'Laren), on 8th November 1887, before answer, allowed a proof.

The defender reclaimed, and argued;—No relevant ground for a reduction was stated. Written claims were not necessary in a reference like the present to men of skill. Besides, written objections had been given in, heard, and considered. Such references for the purpose of valuation only were different from references to arbiters to determine questions in dispute between two parties.[1] Proof was not necessary.

The respondent argued;—The arbiters here had declined to ascertain matters of fact. The case of *Wm. Dixon, Limited*,[1] dealt with a wholly different class of contract from the present, and was not in point. In *Nivison's* case[1] all that was held was that formalities were not necessary in a reference. Proof of the averments in cond. 8 ought to be allowed. Clearly the important time to value a crop was when it was being reaped, or subsequently. It was not enough that one of the arbiters should then inspect it. Both ought to have done so.

LORD PRESIDENT.—This is a very clear case indeed, especially as it is now reduced to the objections which are stated in the 8th article of the condescendence. A number of matters were submitted to the arbiters, but the objections now before us relate entirely to the value of the waygoing crop. That part of the submission is simply a valuation, and whenever two men of skill are appointed to value a subject which is to be handed from one person to another, not only is it unnecessary to take evidence, but it is incompetent. The matter which is submitted is the value of a certain subject, and it is so submitted to arbiters because they have the necessary experience and skill to enable them to form an opinion in regard to it. What they did in the present case was quite proper. They disposed of the other matters falling within the submission, and they valued the waygoing crop, estimating the number of bushels it contained, and making a certain deduction on account of bad weather, and then putting a price and value upon the whole, subject to that deduction. They then issued their award in the form of notes. The pursuer thereafter lodged his objections, and the arbiters, having reconsidered their determination, adhered to their former opinion as to the amount of the valuation.

The objections are now reduced to the averments which are made in the 8th article of the condescendence. As to the want of written claims, and the refusal of the arbiters to admit proof, it is needless to say that both were quite superfluous, if not incompetent, in a reference which related only to the value of a waygoing crop. So that the objections are thus reduced to the single averment that "only one of the arbiters saw the crops after being cut, and the other was therefore wholly unable to judge of their value or of the amount of deduc-

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[1] Nivison v. Howat, Nov. 22, 1883, 11 R. 182; Wm. Dixon, Limited, v. Jones, Heard, & Ingram, March 19, 1884, 11 R. 739.

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tion which should be made." Now, assuming that this averment is true, what is the result of it? Of course it impliedly admits that both arbiters saw and inspected the crop while it was standing, and I know no point of time at which it was more necessary that they should inspect it than when it was standing. No doubt it is also very important to see how the crop fares when it has been harvested and lodged in the stackyard, but it seems to me that for this purpose the visit of one arbiter is amply sufficient. The objection appears to me to be of a most flimsy nature; none more so could be stated.

Lord Mure concurred.

Lord Adam.—I concur with your Lordship. This is not a case of a reference of questions in dispute between the parties, but it is simply a reference to men of skill to value a waygoing crop. I think it is incompetent to lead evidence before the arbiters in such circumstances. The duty of the arbiters is simply to go and see the waygoing crop they are to value, and to judge with their own eyes what price ought to be put upon it. I do not think the position of the arbiters could be better explained than in the words of their own minute of meeting when they disposed of the pursuer's objections and of his application to have a proof allowed. The arbiters say that they "resolved to refuse Mr Logan's motion for proof on the ground that they already know from their own experience the whole facts that could be submitted, and that it is therefore unnecessary."

The only objection now insisted on by the pursuer is that which is stated at the end of condescendence 8—that one of the arbiters did not see the crop after it was cut. I do not think we can set aside this award on any such ground as that. Further, there was no refusal to hear parties in the ordinary sense of hearing them upon the whole case. The only refusal was to delay the proceedings in order to hear the pursuer's agent on his motion to be allowed to lead proof, and I think that in so refusing the arbiters acted rightly.

Lord Shand was absent.

The Court recalled the Lord Ordinary's interlocutor; further, repelled the reasons of reduction as irrelevant; dismissed the action accordingly, and decerned, &c.

John Macmillan, S.S.C.—Lindsay, Howe, & Co., W.S.—Agents.

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M'Arthur v. Boucher.

Arthur M'Arthur, Pursuer (Appellant).—*Baxter*.
James Boucher, Defender (Respondent).—*C. S. Dickson*.

Process—Appeal for Jury Trial—Judicature Act, 1825 (6 *Geo. IV., cap.* 120), *sec.* 40.—It is incompetent to remove a Sheriff Court cause to the Court of Session under the 40th section of the Judicature Act while the interlocutor allowing a proof is under appeal to the Sheriff.

1st Division.

Sheriff of Lanarkshire.

M.

In an action of damages at the instance of Arthur M'Arthur against James Boucher for wrongous sequestration, brought in the Sheriff Court of Lanarkshire at Glasgow, the Sheriff-substitute (Erskine Murray) on 17th November 1887 allowed a proof.

On 22d November the defender appealed to the Sheriff.

On 23d November the pursuer appealed under the 40th section of the Judicature Act, 1825, to the First Division of the Court of Session.

When the case was called in the Single Bills of the First Division the defender objected to the competency of the appeal, maintaining that there

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was no standing interlocutor allowing proof. The provisions of the 40th section of the Judicature Act could not be taken advantage of after a case had been appealed to the Sheriff.[1]

The pursuer replied that the defender could not suffer if the appeal to the Court of Session were allowed, because that Court could review any judgment which had been pronounced by the Sheriff-substitute before the appeal was taken.[2]

LORD PRESIDENT.—The privilege given to either of the parties in an inferior Court process by the 40th section of the Judicature Act (6 George, IV., cap. 120), where the claim amounts to more than £40, is as soon as an interlocutor has been pronounced allowing a proof to remove the process into the Court of Session by bill of advocation, and now by appeal. The meaning of that provision certainly is not that there shall be any review of a judgment, but that the process shall be brought here for the purpose of becoming a Court of Session process, and being brought to an end here by a verdict and judgment. But the condition of that privilege is that an interlocutor has been pronounced allowing or appointing proof. The answer here made is that there is no final interlocutor in the Sheriff Court allowing proof, because the interlocutor of the Sheriff-substitute is under appeal, and may be altered when the Sheriff's judgment is pronounced. Accordingly, the very foundation of the Sheriff-substitute's interlocutor may be removed, and I am therefore of opinion that the present appeal cannot be brought at this stage.

LORD MURE.—The 40th section of the Judicature Act contemplates that there is to be an operative and effective interlocutor before the appeal is taken. The moment an interlocutor is appealed, it ceases to be operative. The appeal to the Sheriff preceded the appeal to this Court, and I am of opinion that we cannot entertain the latter.

LORD ADAM concurred.

LORD SHAND was absent.

THE COURT refused the appeal, with £2, 2s. of expenses.

WILLIAM BLACK, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

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Kennedy v. Creyk.

JOHN KENNEDY, Pursuer (Reclaimer).—*Asher—Ure.*
ALEXANDER CREYK, Defender (Respondent).—*Balfour—C. J. Guthrie.*

Reparation—Wrongous use of Diligence—Lease.—A tenant of grazings agreed with his landlord in writing to have a certain amount of stock always on the ground while the rent remained unpaid. He also granted a bill for the rent. The bill having fallen due, and being unpaid, the landlord presented a petition to the Sheriff for warrant to sell the stock to an amount sufficient to pay the rent and expenses. The Sheriff,—no appearance being made for the tenant,—granted warrant to sell so much of the stock as would meet the debt and expenses of process and sale, and the sale was carried out, and the proceedings reported to the Sheriff by the person appointed by him as judge of the roup. The tenant thereafter raised an action of damages against the landlord, on the grounds (1) that the warrant of sale was illegal, as being granted while he was still tenant of the grazing and in possession of the stock; (2) that in any view it was illegally carried out since the stock had been sold in an improper manner, and to an extent greatly exceeding the amount of the debt; (3) that the de-

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[1] Sheriff Courts Act, 1876 (39 and 40 Vict. cap. 70), sec. 29.
[2] Virtue v. Police Commissioners of Alloa, Dec. 12, 1873, 1 R. 285.

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fender had verbally agreed, before the sale began, to accept a certain sum as in full of his debt and expenses, which sum was to be sent for from a neighbouring bank by a friend of the tenant who was present, and had only to send for the money, but that the defender had broken this agreement and instructed the sale to be proceeded with, without allowing time for the money to be brought, the result being, as the pursuer averred, that his stock was sacrificed at a low price, and his credit much injured.

The Court (*aff.* judgment of Lord Fraser) dismissed the action as irrelevant, Lord Rutherfurd Clark *dissenting* on the grounds (1) that the stock was, according to the pursuer's averment, in his possession as tenant of the grazing, and not in the defender's, when the warrant was granted; (2) that he had not by his non-appearance to oppose it assented to its being granted; and (3) that the warrant, assuming its legality, had, according to the pursuer's averment, been so carried out that the defender ought to be put to justify it.

2D DIVISION. Lord Fraser. M.

JOHN KENNEDY, farmer and cattle-dealer, Soillerie, near Kingussie, raised an action for reduction of a warrant, pronounced on 13th May 1887 by the Sheriff-substitute of Morayshire at Elgin, granting warrant to the defender, Alexander Creyk, to sell by public roup sheep stock belonging to the pursuer and a man named William Cameron, and which had been at that date upon the farm of Dalvey, of which the defender was tacksman, and further, whether the warrant should be reduced or not, for damages, which he laid at £1200.

The pursuer averred that the defender was tacksman of Dalvey and Tominoird Plantation adjoining it, and that he had sublet Tominoird Plantation to him and Cameron for the period from 13th April 1885 to Whitsunday 1886, and also the winter grazing on Dalvey from 1st November 1885 to Whitsunday 1886, the rent for the latter being £140, payable by three months' bill, to be granted at 1st January 1886; that he and Cameron had possessed these grazings and had sheep thereon belonging to other parties, for whom they were grazing the sheep under the care of their shepherds; that at 30th December 1885 the half year's rent of Tominoird was paid, and of the same date an agreement was entered into between the defender on one hand and the pursuer and Cameron on the other whereby the pursuer and Cameron agreed that so long as the rent of £140 remained unpaid they would leave upon it 300 head of sheep, at least, against the rent; that on same date, 30th December, the three months' bill for the £140 rent, dated 1st January, was granted.

The pursuer further averred, that in April 1886 the defender applied to the Sheriff at Elgin for and obtained an interdict against him and Cameron removing sheep from the grazing so as to reduce the number below 300 head until the £140 rent should be paid, and that on 5th May 1886 the defender presented a petition to the Sheriff for warrant at the sight of a person to be appointed by the Sheriff to sell by public roup the sheep stock belonging to the pursuer and Cameron, and then upon the defender's land, and after deducting the expenses of process and sale, to apply the proceeds in payment of the £140 rent; that the petition was served on him, but not having legal advice, or having time to instruct an agent, he did not appear, and that on 13th May the Sheriff, on the defender's motion, and in respect of no appearance for the pursuer and Cameron, granted warrant to the Sheriff-clerk-depute at Grantown (Mr William Fleming), to sell by public roup "as many of the sheep mentioned in the petition as will satisfy and pay the rent claimed, and the expenses of process and sale," and appointed the sale to take place at Grantown on 31st May after advertisement; that the only grounds for the petition were that the pursuer and Cameron were the defender's subtenants, and had made the agreement to leave 300 sheep on the grazing so long as the rent was unpaid; and that the rent was past due, and was unpaid.

The pursuer then averred that the warrant of sale was wholly illegal and not according to any form of lawful diligence, but that the defender proceeded to carry it out by removing, on 31st May, the whole sheep on the grazing to Grantown for sale, which sheep included a large number, specified by the pursuer, which belonged to various persons, also specified, who had arranged with the pursuer and Cameron to have them grazed on the grazing let to them; that when the sheep were brought to Grantown for sale on 31st May, the true owners of certain of them claimed them as theirs from the defender and Fleming, but without avail; that the pursuer, in order to prevent the sale, offered the defender instantly to pay the £140, together with the balance due on another bill between the parties, and with a sum in full of expenses and all sums due by him and Cameron; that he had arranged with a Mr M'Dougall, merchant, Grantown, who was present at the sale, to make payment for him of £205, and that the defender agreed to this, and that M'Dougall was ready at once to send to the bank in Grantown for the money; that he was, as the defender well knew, quite good for the amount, and ready to pay it at once; that after instructing Mr Fleming to accept the £205, the defender, either in consequence of Fleming's advice or at the instigation of someone else who had come to bid, and wished the sale to proceed, changed his mind, "and in breach of the said arrangement, and in disregard of the offer made by and on behalf of the pursuer of full payment of his claims, the defender wrongfully and illegally caused the sale to be proceeded with, and although he was entitled under the said warrant only to sell for the said sum of £140 and expenses, he wrongfully and illegally caused the whole of the said sheep to be exposed in one lot."

The pursuer then averred that in order to prevent the sheep from being sold to a third party and passing beyond his control, M'Dougall took part on his behalf in the bidding for the sheep, that after the price reached £234, M'Dougall ceased bidding, and he himself continued the bidding till the price reached £245, when Mr Fleming objected to his bidding and caused it to be put back to £234, at which price the sheep, including those belonging to other persons than the pursuer, were knocked down to a man M'Donald; that notwithstanding that the defender had by his illegal, wrongous, and injurious proceedings caused serious loss to him and realised by the sale a sum greatly in excess of the amount referred to in the warrant of sale, the defender had proceeded to do diligence on another bill for £75, granted for the rents of the Tominoird plantation and certain damage to turnips, and caused a poinding to be executed of the pursuer's cattle and furniture at his farm of Soillerie, to stop the further execution of which the pursuer paid that bill with the expenses. He then averred that in consequence of the proceedings of the defender his credit had been seriously injured and much loss caused to him, that prior to the proceedings complained of he had been an extensive cattle-dealer in good credit, but since the granting of the warrant of sale, and since the poinding, his business and reputation had been irretrievably hurt.

He averred that the sheep illegally and wrongfully sold were worth £350, that he was liable to their owners for such of them as were not his own, that after deducting £140 from the £350, there remained £210 of loss to him on the sale of sheep alone.

He pleaded, *inter alia*;—(1) The said warrant of sale, and whole grounds and warrants thereof, being illegal, the pursuer is entitled to decree of reduction as craved. (3) *Separatim*, The defender having in breach of his agreement with the pursuer, as narrated in condescendence 10, caused the said sheep to be sold, and the pursuer having thereby suffered loss and damage, the pursuer is entitled to recover compensation therefor from the defender.

The defender pleaded that the pursuer's statements were irrelevant; that the proceedings at his instance had been lawful and regular, and that the pursuer was barred by acquiescence and by his own actings from maintaining that they were irregular.

The Lord Ordinary (Fraser) pronounced this interlocutor:—"Finds that the pursuer's averments are irrelevant, and further that he is barred by his own actings from insisting on the irregularity of the proceedings complained of: therefore dismisses the action."*

The pursuer reclaimed, and argued;—(1) The warrant of sale was irregular; it was an attempt to enforce something of the nature of a conventional hypothec of a kind unknown to the law. The defender might have done diligence on his £140 bill, but he preferred to take a course for which he had no right to obtain judicial authority, and the Sheriff no right to authorise. The Lord Ordinary said the sheep were on the defender's farm of Dalvey as a pledge for the payment of the rent. But there could be no pledge without possession, and possession the defender could not have if the pursuer were right in the averment, which he asked leave to prove, that he was tenant till the Whitsunday following the date 5th May, when the defender presented his petition to the Sheriff.

(2) It was said that the pursuer should have appeared and objected to the defender obtaining the warrant from the Sheriff. His reason for not doing so was that he was in temporary difficulties, from which he was now free, and also, as he stated on record, that he did not know his legal right to have the warrant refused. But in any view it was no defence for obtaining an illegal warrant wrongfully that the other party had been cited to appear.

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* "NOTE.— . . . The Lord Ordinary is of opinion that the objection to the proceedings is not well founded, and that decree of reduction of the warrant of the Sheriff-substitute cannot be granted. The sheep were upon the farm as a pledge for the payment of the rent. The debt was constituted by the bill which was overdue at the time when the sale took place. The pursuer's right of possession of the grazings had terminated, and the sheep were in the defender's possession at that time. As the sheep required at once to be attended to, it was a very proper course to apply to the Sheriff for a warrant to sell them.

"The pursuer is, moreover, barred from stating any objection to the course which was adopted. He lay by, and entered no appearance, and stated no objection to the granting of the warrant. After advertisements were sent out intimating that the sale would take place, no step was adopted by him in the way of preventing it, either by getting the warrant recalled or otherwise. Nay, further, he attended at the roup, and was himself a bidder, without any protest against the carrying out of the warrant, except stating that some of the sheep that were offered for sale did not belong to him, but to other persons named. If this were the case, the owners of these sheep may have their remedy against the defender. It is therefore in vain in these circumstances to insist in an action of reduction at the instance of a party who has so conducted himself.

"The averment of the pursuer in article 10 of an agreement between him and the defender to postpone the sale is not relevant, in respect that there is no averment of a tender of the money. It is probable enough that there may have been some conversation as to delaying the sale, but without an offer of the money the averment is not relevant. The people had assembled, and everything was ready for the roup. Unless the pursuer is able to aver, which he has not done, that he then and there produced the money due, there is nothing stated which requires proof."

He was not bound to appear, but might properly let the applicant take the risk of his own proceedings.

(3) Even if the warrant had been legal, it was harshly and oppressively carried out. That might be the case with the enforcement of a judicial warrant.[1] The pursuer had relevantly averred an agreement by the defender to wait till M'Dougall could go to the bank a short distance off for the money to meet the claim, and that the defender had then broken that agreement, and pressed on the sale. It would also be proved that M'Dougall had plenty of money lying in the bank to meet the claim. It would be said that the pursuer by bidding acquiesced in the sale, but he was only doing his best to avoid a ruinous sacrifice of the sheep threatened notwithstanding his remonstrances, and his bids were indeed declined by the judge of the roup. Again, the warrant was, in any view of it, only to sell "as many of the sheep mentioned in the petition as will satisfy and pay the rent claimed, and the expenses of process and sale," and the defender had sold the whole of them, and that in one lot, at a price of £234, while the debt was only £140. This margin for expenses was far beyond what was reasonable, and the defender was in any view of it bound to act with reasonable regard to the interest of his debtor, as *Le Conte's* case[1] shewed.

On the first point the defender was not called on. On the question of the regularity of the execution of the warrant he maintained that the judge of the roup having decided that the sale should go on, and that the sale of the sheep in one lot was expedient, and would not produce too great a sum for the debt and expenses, the Court would not interfere with his discretion. The pursuer should in any view have appeared and objected before the Sheriff when the report of the sale was approved of. The averment as to the alleged agreement to stop the sale was not relevant.

LORD JUSTICE-CLERK.—The only point on which I have felt any difficulty is as to the quantity of sheep sold,—whether there was any oppressive use of the interlocutor ordering the sale in the sale of more sheep than was necessary to pay the debt and the expenses. But I am satisfied that there was nothing unusual or irregular in what was done, and, beyond that, there was a person appointed as judge of the roup who had a part to perform, and who was the person at whose discretion that was done.

There is a matter which is not cleared up as to the averment that a number of the sheep sold belonged to others than the pursuer. Whether that was so or not we do not know, but the presumption is that all the sheep belonged to the pursuer, and so far as that matter goes no sufficient objection has been stated. As to the sale having produced more money than was necessary, and as to the sheep being all sold in one lot, I may remark that it may quite well be that the sheep brought more money, and not less, because they were sold in that way, and were not sold by head. But that was a matter for the judge of the roup, and I am not disposed with regard to it to interfere with the judgment of the Lord Ordinary.

Again, I am clear that the averment of an agreement at the sale to stop the proceedings on payment of a certain sum is not relevant. I think the pursuer brought this alleged misfortune of which he now complains upon himself by not appearing before the Sheriff (or indeed up till the very time of the sale) to make his voice heard against the proceedings upon which he now brings this action.

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[1] Robertson v. Galbraith, July 16, 1857, 19 D. 1016, 29 Scot. Jur. 481; M'Kinnon v. Hamilton, June 21, 1866, 4 Macph. 852, 38 Scot. Jur. 445; Le Conte v. Richardson, Dec. 1, 1880, 8 R. 175.

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LORD YOUNG.—I am of the same opinion. I think the judgment of the Lord Ordinary is according to the truth and justice of the case, and it has not been impeached on any ground which is, to my mind, satisfactory.

The facts are in a very narrow compass. The defender was tenant of a farm, the winter grazing on which he let to the pursuer for £140, which was payable on 1st April. A bill was agreed to be granted for that rent on 1st January, payable on 1st April. In security also for payment of that rent the pursuer undertook by a written obligation, which is, to my mind, quite sufficient for the purpose, to leave at least 300 sheep on the farm. The bill was dishonoured when it became due, and the rent continued unpaid on 5th May, and the pursuer then proceeded to realise his security. The debt was past due, and the sheep were a security on the defender's farm under the written obligation of the owner not to remove them. I am of opinion that the defender took a proper course (though it is not necessary to decide that) in treating the sheep as a pledge left by their owner on the farm, and in applying to the Sheriff as he did; it was at least not a lawless proceeding. The defender applied to a Court of justice to do justice, and applied in a manner for which there is sufficient analogy, and he called the present pursuer as a party to state any objection he might have to a warrant being granted. The pursuer did not appear, and the Sheriff then held his non-appearance, as is customary in legal proceedings, as confession that he had no objection to state, and was consenting to the order being granted. The remedy craved was then granted in the usual way and with the usual precautions, for the Sheriff appointed the sale to proceed to the extent which should satisfy and pay the rent due and the expenses at the sight of the Sheriff-clerk-depute at Grantown after certain advertisement, and appointed a report to be made of the proceedings. The Sheriff-clerk-depute proceeded to execute the order to sell, and to do so, I must assume in the absence of any specific statement to the contrary, regularly and properly. He sold as many as he thought proper. No doubt he sold what would have appeared to me at first sight an extra number; but on that matter I am not so good a judge as he is, and to him the Sheriff had committed it. He reported the sale and then this pursuer entered appearance in that process for the purpose of discussing the expenses of the proceedings and for no other purpose. Now, if he had had any complaint against the Sheriff-clerk-depute's manner of conducting the sale he ought to have complained to the Sheriff in that process. But he did nothing of the sort. He raised a question as to the expenses of the sale which the Sheriff determined, and ordered the debt and the expenses to be paid, and this in presence of the pursuer. After that he comes here with this action asking us to set aside the proceedings at the sale as lawless, and saying that it was an illegal thing to go to the Sheriff as the defender did. I think he cannot be heard to say that now. He should have stated his objection before the Sheriff.

If therefore it had been necessary to decide whether the application to the Sheriff was legal I should have held that it was, but it is not necessary to decide that. So far as the pursuer's case depends on the objection to the legality of the Sheriff's warrant I am against it, and I cannot entertain his objection to the conduct of the proceedings by the Sheriff-clerk-depute, either as a ground of re-

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duction or as a ground of damages. I am therefore of opinion that the pursuer's demand for an issue should be refused.

Lord Craighill.—I am of the same opinion as your Lordships.

Lord Rutherfurd Clark.—I daresay the judgment which is to be pronounced by your Lordships will be best for the parties, as it will save them both the expense of a jury trial. But I confess I am not satisfied with the judgment of the Lord Ordinary, or with the reasons which have just been stated for affirming it.

The first question is as to the legality of the warrant to sell the sheep. It is said that the sheep were intended to be a security for the rent. So they were. But up to the 15th of May—I take, as I am bound to do, the statements of the pursuer—he, the pursuer, was in possession of the grazing on the defender's farm, and therefore the sheep were in his, the pursuer's, possession. They were not in the defender's possession so long as the pursuer was tenant of the grazing. I therefore think it impossible to hold that these sheep were, as the Lord Ordinary says they were, a "pledge" with the defender upon the farm "for the payment of the rent," because it is clear that in order to constitute a pledge there must be possession, and possession the defender had none. If the sheep had been pledged to the defender he might have applied to the Sheriff for a warrant to sell them, but on that footing only, and I think there was no justification for his application to the Sheriff for warrant to sell the property of another person which was not in his possession. It is a new idea to me that such a course was legal. What other course was open to the defender I do not require to discuss. All I have to decide is whether the course actually taken was legal, and I confess I cannot hold that it was. I think the warrant was illegal.

Again, I do not think this illegal proceeding is made unobjectionable by the fact that the defender in it, the pursuer here, did not think it necessary to appear. That being so, the pursuer is, I think, entitled to redress.

But if I am wrong in holding the warrant to be illegal, I think that the pursuer is entitled to an issue, because, according to the allegation of the pursuer, it was executed in an oppressive way. It was a warrant to sell by public roup "as many of the sheep mentioned in the petition as will satisfy and pay the rent claimed, and the expenses of process and, sale." It was a warrant for nothing else. And yet the sheep were sold to the extent of £67 more than was necessary for that purpose. It may be possible to justify what was done, but *prima facie* it was unjustifiable. I think the defender ought to be put to justify what he did. In the absence of justification I cannot hold that the warrant was fairly or reasonably executed.

It is suggested that the pursuer has lost his remedy by not having stated his objection in time. This is grounded on the fact that he did not, when the sale was reported to the Sheriff, make any complaint of the manner in which it was conducted. But I fail to see what he could have said effectually at that stage. The wrong was done. It was impossible to undo it. He could not have brought it before the Sheriff to any other effect than to get a censure passed upon the Sheriff-clerk-depute, who had been appointed judge of the roup. But he is not seeking that. He is seeking damages, and the Sheriff would not, on the report of the sale being made to him, have listened to the objection which it is suggested the pursuer should have made.

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Dec. 6, 1887.

Kennedy v. Creyk.

Therefore, while sorry to differ from your Lordships, the opinion which I have formed is, that the pursuer is entitled to an issue. But while I should, if sitting alone, have felt obliged to send the case to a jury, I repeat what I said at the beginning of my opinion, that the course your Lordships are taking is probably the best for both parties.

THE COURT adhered.

GILL & PRINGLE, W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.

No. 32.

Dec. 7, 1887.

Stevenson v. Pontifex & Wood.

DUNCAN STEVENSON, Pursuer (Reclaimer).—*Sol.-Gen. Robertson—Ure.*
PONTIFEX & WOOD, Defenders (Respondents).—*Asher—C. S. Dickson.*

Reparation—Breach of contract—Different actions of damages founded on one breach—Competency.—A single act, amounting either to a delict or to breach of contract cannot be made the ground of two or more actions for the purpose of recovering damages arising within different periods, but the whole damage present and future must be recovered in one action.

In a contract of sale of a refrigerating machine, the seller agreed not to sell a second within the same district for some years. Having broken this bargain and sold another, he was sued by the buyer of the first machine for damages for breach of contract, and paid a sum in name of damages. *Held* that he could not be sued in a second action for further damages arising out of the same breach subsequently to the first action.

1st DIVISION.
Lord M'Laren.
M.

IN February 1884 Mr Duncan Stevenson, ice-merchant in Glasgow, contracted with Messrs Pontifex & Wood, engineers in London, to supply him with a Pontifex refrigerating machine. Pontifex & Wood undertook by the contract that they would not, without the pursuer's consent, supply any machine which to their knowledge was to be erected within ten miles of the Cross of Glasgow, and which was intended to be used for making ice for sale, for five years from the date of the contract.

In contravention of that undertaking a machine was in the beginning of 1885 supplied to Messrs F. W. Verel & Company, Cathcart, near Glasgow, who thereafter manufactured ice for sale in competition with Stevenson.

On 16th July 1886 Stevenson brought an action of damages in the Court of Session against Pontifex & Wood for that breach of contract, in which he estimated the loss thereby occasioned to him at £3000.* In that action the defenders tendered to the pursuer £250 in full of his claims under the conclusions of the summons, and agreed to the pursuer's being assoilzied from the conclusions of a summons in an action against him at their instance for a sum of £290, being the balance of the price of the machinery supplied to him. The tender and agreement were accepted by the pursuer, and the case taken out of Court.

On 26th March 1887 Stevenson raised another action against Pontifex & Wood, concluding for £650 of damages, the averments in which were as follows:—(Cond. 7) "Since said 16th July 1886, and down to the present date, the said F. W. Verel & Company have continued to manufacture ice with the machinery supplied to them by the defenders, in competition with the pursuer, have undersold the pursuer in the market, and have thus by the defenders' said breach of contract injured the pursuer's trade to a very great extent, and have reduced his profits. The loss sustained by the pursuer between the two dates last mentioned amounts to a sum of not less than £650, being the sum sued for." (Cond. 8) " . . . The sum tendered and accepted in the action above mentioned included, and was intended by both parties to include, only the damages therein sued for, viz., damage suffered prior to the date of the action. . . ."

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* The pursuer's averment in that action was,—"Notwithstanding the obligations undertaken by them in the above-mentioned article of the contract, the defenders, in or about the beginning of the year 1885, supplied to Messrs F. W. Verel & Company, Cathcart, near Glasgow, ice-making machinery similar to that supplied to the pursuer. Messrs Verel & Company have thus been enabled to manufacture ice in competition with the pursuer, have undersold the pursuer in the market, and have thus to a very great extent injured his trade and reduced his profits. Cathcart is within the prescribed limit of ten miles from Glasgow. The defenders have thus violated the terms of the said contract. The loss occasioned to the pursuer by this breach of contract he estimates at not less than £3000."

The pursuer pleaded;—The pursuer having through the defenders' breach of contract condescended on suffered loss and damage to the extent sued for, he is entitled to decree in terms of the conclusions of the summons, with expenses.

The defenders pleaded;—(1) In respect of the proceedings in the former action and the settlement thereof, the defenders should be assoilzied. (2) It is incompetent to sue, as the pursuer claims right to do, for partial damages for one alleged breach of contract.

The Lord Ordinary (M'Laren), on 15th June 1877, pronounced this interlocutor:—"Finds that the pursuer's claims under the cause of action libelled are satisfied and discharged by the payment founded on in defence: Therefore assoilzies the defenders from the conclusions of the action, and decerns." *

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* "OPINION.—The defenders are makers of 'refrigerating machines,' or machines for making ice in commercial quantities, one of which they sold to the pursuer on 2d February 1884, giving at the same time an obligation not to sell any other machine which to their knowledge was to be erected within ten miles of the Cross of Glasgow, and which was intended to be used for the purpose of making ice for sale. In the year 1885 the defenders (apparently through inadvertence) supplied to Messrs F. W. Verel & Co., Cathcart, near Glasgow, an ice-making machine in breach of this obligation.

"On 16th July 1886 the pursuer raised in the Court of Session an action of damages against the defenders, concluding for payment to him of £4983, 18s. 3d., whereof £3000 is stated to be damages for breach of contract, consisting in the supplying an ice machine to Messrs Verel. This action was compromised by the defenders paying £250, and also discharging a claim of £290, 12s. 4d., being the balance of the contract price of the machine supplied to the pursuer.

"The pursuer now sues the defenders for £650, being damages accrued from the date of the institution of the former action, 16th July 1886, to the date of the institution of the present action, 26th March 1887; and the question is, whether such a claim can be successfully maintained after the compromise of the first action, or whether that compromise does not amount to a discharge of all claims arising out of the sale of an ice-making machine to Messrs Verel.

"The compromise was in general terms for a payment of a sum of money in full of the conclusions of the action, and the question whether this compromise covers emerging damages will depend, apparently, on the terms of the first summons, the amount of the claim made in that summons, and the probabilities of the case.

"In the first summons, the averments are consistent with the supposition that the conclusions were intended to embrace the whole claims arising out of this breach of contract, except that in claiming damages this expression is used: 'The loss occasioned to the pursuer by this breach of contract he estimates at not less than £3000.' It is said on the one side that where a claim is made for damages past and future, it is usual to state the claim as being for damage 'sustained and to be sustained.' It is observed, on the other side, that there is here no reservation of a right to sue for further damages.

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The pursuer reclaimed, and argued;—The question was whether the transaction by minute of tender and acceptance in the former action discharged the whole claim of damages arising out of the breach of contract. The averments and the terms of the tender and acceptance supported the view that the discharge only covered the period up to the date of bringing the action. There was no averment or plea as to future loss in that action. It was expressly limited to the past, and covered only the eighteen months prior to its being brought. No inference adverse to the pursuer was to be drawn from the amount of the claim in the former action, as he could not then know the extent of the injury done to him by the sale to Verel & Co.[1] The only other case of the kind which had occurred was that of *Bruce* v. *Duncan*, 1793, Hume's Decns. 596, where it was held that the same slander could not be made the ground of successive actions, but that did not apply here. If the damage sued for was not a necessary result of the original breach—which was the case here, for the pursuer could not foresee the extent to which it had been carried,—then a second action was competent.[2] Where a statute limited the time within which an action might be brought, and the damage did not appear till later, then the period of limitation fell to be computed from the time when the injury was sustained.[3]

If the above contention were given effect to, the reclaimer further asked leave to amend his record, or to be allowed to raise a supplementary action with the view of embracing in his claim all future damages.

The respondents argued;—The same breach of contract as was founded

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"There is nothing in the first summons that would suggest to the defenders that the pursuer had not brought forward all his claims against them, unless this is to be implied from the use of the expression 'loss occasioned.' I think that the defenders were entitled to insist that the pursuer should bring forward his whole claim, and that if it had been explained that the summons was not meant to cover future damage, the Judge would most probably have amended the record, or would have sisted process in order that a supplementary action might be brought. But I am not convinced that the pursuer by the use of the words 'loss occasioned,' meant anything different from damage sustained and to be sustained. I cannot be sure that 'occasioned' is a limitation of the claim to past damages, because the expression is not grammatical. It is a case of a substantive used as a verb, without, as I think, any definite relation to tense or time; and the meaning is: The loss to the pursuer on this occasion, or on the occasions of this breach of contract, is £3000.

"I am confirmed in this opinion by the consideration that the sum claimed, £3000, is much larger than anyone could reasonably claim for the actual loss of profit consequent on the competition of another firm during the period of a few months. I am also of opinion that it is very improbable that the defenders would have agreed to a compromise if it had been understood that the pursuer was entitled to bring forward fresh claims of damage in respect of the same breach of contract. This is, indeed, so clear that the compromise cannot possibly stand if the present action is to proceed. But it is, in my opinion, more accordant with the meaning of the parties, and with the justice of the case, that the compromise should be sustained as a compromise of all claims of damage arising out of the sale of the ice-making machine to Messrs Verel. . . .

"The judgment will be that the damages sued for are discharged, and that the defenders are assoilzied from the action, with expenses."

[1] Jackson v. Cowie & Sons, July 13, 1872, 9 S. L. R. 617.

[2] Mayne on Damages (4th edn.), 96, and cases there cited; Hambleton v. Veere, 2 Saunders' Reps. 169; contrasted with Hodsoll v. Stallebrass, Jan. 11, 1840, 11 A. & E. 301; and Nicklin v. Williams, July 3, 1854, 23 L. J. Exch. 335.

[3] Whitehouse v. Fellowes, Feb. 12, 1861, 10 Scott's C. B. Reps. (N. S.), 765; Roberts v. Read and Others, Nov. 1812, 16 East's Reps. 215; *cf.* also Shadwell v. Hutchinson, 1831, 2 Barn. & Ad. 97.

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on in the former case was the ground of the present action. *Jackson's* case,[1] founded on by the pursuer, was a very special one,—as the obligation there undertaken by the seller was to supply a certain amount of coal daily, and there was a continuing loss. The principle of the cases of *Bruce* (Hume's Decns. 596) and *Hambleton* (2 Saunders' Reps. 169), and *Hodsoll* (11 A. & E. 301) applied,—that principle was that in order to the competency of a second action there must be a new wrong. Damage *per se,* apart from the wrongful act, would not be a foundation for an action.[2] In all actions of damage for injury the claim included all damage present and future. According to the argument of the reclaimer, future damage was not so included, but the rule to this effect was beyond doubt.[3]

At advising,—

Lord President.—The defenders, who are manufacturers of refrigerating machines, sold one such machine to the pursuer in February 1884 under a written contract, which provided as one of its conditions that for five years from the date of the contract the defenders should not supply any of their machines to be erected within a ten miles radius of Glasgow for the purpose of making ice for sale. This condition was violated in the beginning of 1885 by the defenders supplying one such machine to be used at Cathcart, within the prescribed limit, to a firm named Verel & Company, by whom the machine was used for manufacturing ice for sale in competition with the pursuer.

On 16th July 1886 the pursuer raised an action of damages against the defenders in which the cause of action and claim of damages is thus stated on record:—"Notwithstanding the obligations undertaken by them in the above-mentioned article of the contract, the defenders, in or about the beginning of the year 1885, supplied to Messrs F. W. Verel & Company, Cathcart, near Glasgow, ice-making machinery similar to that supplied to the pursuer. Messrs Verel & Company have thus been enabled to manufacture ice in competition with the pursuer, have undersold the pursuer in the market, and have thus to a very great extent injured his trade and reduced his profits. Cathcart is within the prescribed limit of ten miles from Glasgow. The defenders have thus violated the terms of the said contract. The loss occasioned to the pursuer by this breach of contract he estimates at not less than £3000." In that action the defenders tendered to the pursuer £250 in full of his claims under the conclusions of the summons, and a discharge of their counter claim for the balance of the price of the machine furnished to the pursuer, amounting to £290, 12s. 4d., being in all a sum of £540, 12s. 4d. The tender was accepted, and judgment pronounced accordingly on 6th January 1887.

The pursuer raised the present action on the 26th March 1887. His claim is thus stated in the 7th article of the condescendence,—"Since said 16th July 1886" (the date of the former action) "and down to the present date, the said F. W. Verel & Company have continued to manufacture ice with the machinery supplied to them by the defenders, in competition with the pursuer, have undersold the pursuer in the market, and have thus by the defenders' said breach of contract injured the pursuer's trade to a very great extent, and have reduced his profits. The loss sustained by the pursuer between the two dates last mentioned amounts to a sum of not less than £650, being the sum sued for."

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[1] 9 S. L. R. 617.

[2] Lamb v. Walker, Feb. 1878, L. R., 3 Q. B. Div. 389; Gibbs v. Cruickshank, 1873, L. R., 8 C. P. 454 (C.-J. Bovill, p. 460); Leake on Contracts, p. 1050; Guthrie Smith on Reparation, p. 16.

[3] Young v. Glasgow Tramway and Omnibus Co., Limited, Nov. 29, 1882, 10 R. 242; Shields v. North British Railway Co., Nov. 24, 1874, 2 R. 126.

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The defence is in substance that the claim now made is satisfied and discharged by the interlocutor of Lord Lee in the former action giving effect to the tender and acceptance. I am of opinion that this defence must be sustained.

The cause of action in the previous summons was breach of contract and consequent damage. The breach consisted of the single act of supplying one machine to Verel & Company, and I am of opinion that a single act amounting either to a delict or a breach of contract cannot be made the ground of two or more actions, for the purpose of recovering damages arising within different periods but caused by the same act. On the contrary, I hold the true rule of practice based on sound principle to be, that though the delict or breach of contract be of such a nature that it will necessarily be followed by injurious consequences in the future, and though it may for this reason be impossible to ascertain with precise accuracy at the date of the action or of the verdict the amount of loss which will result, yet the whole damage must be recovered in one action, because there is but one cause of action. The most familiar illustration of this rule is to be found in actions for injury to the person, in which the practice is invariable.

Where the breach of contract or delict complained of consists not of one but of a series of acts the rule is different. Thus, if one contracts to deliver a certain quantity of goods during each month in the ensuing year, and fails to perform in the first or second month, that is in itself a distinct breach of contract, and if the purchaser sues for damages for that breach he cannot in the same action claim for an apprehended breach in subsequent months, for the obligant may perform his contract for the future, and if he fails in any subsequent month, that is a fresh breach of contract, for which a separate action will lie.

So also an operation *in suo* which creates a nuisance to one's neighbour may be followed by long continued loss and damage to that neighbour, and yet it may not be necessary to recover the whole damage in one action; because he who commits the nuisance is under a constant legal obligation to abate it, and so long as he fails in performing that legal obligation he is every day committing a fresh nuisance.

I should hardly have thought it necessary to state these rules and principles, which are somewhat elementary, were it not that the present is the first example so far as I know of any attempt, at least in modern times, to recover by instalments in successive actions the continuing damage resulting from one delict or one breach of contract.

The Lord Ordinary has assoilzied the defenders, and to that interlocutor I think we ought to adhere.

LORD MURE.—As your Lordship has pointed out, the peculiarity in this case is that the breach of contract founded on is the same as that which was founded on in the previous action, which was settled, and that without any reservation. The breach was the sale by the defenders to a person near Glasgow of a refrigerating machine, in violation of an undertaking by them to the pursuer that they would not within five years, without the consent of the pursuer, supply any such machine to be worked within ten miles of the Cross of Glasgow. Now, the breach of contract was complete the moment the sale took place. It was the only breach

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committed by the defenders, and upon it the previous action was founded. In that action the pursuer asked in general terms for £3000 of damages, as the loss occasioned to him by the conduct of the defenders; and it would, as I conceive, have been quite competent for the pursuer to have maintained under his action as laid that the damage he would sustain from the breach of contract would be spread over a considerable time, and to have had this damage estimated upon that footing. But the case was compromised for a much smaller sum than that claimed. I am therefore of opinion with your Lordship that it is incompetent for the pursuer now to bring a second action founded upon the same breach.

Lord Adam.—In this case it appears that in a contract between the pursuer and defenders the latter undertook not to supply without the pursuer's consent any refrigerating machine which to their knowledge was to be erected within ten miles of the Cross of Glasgow, and which was intended to be used for the purpose of making ice for sale, for a period of five years from the date of the contract. Notwithstanding this stipulation, in the beginning of 1885 they supplied to Messrs F. W. Verel & Company a machine similar to that supplied to the pursuer, and it was no doubt within the knowledge of the defenders that it was to be used within ten miles of Glasgow. This was a breach of contract, and the pursuer raised an action of damages for the loss occasioned to him by that breach of contract, which he estimated at £3000. Thereupon a tender was made by the defenders and accepted by the pursuer of the sum of £250, and absolvitor from a claim in a counter action, in full of his claims under the conclusions of the summons.

The question here is whether that compromise included all damages past and future occasioned by that breach of contract. There was only one wrongous act on the part of the defenders, and in my opinion, as soon as the act was committed, the right of action to recover all damages arising from it arose. I agree with your Lordships that the pursuer is bound to recover all the damages to which he can lay claim in the one action. The pursuer says that he is entitled to have successive actions of damages for his alleged losses, as they may arise from time to time over an indefinite period. It may be true that where a person is obliged to have recourse to one action and to one only the amount of damages may vary under different circumstances, but of that we have daily experience and cognisance, for instance, in actions of damages for personal injuries arising from fault. It is always impossible to ascertain accurately what sum of damage will cover the injury or loss, but, although the amount of damages awarded may be to some extent speculative, yet the evil thus resulting is far less than would be the evil of allowing successive actions of damages from time to time arising from the same originating cause. How many actions are there to be—and are they to be brought at the rate of one every six months, or every year? That would lead to an intolerable state of matters. In this case we have had one action, which covered the period down to July 1886. We now have a second, which is founded upon the same wrongous act, brought nine months later. A proceeding such as this is quite unknown to our law, and ought to receive no encouragement.

Lord Shand was absent.

The Court adhered.

Campbell & Smith, S.S.C.—Davidson & Syme, W.S.—Agents.

No. 33.

Dec. 7, 1887.

Dunnett v. Mitchell.

MATTHEW DUNNETT, Complainer (Respondent).—*Jameson*—*Younger*.
ALEXANDER MITCHELL, Respondent (Reclaimer).—*Gloag*—*J. A. Reid*.

Reparation—Fraud—Title to sue—Company—Shareholder—Restitutio in integrum.—In 1877 a joint stock company was formed to buy an estate in Norway, believed to be valuable for its timber and minerals, at the price of £3800, three-fourths of the price to be paid in cash, the remainder in shares. The vendor guaranteed that the sum so paid in cash should be repaid from sales of timber within four years from the company's entering into possession. The company entered into possession of the estate in 1877, and carried on the sale of timber for two years. The business proved unprofitable, and in 1879 the company entered into an agreement with the vendor by which the parties declared the original contract to be no longer binding on either, and discharged all claims by the one party against the other under it, and the company agreed to pay to the vendor (for salary as manager and advances) a sum of money, and to grant him a mortgage over the estate for a further sum. The company carried on the business till January 1884, when they resolved to sell the estate and to wind up the company. In November 1883 one of the partners raised an action of damages against the vendor for the loss the pursuer had sustained by becoming an original shareholder of the company, on the ground that he had been induced to do so by the fraudulent misrepresentations of the vendor.

After a proof, *held* that fraudulent misrepresentation had not been proved, and that the vendor was not liable, the Lord Justice-Clerk, Lord Young, and Lord Craighill further holding that having regard to the proceedings of the company the pursuer had no title to sue, Lord Rutherfurd Clark reserving his opinion.

2D DIVISION.
Lord Trayner.
M.

(SEQUEL of case reported January 6, 1883, 12 R. 400.)

On 8th November 1883 Alexander Mitchell, timber-merchant, Glasgow, in his own right and as assignee of certain other persons, raised an action of damages against Matthew Dunnett. No appearance having been entered, decree in absence was obtained on 8th December 1883. On 11th February 1884, Dunnett brought a suspension of the decree in absence, and a record was made up in the suspension.

The ground of the original action was that Dunnett had by false and fraudulent representations induced Mitchell and his cedents to form a limited company to work the estate of Vaagsoeter in Norway, with the result that they suffered great loss and damage.

Dunnett, as previously reported, maintained that Mitchell had no title to sue the original action. Mitchell maintained that he had, both as a holder of a debenture bond of the company and as a shareholder, a title to sue.

The Court held that the holder of a debenture-bond had a title to sue for damages the complainer, by whose alleged false and fraudulent representations he had been induced to advance money to the company, and, recalling the interlocutor of Lord Adam, Ordinary, who had held that the respondent had no title to sue, remitted to the Lord Ordinary to allow the parties a proof of their averments.

The proof was led partly before the Lord Ordinary (Trayner), and partly in Norway on commission, the respondent leading in the proof.

The Lord Ordinary held that the respondent was not a debenture-holder, and therefore not entitled to sue as such, and this part of his Lordship's judgment was not challenged in the Inner-House.

The other facts established by the proof were as follows:—The complainer, Dunnett, who had been for some time in Norway, came to Glasgow in 1877, with the view of forming a company to purchase the estate of Vaagsoeter in Norway, and entered into negotiations with the respondent and several other persons for that purpose. The representations which

Dunnett made were contained in a prospectus, dated 9th August 1877, and relative documents. The prospectus set forth that the complainer had acquired the estate, and was willing to transfer it to the proposed company; that it consisted of forest land about four English miles long, and one-third to one-half a mile wide, thus containing from 800 to 1000 English acres;* further, that it contained 34,000 trees of certain specified dimensions, and trees of smaller dimensions too numerous to count, but estimated at 80,000; that the estate also contained valuable minerals, consisting of iron ore, containing from 36$\frac{4}{5}$ to 57$\frac{1}{2}$ per cent of metallic iron, which could be worked cheaply and easily, and conveyed to this country without much expense; and that large profits could be made from the estate. The complainer guaranteed the number and dimensions of the trees and the yield up to 57$\frac{1}{2}$ per cent of iron. The prospectus further bore,—"The vendor agrees to transfer the property, with its forests, minerals, and all rights to the company, on the following terms:—1st. That a clear and indisputable title be given to the company. 2d, The price agreed upon is £3800, of which three-fourths, or £2850, is to be paid in cash to the vendor, and the remaining one-fourth in shares amounting to £950, which shares, along with their accumulating profits undrawn by the vendor, are to be held by the general managers for the company until the company's three-fourths, or £2850, has been repaid out of the net proceeds of timber shipped from the estate. 3d, The vendor guarantees this £2850 to be thus repaid within four years from the company's entering on possession," &c.

Before the company was formed, a deputation consisting of two of the persons interested, viz., Messrs Broom and Robinson, proceeded to Norway, where they met the complainer and a Mr Olsen, a Norwegian (who had arranged to sell the estate to the complainer), and inspected the estate. They reported that they had spent five days in the neighbourhood, four of which were occupied in perambulating the boundaries and inspecting the timber, minerals, and water power; that they thought the complainer's estimate of the size of the estate at 1000 acres, and of the number of trees, was understated, and further, that they had examined the minerals and taken samples.

Thereafter, in November 1877, the proposed company was formed, under the name of the Vaagsoeter Estate Company, Limited, the complainer being appointed manager, and having a number of shares allotted to him, and Messrs Robinson and Broom being included among the directors.

The business carried on by the company did not prove successful, and the complainer having failed to give satisfaction to the directors, was dismissed from the office of manager on 14th October 1878, and Mr Olsen, already mentioned, was appointed to fill his place.

Disputes then arose between the complainer and the company, he making claims against them for advances made by him on their behalf, and for salary down to the date of his dismissal, and the company bringing counter claims against him.

These claims were eventually arranged and discharged by a minute of agreement between the complainer and the company, in terms of which he was to receive a money payment from the company and a mortgage over the estate for a further sum, and the parties cancelled and declared to be no longer in force or binding on either of them the contract heretofore subsisting between them, as embodied in the prospectus of 9th August 1877, and they mutually abandoned and discharged "all claims at the instance of the one against the other for implement of the obligations specified in said memorandum or prospectus."

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* The information as to the extent of the estate was represented to be the result of reports supplied to the complainer, not the result of actual survey.

The company continued business till 11th January 1884, when it was resolved to sell the estate by auction, and to wind up the business voluntarily, and a further resolution, that the company could not by reason of its liabilities continue its business, was passed on 30th January 1884, and a liquidator was appointed. Shortly thereafter the property was sold for £300. On 8th November 1883 the respondent, for himself and as assignee of Mr Robinson already mentioned (who had ceased to be a shareholder in 1879), John Donald, and J. L. Mitchell, also both shareholders, had raised the action against the complainer for damages which resulted in the decree in absence now sought to be suspended.

With regard to the honesty of the complainer's representations, as to which the parties were in controversy, it was proved, in the opinion of the Lord Ordinary and the Court, that while the actual measurement of the estate, as shewn by survey, was only 3½ or 4 miles long, and varied in breadth from half a mile to a few hundred yards, the measurements which had been given by the complainer were the result of information given by two competent persons whom he had employed, and that he made use of their information in the belief that it was true. The information which he had given regarding the timber was derived from the same persons, and was communicated to the persons forming the company as he got it, and in the belief that it was true; and he concealed no material part of his information. As to the ore on the estate, it appeared that it did contain a certain amount of iron, which proved, however, as a whole, to be of no market value; but the complainer, who believed it to be valuable, had communicated truthfully the results of the analyses which he had obtained.

The result of the evidence on these points, which has thus been summarised, is fully narrated in the opinion of the Lord Ordinary.

The respondent pleaded;—(1) The respondent being entitled to damages as concluded for in said action against the complainer, in respect that he and his cedents were induced to take and pay for shares in, and take up debenture-bonds of said company, by the false and fraudulent representations and concealment of the complainer, the suspension should be refused. (2) The complainer having knowingly made the foresaid false and fraudulent representations, and having wrongfully and fraudulently concealed essential facts within his knowledge, and having thereby induced the respondent and his cedents to become shareholders and debenture-holders of said company, the decree under suspension was well founded, and the suspension should be refused.

The complainer pleaded;—(3) The averments of the respondent in the action in which said decree was pronounced and in the present suspension being irrelevant the complainer is entitled to suspension as craved. (4) The respondent had no title to sue the said action. (5) The shareholders and creditors of the company were not entitled to make any claim arising out of the transactions referred to on record as individuals and apart from the company, not having alleged or sustained any loss apart or distinct from the company. (6) The respondent's claim in the said action was bad, in respect that the alleged damage was not the natural, necessary, or actual consequence of the respondent and his cedents having become shareholders or creditors of the company, but arose out of the purchase by the said company as its *proxima causa*, and the right to claim damage in respect of said purchase belongs to the company alone. (7) All claims on the part of the said company, or

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separatim, the shareholders thereof, against the complainer were extinguished by the agreement of November 1879. (8) The company, and, *separatim,* the respondent, is barred from insisting in the claim made in the said action by *mora* and acquiescence, and the retention and sale, in March 1884, of said estate after knowledge, actual or imputable to them, of the matters complained of. (9) The averments of the respondent in the said action being, so far as material, unfounded in fact, and in particular the complainer not having made false and fraudulent representations, as alleged in the said summons, he is entitled to suspension as craved. (10) The purchase of the said estate having been made, and the respondent and his cedents having taken shares in the said company, and lent the company on debenture, not on the faith of any representations by the complainer, but of the report of the said deputation, the respondent has no claim against the complainer. (11) The said company having before the purchase of the said estate, and at least before payment of the price and conveyance of the subjects, had equally good opportunities with the complainer of investigating the extent and value of the said estate, the respondent's claims cannot be maintained.

The Lord Ordinary (Trayner), on 17th June 1887, suspended the decree in absence, and the threatened charge thereon, and whole grounds and warrants thereof.*

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* "OPINION.—In this case the complainer seeks to have suspended a decree in absence obtained against him at the instance of the respondent for £3000 and expenses of process. The averments in the original summons on which the decree proceeded were to all intents the same as those now made in the answers for the respondent; and they amount to this, that the respondent and others (whose interests are now vested in the respondent by assignation) were induced by the false and fraudulent representations of the complainer, as well as the fraudulent concealment by him of essential facts within his knowledge, to form a company and buy an estate, whereby they have suffered damage to the extent sued for.

"The first plea urged by the complainer was that the respondent had no title to sue the original action, on the ground that the purchase of the property was made by a company of which the respondent and his cedents were only some of the partners, and that if damage had been sustained by or through the purchase, the company alone had the right to sue for it. Lord Adam (before whom this case originally depended) sustained this plea, and suspended the decree as craved; but on a reclaiming note, the Second Division of the Court recalled Lord Adam's interlocutor, and remitted to his Lordship to allow the parties a proof of their respective averments. The Court, however, expressed no opinion on the plea which Lord Adam had sustained, holding that the objection stated to the respondent's title as a shareholder did not exclude action at his instance as a debenture-holder of the company, which he alleged himself to be, and which at that stage of the case was assumed to be the fact. Lord Young observed,—'The question of loss is only a question of greater or less loss; and as the case is clear on the question of the debenture debt, I would suggest to your Lordships that without indicating any opinion on the question raised as to the shares, we should recall the Lord Ordinary's interlocutor, and remit the case for probation. Everything will then remain open. The respondent will have to prove his case, and the question will then arise on the evidence, whether he is entitled to damages in respect of his debentures and of his shares, or of his debentures only, or of neither?'

"The proof so allowed has been led partly before me and partly on commission, and I have now to consider, 1st, whether the respondent had any title to sue the action of damages; and 2d, whether he has made good in law his claim to the damages he seeks. (1) I am of opinion that, as a debenture-holder of the company, the respondent has no title to sue, because he is not, in point of fact, a debenture-holder in any reasonable sense of that term—[His Lordship

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The respondent reclaimed, and argued;—(1) The complainer was responsible for the effect of his representations regarding the estate and

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then explained the nature of the alleged debenture debt, and expressed his opinion that the sums in question could not be regarded as debenture debts, and proceeded]—The so-called debenture debt (for which debentures were never issued) consists, therefore, of sums paid (1) to meet an overdraft which the shareholders had authorised, and (2) to enable the company to effect a settlement of certain claims made upon it by the complainer. At the time when the first of these sums was paid there was no stipulation or arrangement that the estate of the company was to be burdened with their amount as a debt. The sums so paid were voluntarily advanced by the shareholders to carry on the company and to aid in the completion of the necessary works. The second payment above mentioned was, in like manner, advanced voluntarily to enable the company to meet a claim which had at the time to be settled. If the company had been successful, these sums would no doubt have been repaid to the shareholders who made the advances. But it is at least very doubtful whether such advances could have been ranked on the company's estate as in competition with regular creditors or ordinary debenture-holders. At all events, these debenture debts (so-called) are, in my opinion, not debts which the complainer can be called on to pay either under the name of debt or of damages. They were not advanced on the faith of representations made by him or representations made by the directors in reliance upon representations made by him (*Peek* v. *Gurney*, L. R., 6 E. and I. App. 411, per Lord Cairns). They were not advanced on the security of the estate, but were advanced to meet obligations which the shareholders had undertaken. They were not, in the strict sense, loans to the company; they were rather payments of debt for which the shareholders had assumed liability.

"On the other hand, I am of opinion (differing from Lord Adam) that, as shareholders of the company, the respondent and his cedents had a good title to sue the original action. It is averred that the respondent and his cedents were induced to form the company and buy the estate through the fraud or deceit practised by the complainer. If they had formed no company, but had gone into the purchase of the estate as a joint adventure, each joint adventurer would have had his claim against the complainer for the damage resulting to him individually through the complainer's fraud. I cannot see that the formation of a company makes any material difference, especially when it is averred that the formation of the company was itself induced by the same fraud as that which led the respondent and his cedents to embark their capital in it. In point of fact the greater part of the purchase price of the estate was paid up by the respondent and his cedents, as well as others who joined them in the transaction before the company was formed, and therefore their damage (if any) was sustained before the company came into existence. I think, moreover, that the title of persons injured, as the respondent and his cedents say they have been, to recover damages directly from the person who has done them the wrong, has already been recognised by authority. In the case of *Leslies* v. *Lumsden* (14 D. 213) the representatives of a shareholder in a bank sued certain of the directors for the loss occasioned by their alleged fraudulent proceedings. The defenders maintained that the pursuers had no title to sue, on the ground that if, as the pursuers alleged, the directors had caused loss to the company, they were answerable therefor to the company, but that they could not be called to account by an individual shareholder for his share of the loss. That plea was repelled, and the title to sue sustained. In that case, no doubt, the alleged fraud was said to have been concealed until the company had been dissolved; but I do not regard that as a material distinction between that case and the present. A company continues to exist after dissolution to the effect of enforcing its rights or being made responsible for its obligations, and if the company could, on principle alone, sue for a wrong done to it, and through it to each shareholder, then the dissolution of the company would not have conferred a title on the shareholder which he would not have had prior to the dissolution. The case of *Tul-*

its products, for he was well aware that these representations were not in accordance with fact, or, at all events, he did not know them to be true,

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loch v. *Davidson* (20 D. 1045) is another authority in the respondent's favour on this question of title.

"If the respondent had sued the complainer in respect of a contract entered into between the complainer and the company, I think the plea to title now maintained would have been sound. But the respondent's action is based on the complainer's delict or *quasi* delict, and in such a case I think the rule of law to be, that the person wronged has always his remedy directly against the wrongdoer. Of course, it may be said in reply to this that the company was the only person wronged, and that the company's title to sue is not disputed. But the company could only suffer wrong, at least to its pecuniary loss, through the pockets of its shareholders—the real wrong was done to them. The complainer in support of his plea of 'no title' relied upon the rule laid down in *Foss* v. *Harbottle* (2 Hare, 461), and approved in subsequent cases, as *ex. gr.*, *M'Dougall* v. *Gardiner*, L. R., 1 Ch. Div. 13. I do not think that rule applicable to the present case; and, besides, there is nothing in that rule (as explained by Lord Justice James in *M'Dougall's* case) which conflicts with the views I have already expressed. Assuming therefore, that the respondent had a good title to sue the original actions, there remains the question,—(2) Whether the respondent has made good his right to recover the damages for which he concludes in that action?

"When the complainer first approached the respondent on the subject of his buying the Vaagsoeter estate, there can be no doubt he represented the transaction as one which would be highly advantageous to the buyer on the terms then submitted. The estate and all its advantages were no doubt spoken of in language which was very laudatory. What the complainer's representations actually were admits of no question, as these representations were made in writings now produced, which are contained in the print of 2d December 1884. These writings, however, were not all shewn to the persons who formed the company; some of the original shareholders (and some of these the respondent's cedents) only saw the prospectus dated 9th August 1877 (No. 20 of process). But there is no material difference between the documents in so far as concerns the representations made relative to the estate, and with which in this action it is necessary to deal. These representations related (1) to the extent of the estate, (2) the amount and character of the timber thereon, and (3) the value of the iron ore therein. I shall deal separately with these representations; but I may here say with regard to each and all of them, that it is established by the proof to my satisfaction that they are inconsistent with fact. The estate was not so large, the trees thereon not so numerous, and the ore not so valuable as was undoubtedly represented by the complainer. This discrepancy between the representation and the fact will not, however, *per se*, entitle the respondent to damages. It must be shewn, in order to make the complainer liable, that he made the representations in the knowledge that they were false, or without believing them to be true, or that he made them without reasonable grounds for believing that they were true. The respondent recognises this, and accordingly in his record he avers that the complainer's representations were 'false and fraudulent'; to have said merely that they were untrue would not have been a relevant ground of action.

"I proceed now to consider each of the representations in order; and (1) the representations concerning the extent of the estate. In the complainer's letter to the respondent's firm, dated 26th January 1877, the estate is described as 'forest land, about 4 English miles long, and ⅓ to ½ a mile wide, thus containing from 800 to 1000 English acres,' and in the prospectus it is said 'the estate contains about 1000 imperial English acres . . . . having forests nearly 4 miles in length.' The statements thus made proceeded upon information furnished to the complainer by Olsen, with whom the complainer was corresponding about the estate. His connection with the estate was that of middle-man; he had bought it, or arranged to buy it; he was to sell it to the complainer, who

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and the man who asserted what he did not know to be true was as much responsible as the man who asserted what he knew to be untrue, and it

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in turn was to sell it to the company. Of this Mr Olsen, I may here observe that he appears to be a trustworthy man; and besides, being the manager of the Vaagsoeter Company after the complainer's dismissal, in which capacity he gained the approval of the company, he is adduced by the respondent as his witness. Mr Olsen's letters are not produced (not having been preserved after November 1879, for the reason given by the complainer), but in a letter written to him by the complainer on 1st March 1875 the Vaagsoeter estate is spoken of as 'about 4½ by ¾ English miles roughly estimated.' This refers, I do not doubt, to a previous statement to that effect by Olsen; and that the length and breadth of the estate were not guesses merely or inventions on the part of the complainer may be gathered from the fact that they were not very far from being correct. No survey of the estate had then been made, nor was such survey made till long after the sale to the Vaagsoeter Company, and of this the company were aware before they made the purchase. The extent of the estate was, therefore, not exactly ascertained at the time of the purchase, and the dimensions given by the complainer were always qualified with the word 'about.' The actual survey, however, since made shews that the estate may fairly be said to be about 3½ or 4 miles long, and at some places ⅓ to ½ mile broad. The great discrepancy between the extent of the estate as ascertained by survey and as represented by the complainer arises from the fact that the estate, which is oblong, is very much narrower at some parts than at others. With regard, however, to the dimensions of the estate it is important to notice that Messrs Broom and Robertson, who visited the estate on behalf of the purchasers before the company was formed or the purchase made, with instructions to ascertain, among other things, 'the extent' of the property, reported as the result of their personal examination as follows:—'The extent of the estate given in the prospectus by Mr Dunnett is 1000 acres, which we believe to be understated, as we made the quantity, by taking the least of the different distances we got, considerably more.' (How they got these distances is explained in the previous paragraph of the report, where they say 'as no survey exists of the estate, we spent considerable time in getting the best idea of its extent by following the boundary. . . . and pacing distances.') The report goes on—'Our guide was a man called Knud, who is the subtenant on the estate, and who knew the boundaries. Only actual survey, however, will give the correct area. The shape of the estate is an oblong, extending from the bay over five miles inland, the narrowest breadth being 600 yards.' With regard to this last statement there is some conflict in the evidence. Messrs Broom and Robinson say they were distinctly told by Dunnett or Olsen that the road traversing the estate, which they paced and found to be 600 yards, was the narrowest part of the estate. Olsen says he did not say so, and Mr Dunnet says the same thing. I think probably the reason of this conflict may be found in the fact that Broom and Robinson misunderstood what was said to them about the road, and I am bound to add, that while I regard Messrs Broom and Robinson as perfectly honest witnesses, I am satisfied, from their appearance in the witness-box, that it would not be safe to rely very much upon their memory. The result, therefore, of the examination made by Broom and Robinson justifies the complainer in the representations which he made. They had opportunities of estimating the extent of the estate fully as good as were at the command of the complainer, and they reported that the representations of the complainer, in their opinion, rather understated than overstated the extent of the estate. In these circumstances I cannot hold the complainer's representations to have been false or fraudulent. The information he proceeded upon in making his representations was, so far he could judge (and as, on the evidence, it appears to me), quite reliable and trustworthy. I have no doubt the complainer believed what was told him, and made his representations on the information he had in perfect good faith. I may add that in my opinion the extent of the land, *per se*, was not a material consideration in the view either of the complainer or the was no answer to say that the truth might have been discovered if sufficient inquiry had been made.[1] The mere fact that inquiry had been

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company. The timber upon it was much more material. No doubt a very large extent of land would naturally carry a larger quantity of timber than a small extent; and if a small extent of land had been given with a very large quantity of timber, it might have suggested doubt whether such a quantity of timber could possibly exist, and have led to inquiry. Such inquiry was, as will be seen, actually made. But, provided the timber was there, it was not material, in the view of the purchaser of the estate, whether it grew on 500 acres or on 800. After the timber had been felled and the ore worked, the land, situated as it was, was of no value to the company.

"2. As regards the timber growing on the estate, the complainer represented that there were 34,000 trees of certain specified dimensions, and of dimensions less than those specified, trees 'too numerous to be counted,' but estimated at 80,000.

"It appears from Mr Olsen's evidence that Mr Dunnett wished a statement 'from independent men of how much timber there existed on Vaagsoeter property,' for the purpose of being submitted to persons who might be asked to buy the property, and had written requesting Olsen to procure this. The whole of the letters written by Mr Dunnett to Mr Olsen on this subject are not produced, but the letters of 2d May, 15th August, and 3d October 1876 sufficiently corroborate Mr Olsen's statement. Mr Olsen accordingly employed Holm and Aarseth to make the inquiries and examination of the Vaagsoeter forest necessary to supply the complainer with the information he desired to have, and on getting their report Mr Olsen forwarded it to the complainer. That report, as regards the 34,000 trees of specified dimensions, is practically reproduced in the prospectus which the complainer issued to the respondent and his cedents, the difference in the dimensions between the report and the prospectus being the difference between Norwegian and English measurement. There is abundant evidence that Holm and Aarseth were men quite qualified to report upon the Vaagsoeter forest, as well as men whose statements were quite trustworthy (*ex gr.*, see print for respondent, 56 G and 62 B C). The report by Holm and Aarseth was forwarded by Olsen to the complainer in a letter of 2d November 1876, but that letter is not now extant. The complainer, however, says that he took a copy of it at the time to shew to intending buyers of the estate, and that copy he gives at length in his evidence. There is also produced by Olsen a copy of this letter which the complainer sent to him to certify as correct soon after the present question of misrepresentation was raised. The two copies, although both proceeding from the complainer, are not identical in terms. The difference may perhaps be accounted for by supposing that the copy taken by the complainer to shew to others to whom he might endeavour to sell the property was not a complete copy. This should, of course, have been cleared up in the proof. But I am not disposed to put any disadvantage arising out of this neglect on the complainer. The *onus* lies on the respondent of shewing that the representations made by the complainer were false and fraudulent, and the complainer may be regarded as justified in destroying any letters or documents he had bearing upon this question after a settlement took place between him and the company in November 1879, which he considered final. The importance of Olsen's letter of 2d November 1876 consists in this, that it was upon a statement in that letter that the representation was made regarding the number of trees on the property of less dimensions than those specified by Holm and Aarseth. Mr Olsen writes (at least Olsen, who produces the copy No. 294, does not deny that he wrote) that in the number of trees specified by Holm and made did not bar the action unless it appeared that entire reliance was placed on the inquiry and not on the complainer's statements. (2) The dis-

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[1] Smith v. Reese River Co., 1869, L. R., 4 E. and I. App. 64 (Lord Cairns, at p. 79); Central Railway Co. of Venezuela v. Kisch, 1867, L. R., 2 E. and I. App. 99 (Lord Chelmsford, at p. 120); Smith v. Chadwick, 1882, L. R., 20 Ch. Div. 27; Addie v. Western Bank, 5 Macph. (H. L.) 80; Houldsworth v. City of Glasgow Bank, March 12, 1880, 7 R. (H. L.) 53; Eddington v. Fitzmaurice (1885), L. R., 29 Ch. Div. 459.

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Aarseth 'is not included any of the trees which at 20 feet in height are only 5 inch diameter or less, and which it was impossible to count, but of which there are no doubt more than 100,000.' It is worthy of remark, as proving that some such information was forwarded by Olsen, that the complainer, in his letter to the respondent's firm of date 26th June 1877 (No. 25 of process), mentions that the 100,000 trees was an estimate by Olsen as contra-distinguished from the specification of the 34,000 trees made by Holm and Aarseth. Assuming that a letter in the terms above quoted was sent by Olsen to the complainer along with Holm and Aarseth's report, I think the representation in the prospectus was quite justified. The complainer had no reason to doubt that, as he had asked for information as to facts he had got what he asked, and not a falsehood (if it was a falsehood) invented by Olsen. In my opinion, however, there is no room for imputing falsehood to Olsen. But what opinion did Messrs Broom and Robinson form on this subject? I turn, again, to their report, and find that they say, 'We counted in some places the number of trees to the acre, and consider the average number given in the prospectus, 34,000, at from 5½″ to 15¾″ diameter, to be understated.' They take no notice of the 100,000 trees under 5½″ diameter, I suppose because they thought them of no great moment. If there had been (as they thought there were) the 34,000 trees of specified dimensions, that was sufficient, from their value, to make the proposed purchase a very good bargain for the purchasers. On this part of the case I am of opinion that the complainer took means to ascertain with fairness and approximate accuracy the state of the timber on the Vaagsoeter estate; that he believed, and had reason to believe, in the truthfulness of the information on that subject afforded to him; that he communicated to the respondent and his cedents the information as he himself received it; that he made no false or fraudulent representations thereanent; and made no concealment of any material fact concerning the timber within his knowledge which was calculated to influence the proposing purchasers of the estate. In the prospectus, as well as in the letter No. 25 of process addressed to the respondent's firm, the complainer expressly guarantees the number and dimension of the whole trees. What might have been the effect of such a guarantee, and what the extent of the obligation thereby imposed upon the complainer had the company sought to enforce it, I do not need to consider. The respondent's action is not laid upon guarantee, and probably an action upon the guarantee, being an action upon contract, the company only could have pursued. But that guarantee may very well be taken into view in considering the complainer's good faith in the matter. It is scarcely credible that he would have bound himself by any such obligation if at the time he granted it he knew, or had reason to suspect, that what he was guaranteeing to be a fact was untrue, with the certainty that sooner or later the truth would be discovered, and that such discovery would be followed by such proceedings as would make the sale of the property, so far as he was concerned, not a profit, but a loss. I am convinced that the complainer was not so foolish, and that he gave the guarantee because he believed that what he was guaranteeing was within rather than beyond the truth.

"3. The estate in question no doubt contained iron ore. The only question is whether the complainer's representations as to the percentage of metallic iron obtainable from that ore were false and fraudulent. It is said that he took samples which he knew did not fairly, if at all, represent the veins of ore running through the estate, and submitted analyses of such samples as indicating what was the general character of the ore to be found on the estate. I do not intend to go over the evidence bearing on this part of the case in any detail, but I remark (1), that it is not disputed that the samples of iron ore which the complainer got analysed were obtained by him on the Vaagsoeter estate, that they were handed as found to a chemist for analysis, and that the analyses obtained from the chemists were truthfully communicated; (2) the analyses obtained from the chemists were such as warranted the representations

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charge by which the complainer and the company had mutually discharged their claims did not affect the action. The discharge was a

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which the complainer made; (3) the complainer was himself so satisfied with the analyses that he guaranteed a certain percentage of metallic iron, and this guarantee (for the reasons I have already given) I regard as a proof of the complainer's good faith in making the representations which he guaranteed.

"On this part of the case also I think the respondent has failed to prove that the complainer's representations were false and fraudulent. If the views which I have expressed are sound, the complainer is entitled to judgment in his favour.

"But apart from the questions which I have been considering, the complainer maintains that he is entitled to have the decree complained of suspended on other grounds, which I shall briefly notice.

"1. The complainer avers that the respondent and others who joined him in the purchase of Vaagsoeter estate were not induced to purchase, and did not purchase in reliance on the representations of the complainer, but, on the contrary, purchased in reliance on the information which, independently of the complainer's representations, they procured for themselves.

"A meeting was held on 5th September 1877 'of gentlemen proposing to form a joint stock company . . . for acquiring the Vaagsoeter estate,' at which the respondent and his cedent Mr Robinson were present, the minutes of which bear that a statement in writing (*i.e.*, the prospectus), had been circulated among the gentlemen present, prepared by the complainer, containing a general description of the property proposed to be purchased, and also heads of the agreement for the sale of the property to the company. The minutes further bear,—'The meeting having heard further explanations from Mr Dunnett, it was agreed unanimously, before proceeding with the formation of the company, that a deputation be sent out on behalf of the meeting to inspect the lands, timber, and others proposed to be purchased and vested in the company with the view of ascertaining the extent, value, and other particulars of the property, and reporting to a future meeting of the parties generally as to the advisability of proceeding with the formation of the proposed company, and purchasing the property on the terms mentioned in Mr Dunnett's statement.' Messrs Broom and Robinson were thereupon appointed as a deputation to proceed to Norway, 'and with the assistance of Mr Dunnett to make the necessary inquiries, and to report to a future meeting.' It was further minuted that in the view, that is, in the expectation, of the report by the deputation being favourable, and the title to the estate being found satisfactory, the gentlemen present agreed to become shareholders in the proposed company; and that 'in the event of its being considered inexpedient to proceed to form the company after considering the report of the deputation,' they would each bear a certain proportion of the expenses incurred by the deputation 'in prosecuting their mission.' In pursuance of the instructions thus given to them, Messrs Robinson and Broom went to Norway along with the complainer, having with them a copy of the complainer's prospectus, and on their return they submitted to another meeting their report, No. 52 of process, in which they stated that they had spent four days 'in perambulating the boundaries, examining the forest and minerals and the water power'; that, in their opinion, the extent of the land as represented by Mr Dunnett was understated, although the exact extent could only be got by actual survey, and that no such survey existed; that the trees of specified dimensions, as stated in the prospectus, were understated; that they had made a careful examination of the iron ore, with the results which they gave; and in other respects they reported upon the condition of the estate. That report was submitted to a meeting of 10th October, at which the deputation explained verbally, that 'while unable to test accurately every statement in Mr Dunnett's prospectus . . . they were on the whole satisfied, as regards the extent of land and number of growing trees, that Mr Dunnett's estimate was, if anything, understated.' The meeting thanked the deputation for their report and services, and 'expressed their cordial approval of the manner in which these gentlemen matter between the complainer and the company, while the action was one at the instance of the individual respondent and his cedents for the loss the complainer had caused them. Besides, the claims of which the discharge relieved the parties to it were their mutual claims "for imple-

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had executed their mission.' The meeting, however, considered, 'before proceeding to form the company,' that the title to the estate should be examined by a Norwegian lawyer. The opinion and advice of a Norwegian lawyer on the title was applied for and obtained; and on considering his letter at a meeting of 9th November, it was 'unanimously resolved to proceed with the formation of the company.' The company was immediately thereafter formed and registered, and the property bought.

"In view of these facts, I think it is out of the question to say that the company was formed or the company purchased in reliance on the statements and representations of the complainer. So far from that being the case, the gentlemen proposing to form the company sent persons of their own choosing to ascertain for them everything about the estate—its extent, value of its timber, shipping facilities, water power, &c.—which could influence them in reference to the purchase, declining to form the company or buy the property until these persons had reported. Upon that report they proceeded, and if they have by it been led into a bad bargain, the complainer is not to be responsible for that. So far as I can see, the respondent and the gentlemen who were acting along with him risked nothing on the representations of the complainer beyond the expense of sending out their deputation. In this view it is not material to consider whether the representations of the complainer were true or false. If Mr Dunnett did or said anything which put the deputation off their inquiry in Norway and misled them, that would be a different matter. But of this I find no proof; for as I have said, I place no reliance on the evidence of Messrs Broom and Robinson when they speak only from memory. The claim against Mr Dunnett, and the grounds on which that claim might be made good, have doubtless often been discussed by them and in their hearing; and it is probably difficult, if not impossible, for them now to distinguish between what actually was said in Norway and what has been said since.

"2. There remains only the question, whether the respondent, or the company of which he was a shareholder, discharged the complainer of all claims arising out of the purchase of the Vaagsoeter estate. I have considered all the evidence bearing upon this question, although I do not now propose to go into it in detail. The result I have arrived at is favourable to the complainer's contention. I think the settlement under which the complainer surrendered certain claims was a compromise between the parties, intended and believed to be a complete discharge of all claims *hinc inde* arising out of the Vaagsoeter estate transaction. It is said now by the respondent (or rather his agent Mr Bryson) that the settlement only affected claims and questions known to the company at the time of settlement. By that time I think the company had come to know that they had made a bad bargain, and that the estate was not, in fact, what it had been represented to be both by the complainer and Messrs Broom and Robinson. The extent and quality of the timber on the estate, which was its chief feature so far as mercantile value was concerned, had by the date of the settlement been ascertained, and the report and opinion of Mr Donald (one of the shareholders, and a cedent of the respondent's) on that subject was before the company. In these circumstances the parties entered into an agreement by which they 'mutually abandon and discharge all claims at the instance of the one against the other for implement of the obligations specified in said memorandum or prospectus.' It is quite true that the present claim is not one specified in the prospectus. But reading the agreement or discharge as a whole, I cannot resist the conclusion that it was, as I have said, a final and complete settlement of the whole claims arising or competent *hinc inde* in respect of the sale of the estate by the complainer to the company.

"On the whole matter my judgment is in favour of the complainer, and I shall accordingly suspend the decree complained of."

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ment of the obligation specified in the said memorandum or prospectus." These obviously did not include the claim made in this action. (3) The respondent had a good title to sue, though it was admitted that he was not strictly a debenture-holder. No doubt the company might itself have sued, but individual shareholders deceived by the representations complained of had also a right to sue for their individual loss.[1]

Argued for the complainer (respondent);—(1) There was no fraud on the complainer's part. One who *in bona fide* made a statement as to an investment would not be made liable as for a fraud if he turned out to be wrong. There should be a rescinding of the contract which the fraud had induced if an action for damages were brought for fraud.[2] But the company was formed and carried on its business in reliance really on the report of Robinson and Broom, who went to Norway to make inquiries for themselves and their constituents, and on whose report of what they had seen for themselves the company was formed. In any view, mere non-disclosure was no ground for damages. Such an action required active deceit.[3] (2) Though it was not disputed that in some cases shareholders might sue in respect of obligations incurred to the company, the rule was otherwise. If shareholders and the company could both pursue, then the defender would be liable to be twice pursued, contrary to the brocard *nemo debet bis versari*. It was the company in this case, not the respondent, that made the contract, and the company that granted the discharge. Only the company therefore had a title to sue.[4] (3) Even if there had been no written discharge, the actings of the company were an implied and virtual discharge of all claims against the complainer. The company after becoming dissatisfied with the estate had sold it.

At advising,—

LORD JUSTICE-CLERK.—This is an important case to the parties, and in some aspects of it also to the law. The proceedings have been protracted, and the documents are very voluminous, and even yet, owing to the circumstances under which the question arises, the facts on which the case turns are involved in some obscurity. We have had a long and very able argument from the bar, and we have also the benefit of an elaborate opinion from the Lord Ordinary explanatory of the grounds on which he has arrived at the result under review.

The case itself is of this nature. The pursuer of the action is a Mr Mitchell, and he says he was a member of a copartnery formed by him and several other persons in Glasgow for the purpose of purchasing a piece of ground in Norway, called the Vaagsoeter Estate, on which a forest of timber was understood to grow. The defender Dunnett had proposed this purchase to the pursuer and his colleagues, and had made certain statements founded on his alleged knowledge to induce them—so it is said—to take the step of forming a company. The main object of this company was to cut down and deal in the timber which it was said was to be found growing plentifully on the estate, and to be a valuable article of commerce. According to the pursuer, it was also held out that iron ore existed in the lands, and although the defender was not in a position to speak with certainty as to the prospect of working the ore to profit, yet he held out great encouragement in the hope that it might be worked to profit. The statement of the pursuer, therefore, is that the company was formed on the inducements thus held out by the defender, and that the partners of the company contributed a considerable amount of capital. His contention now is that they were induced to join the concern, and to pay their money, on the representations held out by the defender, which have turned out to be false and fraudulent. He now sues Dunnett, who became the manager of the company for some time in Norway, for damages in respect of those misrepresentations, and in respect of the money which they have lost in consequence, the action being brought by Mitchell in his own name, and as assignee of three of his copartners.

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[1] Leslie's Trustees v. Lumsden, Dec. 15, 1851, 14 D. 213; Tulloch v. Davidson, June 3, 1858, 20 D. 1045, affd. Feb. 20, 1860, 3 Macq. 783; Gordon v. Davidson, Feb. 26, 1864, 2 Macph. 758.

[2] Addie v. Western Bank, May 20, 1867, 5 Macph. (H. L.) 80.

[3] Brownlie v. Miller, July 16, 1879, 6 R. 1076; Lees v. Tod, May 19, 1882, 9 R. 807.

[4] Gray v. Lewis, 1873, L. R., 8 Ch. App. 1035.

A very voluminous proof has been led, and in the conclusion the Lord Ordinary found that the allegations of fraud and misrepresentation had not been established. He accordingly has suspended the decree in absence which the pursuer had obtained, explaining his views, as I have said, in a very able and elaborate note.

As I have come, after full consideration, but with little hesitation, to concur in the result at which the Lord Ordinary has arrived, and that upon the main ground on which the action is based—the alleged misrepresentations of the defender—it may not be necessary for me to go at any length either into the question of the actings of the defender, or the other questions of considerable weight and difficulty which have arisen upon the title of the pursuers. At a former stage of this action, Lord Adam, who was the Lord Ordinary when it came into Court, suspended the decree in absence. On a reclaiming note it was in this Division thought that the facts ought to be investigated. I was not present at that judgment, but I see no reason to differ from it. And indeed it would have been difficult to have arrived at the conclusion which Lord Trayner has reached without these facts having been ascertained. At the same time, in regard to the question of title, I am inclined, if it were necessary to decide that question, to concur with the original judgment of Lord Adam, and that to a large extent in consequence of the actings of the parties under the arrangement which is said to have been induced by the fraud of the defender. I am also inclined to be of opinion with the Lord Ordinary, that the discharge which was granted by the company to the defender in the course of the operations of the company is sufficient of itself to bar this action, and still more is that the case when the proceedings of the company are taken into consideration.

As the whole case is fully discussed in the note of the Lord Ordinary, I shall simply, upon this matter of title, content myself with enumerating the topics that have weighed with me in coming to the result I have indicated.

1. The pursuer and his cedents were partners in this company. The company was formed for the object I have already explained, and Dunnett was appointed manager of the company when it started in 1877. The company became dissatisfied with Dunnett's management, and appointed Mr Olsen, who had been Dunnett's adviser in the purchase, to succeed him; and Olsen took the opportunity of directing a survey of the whole estate, from which it appeared that the representations which had been made by Dunnett in regard to the extent of the estate, the amount of timber, and the prospects of the mineral workings, had been entirely misrepresented. That was in 1879-80, but notwithstanding this the company went on for three years afterwards. It was ultimately wound up at the end of 1883. This action was raised in 1884.

Now, I should have doubted, independently of the discharge, whether under these circumstances any recourse could be had upon the alleged misrepresentations of Dunnett. Even if it could be said—which probably could be said—that when the discharge between Dunnett and the company was granted, the company were not aware of the extent of the misrepresentations of which the pursuer complains, I cannot think that the company or its shareholders were entitled to go on for three years and deal with the subject of their purchase, and to exhaust, as in fact they seem to have done, the whole available timber on the estate, and then to go back and demand from Dunnett recompense for the sums which they had thus unprofitably expended. I think, if they meant to make any such demand, it should have been made at once,—that is to say, whenever they found that these representations had been made. I am, therefore, of opinion that the company itself could not, after the discharge in question, and their proceedings after the date of the discharge, have brought the demand which is before us in this action. I think that on well-known principles they were not entitled to take that course. Therefore, although I think the discharge itself in 1879, according to its fair interpretation, would have been conclusive against such a proceeding, I think their retention of the subject-matter of the contract between them and Dunnett, and their taking the chance of its turning out to profit for three years, would have been quite sufficient to exclude it.

If this be so, can the partners of the company have a higher right than the company itself? I think not; and that all the more that in this instance at all events *restitutio in integrum* is entirely impossible. Nor do I think it makes any difference on this head that the company is now dissolved, and that the claim which is made in the summons takes the shape of an individual action on delict. If any such claim arose, it was vested in the company, who could unquestionably have discharged it in terms, and could have bound the shareholders by that discharge. Therefore I should be inclined to hold that neither on the ground of a debenture debt, nor in respect of the shares which were taken in the company, had the individual shareholders any right to insist for reparation.

II. But, in the second place, I think the allegations of fraudulent misrepresentation have not been established. That Mr Dunnett acted on very sanguine and ill-founded impressions as to the value of this property, and as to its chances of being worked to profit, no one can doubt. The question is how far he was entitled to say to others what were his views about the property as a field for investment. I do not question that although a man may be perfectly honest in his belief on matters of that kind, if he states to others as matters he has ascertained things which he had no reasonable ground for believing, such unreasonable statements may amount to fraud. But it seems to me that this is not a case of that nature. I think that Dunnett did reasonably believe the statements which he made. I have no doubt upon that matter. That he had some grounds for that belief seems also certain.

Apart from the details, into which I do not mean to go, the general outlines of the case on this head are the following: Mr Dunnett made representations beyond doubt, Firstly, of the extent of the property; secondly, of the extent of the timber grown upon it; and thirdly, of the expectations of possible profit from the minerals, which have not turned out to be accurate. And it is true—and the fact has a bearing in both directions—that he offered his own personal guarantee in regard to the accuracy of some of them. But he never intended that these statements should be taken as the basis of a concluded arrangement without further action by the persons with whom he was corresponding. On the contrary, he urged them to make their own inquiries, and to send out one or more of their number to do so—that is, to make on the spot the investigations which were necessary, and thus test the representations which he had made. The negotiators did so. They sent out two gentlemen of the name of Robinson and Broom, who did see the property, and took what steps they thought right to test the accuracy of Mr Dunnett's statements. After spending several days in that task, they returned and reported not only that Mr Dunnett's statement was accurate, but that it fell short of the truth. And I attach great importance in this inquiry as to the good faith of Dunnett to this singular fact. If it had turned out on the inquiry of those gentlemen that Dunnett had other means of knowledge which he did not communicate to them, and that he had concealed from them information which he had possessed, there can be no doubt that that would have been a very material element in the case. But not only does he not appear to have done so, but, as far as I can judge from the testimony, those two gentlemen who were sent out on the part of the speculators had access to all the information, and to all the sources of information, from which Dunnett's representations were made. And, having that access, and obtaining that information, they came to the same conclusion which Dunnett himself had arrived at. That those gentlemen were acting in perfect good faith is certain. Therefore I think it speaks strongly in favour of the good faith of Dunnett, who from the same accounts came to the same conclusion. In particular, Mr Dunnett's main adviser was Mr Olsen, of whom the parties appear to have a high opinion. Mr Olsen's knowledge of the property was much greater and much longer than that of Dunnett. The deputation were in communication with Mr Olsen during the whole time of their stay in Norway, and it is quite certain that Mr Olsen said nothing to them that could induce them to think that Dunnett was playing them false, because, if he had played them false, it is certain that they never would have reported in the terms which they ultimately used. And this applies to all the three grounds on which the allegation of misstatement and fraud rests. (1) It is said that the extent of the property was entirely overstated, but Mr Dunnett informed them from the first that no survey had ever been made. His information was mainly derived from two reports by men of skill and position in the district, which had been obtained by Olsen himself on Dunnett's requisition; and the calculation of the area of the ground was made from general facts which had been reported to Dunnett through Olsen. It is plain also that Olsen's impression at that time in regard to the area of the ground was the same as Dunnett's, and, had he been of any different opinion, he certainly would have informed Robinson and Broom of the fact. (2) It is said that the number of trees was misrepresented and overstated. Now, Dunnett had taken the amount of timber from the reports of those two Norwegian experts whom Olsen himself had employed for that purpose; and he had no reason to suppose that their estimate, such as it was, was not accurate. I think that he was entitled to rely upon their testimony. At all events, I think their statements were enough to prevent Dunnett's representations from being considered as fraudulent. It is to my mind entirely inexplicable that in so large a transaction as this, where a very considerable sum was to be put in hazard, those delegates did not at once direct a regular survey to be made. Indeed, if Dunnett himself had proceeded as most men of care would have done, he would not have made his proposal without having these matters made so distinct that there could be no misapprehension on the subject. But it was open to Robinson and Broom to ascertain

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the fact with certainty, and as they did not think it necessary, proceeding substantially on the same grounds and the same information as Dunnett, I do not see how it can be charged as a fraud against Dunnett that he did not take those very obvious precautions which were as open to his correspondents as to himself. (3) As to the ore, I think there was no fraud there either. That there were specimens of iron ore lying about the property, that there were the remains of old workings, and an apparent possibility of still farther work, was quite true; and beyond that, I do not think that Dunnett had made any representation of fact for which he had no warrant, and he left it to his correspondents to satisfy themselves upon that head.

Such, as shortly stated as those voluminous prints will allow, is my view of the result of this proof as far as Dunnett is concerned. His statements were certainly imperfect in the last degree, but I see no reason to think that he did not honestly believe them, and I cannot affirm that he had no reason for that belief. I observe that Olsen in the latter part of the proceedings throws some discredit on the Norwegian reporters, on whose authority substantially Dunnett acted, but I see no evidence that he made such statements to Robinson and Broom, which it certainly was his duty to do, if at that time he entertained that opinion. On the contrary, from the correspondence it is plain that he did not entertain, or at all events did not express, that opinion until a very late stage.

These are the views I take of the more prominent aspects of the case. I think the Lord Ordinary's view upon the evidence is sound. It is quite certain that all the parties concerned acted with almost incredible credulity and rashness, but I think the same may be said of all of them, and I do not see any ground on which in justice Mr Dunnett can be made liable under the conclusions of this action.

Lord Young.—I come to the same conclusion. We are here in a suspension of a decree, but we must deal with the case in every way as if we were in an original action in which decree in absence is pronounced, regarding the respondents as the pursuers, and the complainer as the defender.

There is to begin with a melancholy amount of litigation. I much wish that it could have been avoided, for I think in the end the case comes to a very simple issue indeed. I am disposed to concur in acquitting Dunnett of any actionable fraud, but it does require some charity to cover his transgressions. I cannot sympathise with the favourable account which he gave of this property. I think it does require a deal of charity to cover the extravagance of his statement. But then we have a good deal of charity, and, even if the pursuer had a title here, and there was no impediment in the way of his action, he would have failed. But I am of opinion that he—(I should say "they," because he represents others)—I am of opinion that they are not in a position to sue the action at all. They were the partners of a joint stock company, and the ground of action is that they were induced to become constituent members of the joint stock company by the defender holding out the prospect of this estate in Norway being so successful as a timber-growing estate. It is said that the prospect which he thus held out was delusive, in short fraudulent, and that he must therefore give them compensation. I know of no precedent for such a case as that. I know of no case approaching that. The company was formed, and they purchased the estate upon the representations held out to them, including the alleged falsehood on which the present action is founded. I have laid out of view the measures which they took to satisfy themselves regarding the value of the estate, and the expediency of making the purchase before actually making it, for they themselves never sought to repudiate the purchase which they had made upon those representations. Whether the representations were true or untrue, honest or fraudulent, they made the purchase, and retained the property for years, selling it as their own, and never making any attempt to get rid of it or of the contract. They made the purchase in 1877. They seem to have made something out of it until 1884. In that year it was thought better to sell it. A short time before it was thus sold by the company, some of the constituent members of the company bring an action, not to set aside the contract as induced by fraudulent representations, but for damages, because these same fraudulent representations on which the contract was made had induced the partners to associate themselves together as a company. I cannot commend that as very ingenious. One sees the view, but it cannot in my opinion be sustained. I put the question to Mr Gloag in the course of the argument, whether any distinction could be made between the case of a joint stock company and an ordinary partnership at common law? Mr Gloag, with that candour and loyalty to the law which one always finds in him, said he could see no distinction. I should not found on that for a moment of course to the prejudice of Mr Gloag's argument, if I could see any distinction myself. If I could see that any such distinction existed, and was well founded, I should act upon it. But, I repeat, I can see no such distinction in the matter with which we are dealing, as between a joint stock company under the Companies Acts, and a private partnership at common law. Just put the case, therefore, of A and B being induced by a magnificent prospectus, setting forth the glories of an estate in Norway, and the profit to be made by a purchaser, saying to himself and two or three others, "Let us associate together as a partnership and buy it." They accordingly communicate with the proprietor who has given this account of it, and who says to them, "Will you buy the estate, for it is all that I represent it to be?" Well, the long and the short of it is that they do buy it, and they hold on to it for a period of seven years, and then sell it as their own, in the meantime discharging all claims against the partners and against the parties who had sold it to them. Then A and B and the other individuals say, "Oh, this leaves us at liberty to bring an action of damages against you the parties who sold this estate to us for having induced us to join together for the purpose of buying this estate." I think that extravagant. I think that is a correct representation of the present case, if there is no distinction between the case of a joint stock company and a partnership at common law, and the very learned counsel for the respondent agrees with me in thinking that there is none.

But I go further. I think there is no distinction between the company and the case of an individual adventurer. If an individual adventurer, induced by those representations, had bought the estate from Mr Dunnett, engaged him as manager, taking his guarantee and all the rest of it, in terms of the prospectus of 9th August 1877, and after two years of his management had found the estate not to be what had been represented, and that it was quite unprofitable, and that the manager was running up claims upon them, and felt that it was better to quit grips with Dunnett and come to terms with him, could anyone say that it had been in the contemplation of that party to bring an action afterwards for damages for having been induced to form the company? Just look at the arrangement to which the parties came. The agreement says,—"In respect of the settlement of the second party's claim in manner foresaid,"—that is to say, that he should take £600, £300, £200, and so on, and should have a mortgage over the property for payment,—"both parties hereby cancel and declare to be no longer in force or binding upon either of them the contract heretofore subsisting between them as embodied in the said memorandum or prospectus of 9th August 1877, and the parties mutually abandon and discharge all claims at the instance of the one party against the other for implement of the obligations specified in the said memorandum or prospectus." Was it in the contemplation of the purchaser to bring such an action as we have here? Can it be said to have been in the contemplation of this party to bring an action for damages for having been by fraudulent misrepresentation induced to purchase the very estate over which he is thus giving him a mortgage in satisfaction of the payment of his claim? The guarantees which were exchanged are somewhat numerous. To begin with, the vendor, Mr Dunnett, guarantees that £2850 is to be repaid to the buyers within four years from the company's entering on possession. He is, in short, under a series of obligations as to the truth of the representations in the prospectus. After two years and a-half of experience they discharge him, he agreeing to limit his demand against them to a certain sum. In such circumstances would an individual, or an ordinary partnership at common law, be allowed to bring such an action? I do not mean that there might not be an ascertainment of some horrid conspiracy and fraud of which parties have been made the victims, and of which they had no knowledge at the time. Under rare or exceptional circumstances the Court will be astute, or even ingenious, to find a remedy to do justice. But the claim in the present action, or any such action as I am mentioning at the instance of an individual adventurer, or common law partnership, for having extravagantly represented the value of an estate—the quantity of timber upon it, the iron ore in it, and all the rest of its advantages, which were found to be deceitful at the time that they were made—I mean deceitful not in the sense of any fraud having been perpetrated, but misleading—I say such an action would never be permitted after settlement of this kind. That is a settlement which would have been conclusive in the case of an ordinary partnership, and individual adventurer, and which for the same reason is conclusive in the case of a joint stock company. I have said so much with reference to the discharge. But I think the right to determine whether the contract of discharge is to be set aside, and damages claimed in respect of fraudulent inducements held out to form the company, lay with the company itself. It was for the company to determine, after their experience of the property, whether they would stand by the contract they had made, or set it aside, if they had ground for doing so. It was for them to judge whether they had grounds for setting it aside on the head of fraud, and also to judge whether it was for their interest to do so, even if they had grounds. Well, they determined that it was not for their interest to do so. They stood aside for seven years without ever challenging the contract on which they held the property. And ultimately they sold the property as their own, having no title to it except what Dunnett gave them. Well, could the constituent members of the company take it up, and say, We shall bring an action? Is such a thing possible? I can conceive circumstances—it does not require much ingenuity to do so, although the circumstances would be very different from what we have here—in which if a company came to an end, leaving the individual members of it great sufferers by some fraud which had been practised upon them, there would be resources in the Court to do justice to the injured parties, the *disjecta membra* of the dissolved company. There are resources in law, as well as in civilisation: legal resources are a part of the resources of civilisation. But there is no case of that kind here. This is a case of a company, having a legal contract, taking over a certain property, retaining it for a length of time, and then dissolving the company, and those who had been members of the company coming and complaining of the fraudulent representations in consequence of which the company, as they say, was formed. It is a mere pretence to say that it was damage done by their becoming members of the company, with a view to buying. I am therefore against the respondent here, not merely upon the merits, but also upon the title and the discharge, although it requires a little charity to cover the complainer's representations, and to acquit him of all guile.

Your Lordship directs my attention to the minute of the company, dated 19th July 1880, three years before this action was raised, which states,—"The secretary read letter from Mr Dunnet of 19th ultimo, with legal opinion enclosed, as to the discrepancy between his estimate and Mr Olsen's survey of the contents of Vaagsoeter, when it was resolved to take no further action in the matter." That confirms the conclusion to which one is irresistibly led by the whole of the patent facts of the case, that the company took a title to the property in 1877, and had pretty well discovered what quantity of timber and iron ore was on it before 1879. But they dismissed their manager, Mr Dunnett, who was also the seller, and went on with the concern under different management. That shews that they did not judge it to be expedient to challenge the transaction on the head of fraud, but resolved that it was expedient to stand by the contract, and to deal with the property as their own accordingly. Now that in my opinion is absolutely conclusive, and it excludes the individual members of the company from any remedy in the matter.

Upon these grounds, I confess without any considerable doubt, I am of opinion that the judgment ought to be affirmed which suspends this decree as one unfounded in point of fact. I should only like to add that while the Lord Ordinary finds expenses due subject to modification, I myself see no ground for modification, and I should therefore give the successful party full expenses.

LORD CRAIGHILL.—There are three questions put forward in the present litigation. The first is whether the pursuer, who is the reclaimer, is entitled to sue; the second is whether, if he is entitled to sue, he has proved the fraud which is the ground of imputed liability; and the third is whether the defender's liability was not discharged by the minute of agreement and discharge entered into between the company which took over the estate in question and the defender, and which was signed in 1879, or, at all events, whether it was not discharged by the conduct of the company in keeping, working, and ultimately selling the estate, without intimating a claim for loss said to have been sustained.

On all these questions, except the first, the Lord Ordinary has given judgment for the defender, and I am so well satisfied, not merely with the result, but with the reasons which the Lord Ordinary has given, that I refer to them as the expression of my views of the case. I could add nothing likely to render the judgment clearer or more satisfactory. But I differ from the Lord Ordinary on the plea against title. He has repelled that plea. I think it ought to be sustained. The matter is, in the circumstances, one of small moment to the

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parties, since judgment is to be given on other grounds, but the plea is one of general importance, and therefore it appears to me to be right that I should in a general way communicate my views on the subject.

In the autumn of 1877 the defender circulated among his friends in Glasgow a prospectus of the Vaagsoeter Company, Limited, the purpose of which, should it be formed, was to purchase from him the Vaagsoeter estate in the kingdom of Norway. The shareholders who saw the prospectus were favourably impressed with the venture, but it was only after two of them had gone as a deputation to inspect the estate that the company was formed. The company thus formed was registered on 6th November 1877 under the name of the Vaagsoeter Estate Company, Limited, with a capital of £5000 divided into 500 shares of £10 each. The pursuer and his cedents were original shareholders. The price to be paid for the property was £3800, of which three-fourths, or £2850, was paid in cash, the other fourth being paid in ninety-five paid-up shares of the company. Possession of the estate was at once taken by the company, and the defender, in terms of a relative provision of the prospectus, proceeded to Vaagsoeter as their resident manager. That was in fulfilment of a clause by which it had been agreed that the vendor should become the company's local resident manager in Norway, subject to the board of directors, at the annual salary of £250, and undertake to erect a loading pier, with twenty feet draught of water, and also put up suitable saw-mill machinery, with pay-office and manager's house, at a cost not to exceed £800. The defender further agreed to advance cash sufficient to put forth the first two cargoes of timber, thus saving the company from creating more capital for working expenses.

The results of this arrangement were not satisfactory either to the company or to Mr Dunnett. Misunderstanding and controversy followed. On the one hand, the company complained that he was not providing the machinery, for which money was to be advanced by him. On the other hand, he put forward claims for salary and certain other charges, payment of which he alleged to be in arrear. The end of it was that Mr Dunnett was superseded as the manager in October 1878, and Mr Olsen, who had been his adviser in the purchase of the property, was appointed his successor. In 1879 a compromise was arranged, and in December of the same year a formal minute of agreement and discharge was arranged and signed by the parties. It is necessary to look at what this document sets forth. It says,—"Whereas disputes have arisen between the parties as to the intent and meaning of the second party's contract with the company constituted by a certain memorandum or prospectus, dated 9th August 1877, under the hands of the second party, and afterwards adopted as the basis of his agreement with the company, for the sale to the company of the Vaagsoeter estate in Norway, and appointment of the second party as the manager of the company in Norway; and whereas the second party ceased to be manager of the company as at 31st October 1878, at which date he claimed, *inter alia*, from the company the sum of £306 as advances by him on behalf of the company, and salary to that said date, with interest thereon since said date at 5 per cent per annum; and whereas parties have now arranged for the settlement of said claim, and all the other claims arising the one party against the other in respect of their said contract, and the cancelment of the said second party's appointment as manager, on the following terms:—Therefore," the company undertake to make the payments specified in the first and second heads of the agreement; and under the fourth head it is said,—"in respect of the settlement of the second party's claims in manner foresaid, both parties hereby cancel and declare to be no longer in force or binding on either of them the contract heretofore subsisting between them as embodied in the said memorandum or prospectus of 9th August 1877, and the parties mutually abandon and discharge all claims at the instance the one against the other for implement of the obligations specified in said memorandum and prospectus."

The company continued to carry on the works at Vaagsoeter under the management of Mr Olsen until 1883, when the property was sold by the company to him in 1884. Soon after that a resolution was passed to wind up voluntarily the Vaagsoeter Estate Company, Limited.

Now, these are the circumstances in which this plea of want of title arises for decision. The pursuer says that he is not at all affected by the discharge or by the subsequent transactions of the company in connection with the estate, because the ground of action is fraudulent misrepresentation and concealment, leading to the formation of the company and the agreement of the pursuer to become a shareholder. This appears to me to be an erroneous view of the matter. The formation of the company, and the taking of shares by the pursuer, were things with which the defenders had no concern. At anyrate they were things which did not in the least cause the loss from which the pursuer is said to have suffered. The pursuer's case is, in short, neither more nor less than an attempt to recoup his and his cedent's share of the loss sustained by the company through the purchase of the Vaagsoeter estate. The company purchased the property, they paid the price, and they carried on the management of the estate. They discharged the defender in the course of this management. In the end they sold the property; and the pursuer, in my view, cannot be more successful in a demand for damages on such a head than the company itself would have been. But both the company and the defender are barred by their own conduct, in keeping the property as their own and in disposing of it also as their own. They may not now repudiate the contract between them and Dunnett, and if they cannot do that it is plain they cannot insist in an action for damages founded on the assumption that the contract was one induced by fraudulent means, and one from the consequences of which they are entitled to be relieved. Neither the case of *Lumsden* nor the case of *Leslie* appears to me to be in conflict with the views which I have expressed, and indeed there is not, so far as I know, any case by which a title to sue in circumstances like those which here occurred has been put forward, or at all events sustained by the Court.

On the whole matter my opinion is that this reclaiming note ought to be refused, and the judgment of the Lord Ordinary sustained.

LORD RUTHERFURD CLARK.—Your Lordships are of opinion that fraud has not been established against the defender, and I am not disposed to differ from that conclusion; but that is to my mind quite enough for the decision of the case, and I would rather avoid giving any opinion on the somewhat intricate questions which have been raised by the parties.

THE COURT adhered, and gave the complainer full expenses.

BOYD, JAMESON, & KELLY, W.S.—J. & J. ROSS, W.S.—Agents.

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CAROLINE HALMOE AND ANOTHER (Owners of the "Immanuel"), Pursuers (Respondents).—*Balfour—C. S. Dickson.*
JOHN DENHOLM & COMPANY, Defenders (Appellants).—
D.-F. Mackintosh—Salvesen.

Ship—Foreign—Bill of lading—Proof.—In an action brought by the owners of a Danish ship against the indorsees of the bill of lading for freight on the cargo delivered to them at the port of discharge in Scotland, the defenders averred that they had not received the full cargo specified in the bill of lading granted by the master at Riga, the port of shipment, and pleaded that they were entitled to retain from freight the value of the deficiency, alleging that by Danish law (the law of the flag) the bill of lading was conclusive against the owners. After a proof, which shewed that the indorsees of the bill of lading had only agreed to pay for so much of the cargo as was delivered to them, *held* that the defenders had only become indorsees of the bill of lading to the extent of the cargo actually on board the vessel, and were not entitled to retain any part of the freight.

Opinions (*per* the Lord Justice-Clerk, Lord Young, and Lord Craighill) that the owners were only liable for the cargo actually put on board, and that by the law of Scotland, which, as the law of the *forum*, must regulate the proof, the bill of lading was not conclusive evidence as to the amount of cargo shipped.

2D DIVISION.
Sheriff of Midlothian.
I.

THIS action was brought by Caroline Halmoe and Albert Hansen Petersen, Marstal, Denmark, the owners of the Danish vessel "Immanuel," in the Sheriff Court of Linlithgowshire, against John Denholm & Company, shipbrokers, Bo'ness, to recover £42, 14s. 6d. as the balance of freight alleged to be due under a charter-party entered into at Riga on 11th September 1886 between A. H. Petersen, master and part owner, acting on behalf of the pursuers, and Gustav Schmidt & Company, merchants there. In defence Denholm & Company stated that the full cargo mentioned in the bill of lading had not been delivered, and maintained that they were entitled to retain the value of the deficiency from the freight. They averred that the master had failed, contrary to the recognised custom, to see that the proper cargo in number and dimensions had been shipped, and was thus guilty of gross negligence, for which the owners were responsible; further, that the bill was a clean bill of lading, and that "the pursuers are Danes, and the vessel 'Immanuel' belongs to a Danish port, but the charter-party and bill of lading was entered into at a Russian port with a Russian subject. The Danish law (being the law of the flag), or alternatively, the Russian law (being the *lex loci contractus*), are the laws which regulate the authority of the master to bind his owners and the responsibility of the pursuers under said bill of lading. By said laws a clean bill of lading signed by the master is conclusive evidence that the amount therein mentioned was actually shipped as in a question between the owners and an onerous indorsee. According to said laws the shipowner is responsible to such indorsee for the value of the difference between the cargo as specified in said bill of lading. whether signed by himself or his servant the shipmaster, and the cargo actually delivered. Under said law it is within the scope of the master's authority to bind his owners for the quantities mentioned in the bill of lading, where the same could have been ascertained by him during the course of shipment, and the owners are estopped as against an onerous indorsee of the bill of lading, who has taken it for a valuable consideration on the faith of the acknowledgment which it contains, from denying the truth of the statements to which the master has given credit by his signature, so far as these statements relate to matters which are or ought to be within his knowledge. The pursuers have therefore no right to

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recover freight, except subject to payment of the sum due to the defenders in respect of the foresaid short delivery." *

They pleaded;—(1) The defenders having contracted with the master as acting for and on behalf of the owners of said vessel to take delivery of a small remnant of the cargo and pay freight on correct delivery of the cargo as per bill of lading, and correct delivery not having been made, they ought to be assoilzied, with expenses. (2) The pursuers' liability under said bill of lading falls to be regulated by the laws of Denmark and Russia, and the pursuers being by said laws bound to make good to the defenders the value of the difference between the cargo as therein specified and the cargo actually delivered, the defenders' counter claim should be sustained. (3) *Separatim*, The defenders, as onerous indorsees and holders of the bill of lading signed by the master and owner, are entitled to delivery of the full quantities therein specified, or to retain from the freight the value of the short delivery.

A proof was led. The following facts were admitted or proved:—On 11th September 1886, A. H. Petersen, master and part owner of the Danish ship "Immanuel," entered into a charter-party (which was in the English language) at Riga, on behalf of the owners, with Gustav Schmidt & Company, merchants there, whereby it was agreed that the "Immanuel," then at Riga, should proceed to Poderaa Bight and there load a full cargo of pit-props, and proceed to any good and safe port in the Firth of Forth which the charterers might direct on her arrival in Leith Roads, freight to be at the rate of £1, 4s. for "each St Petersburg standard of 165 English cubic feet taken on board in frames measured longside of the ship." The "Immanuel" took in her cargo at Poderaa Bight and returned to Riga. Bills of lading were signed by the master at Riga on 20th September, setting forth that there were shipped in good order and well conditioned by the charterers "8481, say eight thousand four hundred and eighty-one pieces white wood props per specification on the other side hereof on deck, 1921 pieces being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned" at a port in the Firth of Forth, "unto order or their assignees, he or they paying freight for the said goods at the rate of 24s. per delivered standard of 165 cubic feet English piled on land, and measured in frames by the official custom-house measurers." The "Immanuel" sailed from Riga with her cargo, and she arrived in Leith Roads and was ordered to Bo'ness, where she arrived on 23d October, and where she was ready to discharge on Monday 25th October.

Prior to the arrival of the vessel at Bo'ness, J. F. Napier & Company, timber-merchants, Sunderland, who had become proprietors of the cargo, had been in communication with John Denholm & Company, shipbrokers,

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* In the course of the process the pursuers lodged a minute, in which they "admit the defenders' statement as being the law of Denmark; but the pursuers, while admitting that, deny the statement that the Danish law (being the law of the flag), or alternatively, the Russian law (being the *lex loci contractus*), have any bearing on the case, and is not applicable to decide the matter in dispute, seeing the performance of the contract under the charter-party and B/L is expressly declared therein to be in Scotland. Further, the pursuers are willing to admit that Albert Hansen Petersen, designed by them in article 1 of the condescendence as master, and which is still adhered to as being correct, yet notwithstanding that, and to save delay and obviate commission to take evidence in Denmark being granted, hereby admit, so as to meet the defenders' contention, that the said Albert Hansen Petersen is a part owner; but on the assumption that the law of the flag cannot apply, deny that the B/L, signed by the master as such, binds the ownership in any respect."

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Bo'ness, with the view of selling it to them. According to the evidence of Welsh, the cashier for Denholm & Company (which was concurred in by Mr Denholm), Denholm & Company, having had some shortage on a previous cargo shipped by the same shippers, were not willing to take the risk of shortage in delivery, and were desirous that the master should undertake it. He refused to do so, however, and ultimately, on 30th October 1886, Denholm & Company arranged to take the cargo and pay for it as delivered from the ship, and the bill of lading was indorsed to them. On the same day Denholm & Company wrote to the master intimating that they were now the "receivers of your present cargo pit-props and holders of the bill of lading, and we hereby agree to pay whatever freight and demurrage may be legally found due on correct discharge in terms of the bill of lading and charter-party." The discharge of the cargo was completed on the following Monday, 1st November. The quantity of pit-props delivered was less by 117 pieces than were specified on the back of the bill of lading, and therefore less by a number of feet than the bill of lading set forth. Measured according to standard, there were 54 standards, and not 59, and the difference in value between the cargo as per the bill of lading and that delivered was £28, 16s. 9d.

The master deponed that he had delivered at Bo'ness all the cargo he received from the shippers at Riga, and no evidence to the contrary was led; and the defenders led evidence to the effect that the custom was where a master was signing a bill of lading for a cargo which he did not know to be exactly of the amount there stated, to insert a clause stating that the numbers or measurement were not known.

The Sheriff-substitute (Melville) decerned against the defenders.

The Sheriff (Crichton) on appeal found, *inter alia*, in point of fact,—"(12) That on Saturday the 30th of October 1886 the said Albert Hansen Petersen received from the defenders the letter No. 11 of process, intimating that they were 'now the receivers of the cargo pit-props and holders of the bill of lading,' and agreeing to pay whatever freight or demurrage might be legally found due: (13) That on Monday the 1st of November 1886 the unloading of the cargo was resumed, and was finished the same day: (14) That the quantity of pit-props delivered amounted to nearly 54 standards, and that this was the whole quantity put on board at Poderaa Bight: (15) That the difference in value between the quantity of pit-props stated in the bill of lading to have been put on board and the quantity actually put on board and delivered amounts to £28, 16s. 9d.: (16) That the defenders claim to deduct this amount from the amount of freight sued for: (17) That the freight due for the cargo delivered amounts to £64, 14s. 6d., which, with £2 as a gratuity to the master, amounts to £66, 14s. 6d., but from which there falls to be deducted the sum of £1, 7s., leaving a balance of £65, 7s. 6d.: (18) That to account of this sum the pursuers have received £35, 5s. 1d.: Finds in law that the defenders are not entitled to deduct from the freight payable in respect of the goods delivered the said sum of £28, 16s. 9d.: Further, that the defenders are liable to the pursuers in the sum of £6 for demurrage: Therefore finds the defenders liable to the pursuers in the sum of £36, 2s. 5d., and decerns therefor accordingly."

The defenders appealed, and argued;—The bill of lading was a "clean" one, containing no reservation, and the master, by the law of the place to which his owners, from whom he got his authority, belonged, could bind his owners by his statement that the cargo mentioned in it was actually on board. It was of no avail to say the law of Scotland or England gave him no such authority. It was different in that respect from the law of most of northern Europe, and the law to which to appeal on such a

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question was the law of the flag. The question was—What authority had this master? That question must be answered by the law of the place of domicile of the ship, which was Denmark.[1] There was Scottish authority on the same point in an unreported portion of the case of *Meier* v. *Küchenmeister* (Lord Rutherfurd Clark, Ordinary).[2] By the Bills of Lading Act (18 and 19 Vict. cap. 111), the property of the cargo was entirely transferred to the defenders as onerous indorsees with all rights of suit against the captain. Even in Great Britain the statement of the quantity shipped was conclusive against the person signing the bill of lading.[*] Even if it were true that the defenders had only paid for fifty-four standards and not fifty-nine, the defenders would still be liable to Napier & Company for the whole.[3] But it had never been maintained on the other side in the inferior Court that the defenders were not onerous indorsees for the whole cargo which the bill of lading mentioned, and in point of fact Napier & Company had held them liable for the whole. Even if the loss had arisen only through the negligence of the captain the defenders were entitled to retain the sum in dispute against freight.

Argued for the pursuers;—It was the law of Scotland and England that the master did not make the shipowner responsible for the statements he made in the bill of lading so as to make it conclusive that the goods therein mentioned were actually put on board, and that law ought to be applied.[4] The owner could only be held liable if there were fraud to which he was a party. But in any view the evidence of the defenders themselves shewed that they purchased the bill of lading when suspicious of a short shipment.

At advising,—

LORD JUSTICE-CLERK.—This is an action raised by the owners of the schooner "Immanuel," of a port in Denmark, against John Denholm & Company, shipbrokers, Bo'ness. The claim of the pursuers is for the balance of an amount of freight due by the defenders in respect of a cargo of propwood, which it is admitted was received by the defenders under a bill of lading of which they were

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[1] Lloyd v. Guibert, 1865, L. R., 1 Q. B. 115; Gaetano and Maria, 1882, L. R., 7 P. D. 1, reversed on appeal, same vol., p. 137; The Express, L. R., 3 Adm. 597 (Sir R. Phillimore at p. 604); The Chartered Mercantile Bank of India, London, and China v. The Netherlands Steam Navigation Co., Limited, L. R., 9 Q. B. Div. 118, on appeal, L. R., 10 Q. B. Div. 521; Meyer v. Dresser, 16 C. B. (N.S.), 464 and 665, 33 L. J. (C. P.) 289; Storey's Conflict of Laws, sec. 286 (*b*); Guthrie's Savigny's Private International Law, p. 235; M'Lachlan on Shipping, 3d. edit., p. 170.

[2] March 17, 1881, 8 R. 642.

[*] The Act 18 and 19 Vict. cap. 111 (Bills of Lading Amendment Act, 1855), provides (sec. 3),—"Every bill of lading in the hands of any consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or part thereof may not have been so shipped, unless such holder of the B/L shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or of some person under whom the holder claims."

[3] Craig & Rose v. Delargy, July 15, 1879, 6 R. 1269.

[4] Grieve v. König, Jan. 23, 1880, 7 R. 521.

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the indorsees. The defence in substance is, that the defenders are entitled to withhold the sum in question against an alleged short delivery of the propwood as specified in the bill of lading. It is admitted that the quantity specified in the bill of lading was erroneous, but it is replied that all that was received by the master of the schooner was delivered to the defenders, and that although a larger amount was specified in the bill of lading, yet, in point of fact, no greater amount was delivered on board than that received by the defenders. The Sheriff and the Sheriff-substitute have both decided in favour of the claim of the pursuers, and we are now to consider the view of the learned Sheriffs on the merits of the question.

It is not denied on the part of the defenders that if the case were to be considered in the light of the law of this country the pursuers could not have been made liable for short delivery, if they carried and delivered the whole cargo received by them. But it has been maintained on the record, and is now admitted by the pursuers, that by the law of the place of the contract, which was Riga, a Russian port, and also by the law of the domicile of the owners, who are Danes, the bill of lading is conclusive evidence of the amount of cargo shipped. The pursuer says that consequently it was incompetent to receive any evidence to the contrary effect. I may remark in passing, that it seems doubtful whether this allegation of foreign law is relevantly stated, for the alternatives alleged on the record are mutually destructive of each other, and the defenders nowhere specify which of these two alternatives they hold to rule the present case. I think they were bound to specify by what foreign law the case was in their view to be decided. The alternative presented two inconsistent allegations not susceptible of being remitted to proof. Indeed, when the case came up for argument before us, we were still left in doubt whether the defenders maintained the law of Russia, being the *lex loci contractus*, or that of Denmark, the law of the domicile of the owners, to be applicable to the case. They are no doubt said to be identical, and both are admitted, and I do not need to press this view of the subject further. I therefore proceed to another aspect of it.

The Sheriff in his interlocutor has very accurately stated the facts as he has found them proved by the evidence before him, and it is therefore unnecessary that I should go over these facts in detail. But there are two facts established, as I think, by the testimony, and substantially found by the Sheriff, which are probably sufficient of themselves to enable us to dispose of this case. I think it clearly proved that the master delivered at Bo'ness the whole of the cargo which he received at Riga. On this subject, the defenders have not ventured to make any specific allegation, but the master and the crew sufficiently establish the fact. The second matter of fact which appears to me to be material is, that the defenders are not truly onerous indorsees of the bill of lading beyond the amount carried, delivered, and received.

In regard therefore to the first of those grounds on which the pursuers rest, if the allegation of foreign law is thrown out of view, there can be no question at all on the principles by which this case should be determined. Ever since the case of *Grant* v. *Norway*, in England, 10 C. B. 665, and the case of *Munck* v. *Maclean & Hope*, June 14, 1867, 5 Macph. 893, affd. March 27, 1871, 9 Macph. H. L. 38, in this country, it has been settled law that the owners of a trading vessel under a contract of affreightment cannot be made liable for a greater amount of cargo than they actually received on board. The case of *Munck* v. *Maclean & Hope* is specially valuable on this subject, and I refer in particular

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to the opinion of Lord Neaves in that case as giving effect to the elementary principles of the law of the contract of affreightment.

The general rule is thus stated by Storey in the Conflict of Laws (280)—"Where contracts are made in one country to be executed in another, where the contract is either expressly or tacitly to be performed in any other place, the general rule is in conformity to the presumed intention of the parties that the contract as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." And the contract before us is eminently an illustration of the general principle, for from its nature it generally, at least, implies that the place where the contract is made is not to be the place of performance. The case of *Munck* v. *Maclean & Hope* was simply an application of this rule. In that case a foreign vessel had been chartered in Genoa in Italy to carry a cargo of bones to Leith. Therefore the place of the contract was foreign. Munck, who was the master, and represented the owners, was a Swede, and the vessel was Swedish, while the vessel was chartered to Leith, where the contract was to be performed. When the cargo came to be delivered it was found not to be in terms of the bill of lading, which represented a larger amount than the vessel brought. Therefore, the question which arose in that case was precisely the question which we have to deal with here. Hope & Maclean, the indorsees of the bill of lading, raised their action for the deficiency of cargo against Munck. But the Court held that, as the goods had never been put on board, the contract of affreightment never attached to them at all. In his opinion in that case Lord Neaves goes back to the foundation of this principle of international law, and demonstrates very clearly that the contract of affreightment proceeds on principles entirely exclusive of any such claim. He says,—"The indorsement substitutes the indorsee for the shipper, and constitutes him the owner, so as to give him the right to bring a *rei vindicatio*, but the idea of a man being the proprietor of goods which never existed is nonsense. There cannot be a contract of affreightment without a cargo," and he ends by saying,—"On these solid principles of general law I have arrived at the same result with your Lordships. There is no basis for this action as an action on a contract of affreightment, and no relevancy in it as an action of damages." It is true that neither in this case, nor in any of the preceding cases, was it pleaded that the law by which they were to be judged was that of the home of the carrier-ship. Nor, as far as I know, was any such plea ever maintained. Even if it had been, I should have thought it unfounded without the aid of those previous decisions. I am not aware of any case in which the effect of a bill of lading has been judged of by our Courts otherwise than by the law of this country, and that upon the general principle which I have already enounced.

It is said that a bill of lading is substantially equivalent to a bill of exchange, and cannot be redargued or contradicted by evidence. But that is not in the least the nature of the document, and so Lord Neaves in the opinion already quoted from, says,—"A bill of lading is not a *literarum obligatio* like a bill of exchange. It is a shorthand charter-party, by which in a simple form the liability of the shipowner is expressed, and the owner of the goods is enabled to transfer the property."

The same law was laid down in the case of *Grieve* v. *König*, Jan. 23, 1880, 7 R. 521, and in that case also the ship was foreign.

No authority was quoted to us for the contention maintained in regard to the operation of foreign law in so far as a contract of affreightment is concerned.

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The case quoted from the Probate Court in England of "*The Gaetano and Maria*" related to a matter entirely different,—namely, by what law the powers of the master of a trading vessel to take up money on bond and hypothecate the vessel of which he was master for necessary furnishings was to be judged,—and the Court of Appeal found that his powers were to be regulated by the law of the home of the ship, which is substantially the law of the domicile of the owners, who were the debtors in the bond. This question was in fact an old controversy as regards maritime law, and it is one dealt with by Mr Storey in his work on the Conflict of Laws. He states the view which the Courts in England had been in use to maintain, and not altogether with entire favour, for, he says—"In England it would be held—at least such seems the course of the adjudications—that a master's authority to bind the ship or the owner in a foreign port would be governed by the law of the domicile of the owner, and that, consequently, the master of an English ship could not bind the owner for advances or supplies in a foreign port which were not justifiable by the English law. But it is far from certain that foreign Courts, and especially the Courts of the country where advances or supplies were furnished, would adopt the same rules if the lender or supplier had acted with good faith, and in ignorance of the want of authority in the master." But it is quite unnecessary that we should enter into or decide that question. A bottomry-bond is simply a bond for borrowed money secured upon the property of the owners, namely, the ship itself. That is plainly a contract to be adjusted on different principles from those which regulate a contract of affreightment, which is to be performed in a country presumably different both from the country of the contract and the country of the home of the ship. It does not appear to me to have any bearing whatever on the controversy we have before us. I am the more satisfied that the Court of Appeal in the case of *Gaetano and Maria* meant to confine their judgment to the master's power to bind his owners for advances borrowed on the security of the ship, that I find that a similar question came before the same tribunal in the course of the next year, 1883, but with a different result. The case is that of *The Chartered Bank of India* v. *Netherlands Steam Navigation Company*, 10 Q. B. Div. 521. That was a case of collision, and the vessel said to be in fault belonged to Dutch owners, and to a Dutch port. It was pleaded that the law of Holland must govern the obligations contained in the bill of lading, but the Court disregarded the plea, and applied the law of England. Lord Justice Brett thought that the vessel might have been considered to be English, although registered in Holland, on grounds which he states, but that "even if this is to be regarded as a Dutch ship, it seems to me that the contract is nevertheless English."

I hold therefore that the tender of the allegation of foreign law did not, and could not, exclude the ascertainment of the fact, and the competency of admitting the evidence was for the *forum* to decide. The plea founded on it was properly disregarded.

But, in the second place, it is perhaps not necessary that we should even come to that result, although for myself I do not think that the question presents any real difficulty. This bill of lading is tendered on the part of the indorsee as an onerous holder. He alleges that he holds it for value, or at least he sues upon that assumption. But in point of fact it has, I think, been clearly shewn upon the proof that this is not so. He acquired the bill of lading from Messrs Napier, of Sunderland, who were the consignees of the cargo. It seems that the master of the vessel had commenced to deliver the cargo without any security for payment of the freight, and that after he had delivered a certain portion of it he stopped delivery until he should get security for payment. At this time, according to the statement of the defenders, Denholm & Company were in negotiation with Messrs Napier, the consignees, for the acquisition of the bill of lading; and they paid to the master a certain proportion of the freight, and thereupon the remainder of the cargo was delivered. The master was quite within his right in the course which he followed, as he was under no obligation to deliver until his freight was secure. But we have it in the evidence both of the defender himself, Mr Denholm, and of Mr Welsh, who was acting for him in this negotiation, that this bill of lading was acquired from the consignee on the express condition that the indorsee should only be responsible for the cargo delivered, and should pay for that only. The evidence of Mr Welsh is quite precise on that subject. Mr Napier went to Bo'ness to see Mr Denholm, and he says by that time a portion of the cargo had been delivered. "On Saturday, the following morning," he says, "Mr Napier himself came to Bo'ness, and we arranged with him that we would take the cargo and pay for it as delivered from the ship." Mr Denholm says he is the sole partner of Denholm & Company, and that he heard the evidence given by Mr Welsh. He adds,—"I concur in all that he has said." He also makes the remark that the mistake arose from the captain not having taken precautions to ascertain what cargo he took at Riga. That this was an oversight on the part of the master there can be no question, but as regards the present defenders, they have suffered nothing by it, seeing that they are only asked to pay freight on the cargo which they actually received. And, as far as I see, they have never become responsible in any way for any further sum. The result of the defence would be to liberate them from payment of freight for the cargo they actually received—a result which I cannot sanction.

LORD YOUNG.—I am of the same opinion. The case presented by the pursuer is simple and conclusive on the admitted facts of the case, for he seeks payment of the freight of certain goods carried from Riga to Borrowstounness, and admittedly safely carried and delivered in good order to the defender, and received by him. The charges are admitted. Therefore on the admitted facts the pursuer's case is clear at the outset.

But the defender sets up a counter claim, and on that counter claim, which is for £28, we have had this litigation. I think it important at the outset that the pursuer's case is in itself unanswered. The facts on which the counter claim is pleaded as a set-off in this Scottish Court, before which the pursuer brings his case, are these: It is said that the bill of lading specified more goods to the value of £28 than were delivered to the defender, and that he is entitled by the law of Denmark to be paid the sum of £28; and this is the counter claim which the Scottish Court should, it is said, entertain as a set-off. Now, here we have, I think, a question of Scottish law. Will the Scottish law entertain this plea of set-off, founded upon the circumstances I have stated, in answer to the pursuer's liquid demand for the debt to him—for I think it is a specimen case of a liquid demand, being as it is a demand for the freight of certain goods carried on a certain voyage and delivered to the defender. I treat the question as one of the law of Scotland. I do not know whether the law of Denmark allows a set-off when such a counter claim is made. I am not sure that on the facts here I should have, as the Sheriff has done, entertained the

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set-off for consideration, or should not rather have given decree for the freight of these goods, which have been safely carried and delivered in good order according to the charges stated in the contract, and have left it to the defender to bring in an appropriate action any claim of damages for short delivery which he might have decided on bringing. But I do not need to enter upon that question, for the Sheriff allowed a proof to establish, if that could be done, the counter claim, and he has found that the bill of lading specified more goods to the extent of £28 than were delivered. There was an error in the bill of lading to that amount, and therefore if we are of opinion that the counter claim ought to be sustained, it will be so, to the extent of £28.

The case was argued as if it depended on whether the law of Scotland or that of Denmark applied. The first proposition maintained for the defenders was, that by the law of Denmark a bill of lading is conclusive evidence of the quantity of goods put on board the ship. I am prepared to say that though the law of Denmark be so, and I shall take it to be the law of Denmark that the Danish Courts will proceed as matter of fact upon the statement of the amount of goods in the bill of lading whenever a bill of lading is presented to them, I should not think that on that account this action is to be decided in the defenders' favour. But here is a ship, Danish, no doubt, but sent out by its Danish owner into the world to trade, not necessarily from Danish ports, but, as in this instance, from Riga in Russia, to a British port, and it was said at the bar, I think accurately, that the question would have been the same had the voyage been one from London to Leith, or from Aberdeen to the Firth of Forth—the contract of carriage must be read according to Danish law, because it was a Danish ship. Now, if the contract were produced in a Danish Court, that Court would, in the first place, require to get it translated. The ship sent forth into the world by its Danish owner makes this contract in the English language and in the English form to carry goods to a British port. The Courts of Denmark would be surprised, I think, if we were to ask them how to decide upon such a contract. I have no idea that because the ship sailed under the Danish flag the contract of carriage is to be construed according to the Danish law, or that any of the incidents of it are to be judged by that law. I think we must interpret this contract, written in our language and expressed in our form, for ourselves. We understand it, and it contains no technical matter of Danish law on which we require any assistance.

But what is pleaded is that it is a question of the master's power. But all that can here be said as to the master's power is that he has power to make contracts for the carriage of goods. And when he makes that contract the relation between the master and the owner is just a specimen case of general agency. No doubt when you come to such a matter as a power to borrow, it may well be that you have to refer to the law of the country under whose laws he was appointed the owner's agent. He may carry such an authority in his pocket, or it may be implied from his mere position as master, and to see if the latter is the case we might have to refer to Danish or other foreign law. But I should assume without inquiry—and I understand it to be the case—that if a Danish owner has sent his ship to trade between Russia and Britain, the master has his authority to enter into a contract of carriage. But there the question of authority in this case ends. How he exercises it depends on the particular contract he makes. I have that contract here before me in English, and need no help to construe it from the law of Denmark. Now, I think that there appears from the evidence in the case some suspicion that an attempt was made abroad to impose upon the master who was a Dane, not able to speak English—he was examined through an interpreter in this action—and who was contracting by a contract in English form, and written in English. He says he protected himself by getting it entered in the bill of lading that the cargo was to be measured by the custom-house measurers in this country, so that the bill of lading ran that the cargo was to be delivered unto order or their assigns, "he or they paying freight for the said goods at the rate of 24s., say twenty-four shillings Br. stg. per delivered standard of 165 feet Engl., piled on land and measured in frames by the official custom-house measurers, ship paying sixpence per frm. of 165 feet." I put the question to the defenders' counsel, "You claim the price of this shortcoming? Do you admit that you would have been liable to pay freight for it if it had come?" "Certainly," it was replied. Then if so, this bill of lading is not meant to be conclusive. If conclusive on the one side, it must be so on the other, and the defenders' counsel so argued the case,—"I am," he said, "to have the quantity specified in the bill of lading, and to pay freight for it." But the goods were to be measured on arrival, and the master tells us he insisted on that in order to regulate the payment of the freight. It is on that very contract that the goods are landed and measured on their arrival, and if I were told that the law of Denmark would lead to another result, and that I must give effect to it, I would not entertain a plea of set-off on a Danish law to that effect. I have great doubt if there is any. There is no suggestion here, even in the defenders' averments, that the law of Denmark is to any particular effect, but only that the bill of lading is conclusive evidence of the quantity put on board. But not surely on a contract which, as in this case, contains language to the contrary. It is the effect of that we have to consider. I have no doubt the law of Scotland determines that effect. It is really a question of evidence in any view, and laying aside the specialty which the captain says was introduced on his urgent request, and the specialty also which caused a good deal of difficulty at Bo'ness, according to the defenders' cashier, I repeat it is a question of evidence which belongs to the law of the remedy, and it was so treated, and quite properly, by the parties. For the captain when examined is asked,—"Did you deliver at Bo'ness exactly the same quantity of cargo that you received from the shippers at Riga?" and the question is objected to, and the objection being repelled, is answered in the affirmative. Now, was that a question of evidence for the Sheriff to determine, or was it incompetent to inquire into it? because by the law of Denmark the bill of lading is conclusive evidence that the captain received all which is contained in it. I think it clear it is a question of evidence, and that it is a misuse of language to call it a question of the power of the captain. It is not a question of power, but of liability on conclusive evidence of a fact—and a fact to be established by evidence competent according to the law of the place of remedy. It might conceivably have been, for example, that by the Danish law a bill of lading signed by the master was not any evidence at all of the quantity put on board, but a Scottish Court applied to for a remedy on the contract would say that the bill of lading was *prima facie* evidence of what was put on board—for that is our law. So, again, the law of the foreign country might not admit parole evidence, but ours, where the remedy is applied for, would admit it. I think, then, that the question is one of evidence, and upon the views I have stated my opinion is entirely against the defenders, and I would be prepared to decide against them.

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My opinion is also against them on the remaining point. The ship arrived on 23d October. They became indorsees of the bill of lading on the 30th, and they became so after their suspicions were aroused that the quantity specified was not on board. They say so. On record they say,—(Stat. 1) "In or about the month of October Messrs J. F. Napier & Company, timber-merchants, Sunderland, entered into negotiations with the defenders for the sale and delivery to the defenders of the cargo per the 'Immanuel' as per bill of lading, but the said negotiations were not completed when the vessel arrived at Bo'ness, and Messrs Napier & Company, or their agent, Johann Anderson, shipbroker, Bo'ness, demanded and received delivery of nearly the entire cargo, and the remainder would have been duly discharged by them within the stipulated lay-days had not the master, on the afternoon of Friday, 29th October 1886, without any previous warning or intimation, stopped delivery and refused to proceed further therewith until he received cash or a bank guarantee for the full freight. The defenders thereafter purchased and agreed to accept from the said Messrs J. F. Napier & Company that portion of the cargo delivered to and received by them, and to discharge the remainder thereof, and on the 30th October they intimated this to the master by letter delivered to him on that date, and stated that they agreed to pay whatever freight and demurrage might be legally found due to him on correct discharge in terms of bill of lading and charter-party, and they also stated what steps they proposed to expedite the delivery of the remainder of the cargo. To this letter the master made no reply, but on the forenoon of Monday, the 1st November, he called at the defenders' office and intimated his willingness to give them delivery of the remainder of the cargo on the terms specified in their said letter. The discharge of the vessel was thereupon resumed, and was completed in seven hours." (Stat. 2) "The defenders became, on or about the said 30th October 1886, the onerous indorsees of the bill of lading." Had it not been then suggested to Denholm's mind that the full quantity was not on board? His cashier, Welsh, with whom he concurs, says,—"Previous to that,"—that is, that purchase of cargo—"we had had some difficulty owing to a shortage in the delivery of the cargo of the 'Clara,' which had been shipped by the same shippers, Messrs Schmidt & Company of Riga, and we had some doubts as to the receiving of this cargo, fearing some shortage thereof. Ultimately Messrs Denholm bought the cargo, and became onerous indorsees of the bill of lading. When the ship came to Bo'ness these negotiations were continuing, and we refused to take delivery of the cargo unless the captain undertook the responsibility of any shortage. He did not undertake any responsibility, or say anything on the subject. . . . On Saturday," 30th October, "Mr Napier came to Bo'ness, and we arranged with him that we would take the cargo and pay for it as delivered from the ship. Mr Anderson was to continue and complete the discharging, and then hand over the cargo to us. I saw the captain of the 'Immanuel' that evening, and told him the arrangements we had come to. He made no objections to the arrangements. I had several conversations with the captain as to my fear of a shortage of the delivery of the cargo owing to our former experience of the same shippers."

Thus it turns out that whereas the counter claim on which the set-off depends is made on the allegation that they were deceived by the bill of lading, indorsation of which they accepted in reliance on the fact that every pound mentioned in it was on board the ship, the facts are quite the contrary of that allegation,

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and they knew everything when they became indorsees of it which they know now.

On the whole matter, dealing, I confess, with the case as one to which the law of Scotland applies, I think the Sheriff did right in refusing to sustain the counter claim. I think I could not myself have entertained it at all, but I think that having entertained it he did right in rejecting it, and giving decree against the defender. That disposes of the whole case, except a question of £6 as demurrage, but we need not consider that, as Mr Salvesen for the defenders said he would not speak to that point.

I think the appeal should be dismissed, and that the judgment should be affirmed, with expenses.

Lord Craighill.—(After stating the facts and the nature of the counter claim maintained by the defenders)—The question between the parties really is, whether or not judgment ought to be given in favour of this counter claim? The Sheriff has found in the negative, and I concur in his judgment.

Several questions of greater or less importance were raised during the discussion affecting the law of the case, and upon one of those questions in particular the defenders have ably insisted—the question, namely, whether the bill of lading must not be held to be conclusive of the quantity of cargo put on board the "Immanuel"? That is said to be the law of Denmark, which is the home of the ship in question, but it is not the law of Scotland or of England, nor is it the ordinary maritime law of Europe. But however that may be, the question thus raised does not call for decision on the present occasion. For it seems to me the defenders have no case except upon the assumption that they are the onerous holders of the bill of lading for the full quantity specified in that document, which they are not. They have received all that was put on board. They bought and they paid for only what they received. That is according to my reading of the evidence, and particularly the evidence of the defenders' cashier, Mr Welsh, and of the defender Denholm himself, who concurs with his cashier. There is certainly no evidence to the contrary. The defenders got the bill of lading only to cover the cargo actually shipped. This was their contract with the Napiers, by whom the bill of lading was indorsed to them. They have received all to which they acquired right, and they have no claim to anything beyond. The consequence is that they have suffered no loss on account of short delivery. This seems to me to be conclusive of the case. There being no damage, there is no ground for withholding payment of the balance of the freight, and for that balance, therefore, the decree given by the Sheriff must be sustained.

Though it is unnecessary as a ground of judgment, I think it right to add that the contention maintained by the defenders as to the effect of the bill of lading on the obligation of the owners and the master appears to me to be unsound. The question is one of evidence, and therefore is one of procedure. Even on the assumption that the bill of lading would be conclusive as to the quantity taken on board in a Court subject to the law and practice of Denmark—taking these to be as alleged by the defenders—there is no rule of the kind to which the defenders can appeal in Scotland. Procedure is governed by the rules of the tribunal appealed to, and a bill of lading, even when held for value, not being conclusive on the question whether the quantity acknowledged to have been received was actually put on board, this Court may receive such

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evidence as is offered or may be thought necessary for the determination of this controversy. *Tota re perspecta*, the true conclusion is that the quantity delivered at Bo'ness was the full quantity shipped, and indeed this was not really disputed at the debate.

On the whole matter my opinion is that the appeal ought to be dismissed and the judgment of the Sheriff sustained.

Lord Rutherfurd Clark.—Your Lordships are of opinion that the defenders acquired right to the cargo which was actually put on board the ship, and that they were indorsees on the bill of lading to that extent, and to that extent only. I am willing to decide the case on that footing. On the questions of international law which were argued before us, I desire to reserve my opinion.

This interlocutor was pronounced:—"Find in fact that the goods delivered by the pursuers to the defenders at Bo'ness comprised the entire cargo shipped on board the 'Immanuel' at Poderaa Bight by the charterers: Find in law that the defenders, as holders of the bill of lading, are not entitled to claim more; therefore dismiss the appeal, and affirm the judgment of the Sheriff appealed against."

J. & A. Peddie & Ivory, W.S.—Boyd, Jameson, & Kelly, W.S.—Agents.

No. 35.

Dec. 8, 1887.
Thomson v. Dundee Police Commissioners.

THOMAS THOMSON, Appellant.—*Sol.-Gen. Robertson—Kennedy.*
DUNDEE POLICE COMMISSIONERS, Respondents.—*Balfour—Macfarlane.*

Delegation—Police Commissioners—Power of committees to delegate to subcommittee—General Police and Improvement Act, 1862 (25 *and* 26 *Vict. c.* 101), *sec.* 63—*Dundee Police and Improvement Act*, 1882 (45 *and* 46 *Vict. cap. clxxxv*).—Under the powers conferred by sec. 63 of the General Police and Improvement Act, 1862, incorporated with the Dundee Police Act, 1882, the Dundee Police Commissioners appointed a works committee to superintend the building of houses, &c. This committee had no express power under the general or local Act to delegate its powers. The committee remitted certain plans to a "subcommittee" of their number. The subcommittee issued a deliverance in name of "the Commissioners" disapproving the plans. On appeal, *held* that the works committee had no power to delegate its powers, and that therefore the deliverance fell to be quashed.

1st Division.
M.

On 8th November 1886, at a meeting of the Magistrates and Town-Council of Dundee, as Commissioners of Police under the Dundee Police Act, 1882, the Commissioners appointed standing committees "for superintending and carrying into effect all matters falling under or in use to be discharged by the departments to which the said committees respectively relate, and which matters were and are hereby remitted to the said committees respectively accordingly, viz., . . . works committee, including paving and flagging of streets, and drainage; . . . and it was resolved that any two members of each of these committees shall form a quorum." The works committee consisted of twenty-four members.

On 24th October 1887 the works committee remitted the plans and sections of dwelling-houses proposed to be set up in Magdalen Yard Road by Mr Thomas Thomson, New Scone, "to the following subcommittee, with powers, viz.," (then followed the names of eight gentlemen, who were all members of the works committee)—"the convener convener, and two a quorum."

On 31st October a resolution was come to by the subcommittee, which

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bore that "the Commissioners disapproved of the said plans and sections" in certain respects.

The minute was headed,—"Minute of meeting of the subcommittee of the works committee of the Commissioners of Police for the burgh of Dundee."

This deliverance was served on Mr Thomson, who, on 14th November, appealed to the Court of Session under section 329 of the Dundee Police Act, 1882.

On the same day—14th November—the works committee met. The following is the minute of the meeting:—"The minute of meeting of this committee, of date 24th October last, and the minutes of meetings of the subcommittee of this committee, anent plans and sections of shop and dwelling-houses in Magdalen Yard Road, of dates 29th and 31st October last, were all held as read and approved of. . . . ."

Mr Thomson, in his appeal, craved the Court to quash the deliverance. The above facts were admitted. The appellant argued, as a preliminary point;—Under the Dundee Police Act the subcommittee had no power to issue a deliverance such as that complained of. The works committee had no power, either under the general or the local Act, to delegate its powers. The works committee was legally appointed under section 63 of the Police and Improvement Act, 1862, which was incorporated into the Dundee Police Act of 1882.* He did not deny that that committee could have issued the deliverance, but they might not delegate their power to a subcommittee. A delegate could not delegate his powers and duties.[1]

Argued for the respondents;—Under section 63 of the General Police Act there was a power to appoint committees. The subcommittee here appointed was only a subcommittee in name, it was really part of the works committee. If the word *sub* had been omitted there would have been nothing to shew that there was any distinction between the works committee and the subcommittee. The quorum was the same, and all the members of the subcommittee were members of the works committee. It was not, therefore, a case of delegation, but simply an arrangement for the convenience of the Police Commissioners in a burgh where so much work had to be done that committees were a necessity. [LORD PRESIDENT.—There are two cases which require attention here, *Gillespie* v. *Young*, July 20, 1861, 23 D. 1357, 33 Scot. Jur. 686, *Lord Advocate* v. *Sinclair*, Nov. 26, 1872, 11 Macph. 137, 45 Scot. Jur. 86.] The distinction between this case and those was that in the cases mentioned there was delegation of definite powers to a stranger, whereas here the subcommittee were all members of the committee. A certain number of the general committee were asked to carry out a particular class of business.

LORD PRESIDENT.—I do not think that here we have anything to do with public interest, or any general consideration of expediency. The sole question is whether the deliverance complained of is good under the Act. It bears *ex facie* that it is a deliverance of the Police Commissioners, and therefore, *ex facie*, it is a good statutory deliverance. But it is not disputed that in reality it was

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* Section 63 of the General Police Act, 1862, provides,—"The Commissioners shall have power to form committees of their number, either with directions to report to the Commissioners, or for carrying the various purposes of this Act into execution, and to delegate to such committees the powers competent to the Commissioners under this Act, in whole or in part, with regard to the subject which may be remitted, to name the convener, and to fix the number of such committees who shall form a quorum."

[1] Thomas v. Elgin, July 4, 1856, 18 D. 1204, 28 Scot. Jur. 590.

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made not by the Commissioners nor by the committee appointed by them, but by a subcommittee of that committee. The simple question then is, had the committee power to delegate? If they had not then the deliverance is bad, if they had then it is good. What then are the powers of delegation in naming committees given to the Commissioners? That is to be found in section 63 of the General Police Act, which is incorporated into the Dundee Police Act. That section gives the Commissioners a very clear power to appoint committees, but it does not import that each committee so appointed can subcommit to a certain number of their own body to do anything in the name of the Commissioners or of the committee. So to decide would be to disregard the rule of the common law, which is perfectly fixed—*delegatus non potest delegare.* That is the ground on which I hold that this deliverance is altogether unstatutory and null, and that therefore it must be quashed.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

THE COURT quashed the deliverance complained of.

GREGOR MACGREGOR, S.S.C.—J. SMITH CLARK, S.S.C.—Agents.

No. 36.

Dec. 9, 1887.
Caldwell v. Glass.

DAVID CALDWELL (Inspector of Ayr), Pursuer.—*Orr.*
ALEXANDER STEWART GLASS (Inspector of Dalmellington), Defender (Appellant).—*J. G. Smith.*
JOHN ANDERSON (Inspector of Maybole), Defender (Respondent).—*J. G. Smith.*
JAMES DUNLOP (Inspector of Stewarton), Defender (Respondent).—*J. A. Reid—James Clark.*

Poor—Residential settlement—Retention of settlement.—A husband died within four years after removing with his family from the parish of M, in which he had a residential settlement. His widow became chargeable in another parish sometime after the four years of absence from M had expired. *Held* that the derivative settlement in M which accrued to the widow on her husband's death had not been retained after the expiration of four years and a day from the time of removing from M.

Allan v. *Higgins*, Dec. 23, 1864, 3 Macph. 309, *followed.*

2D DIVISION.
M.

WILLIAM ARTHUR, house-painter, acquired a residential settlement in the parish of Maybole. Shortly before Whitsunday 1881 he removed to work in Ayr, but his wife and family remained in Maybole till Whitsunday 1881, when he took them to live with him in Wallacetown, in the parish of Ayr.

On 23d March 1885, when still residing in Wallacetown, in the parish of Ayr, he was killed by an accidental fall when engaged at his work. He left a widow and young family.

In September 1885 his widow became a proper object of relief, and was relieved by the parish of Ayr.

An action of relief was raised in December 1886 in the Sheriff Court of Ayrshire, at Ayr, by the parish of Ayr against the parish of Maybole, the parish of Dalmellington, which was the parish of Arthur's birth, and the parish of Stewarton, which was the parish of his widow's birth.

The Sheriff-substitute (Orr Paterson) held that Mrs Arthur became a proper object of relief in April 1885, when she received a sum of relief from the parish of St Quivox, and that that date being less than four years from the time of the removal from Maybole, where her husband had a residential settlement, her settlement derived from him had not been lost by absence from that parish at the time when she became a proper object of relief. He therefore found Maybole liable.

The Sheriff (Brand) on appeal held that Mrs Arthur was not a proper object of relief till more than four years had elapsed from Whitsunday 1881, and that the parish liable to relieve Ayr was Dalmellington, the parish of the birth of Arthur himself.

The parish of Dalmellington appealed.

At the debate on the appeal it was agreed by the parties that neither the judgment of the Sheriff-substitute nor that of the Sheriff could be maintained, the former having found that Mrs Arthur was a proper object of relief in April 1885, whereas it was admitted that she was not a proper object of relief till September 1885, after the expiration of four years from Whitsunday 1881, when the Arthurs left Maybole, while the latter had found Dalmellington liable as the parish of the husband's birth, a decision which could not be supported in law. The question argued, therefore, it being agreed that Dalmellington was not liable, was whether Maybole or Stewarton was liable, the latter being the parish of Mrs Arthur's birth.

Argued for Maybole;—The husband had when he died been absent for nearly four years from Maybole, and the widow had never returned thither. More than four years had elapsed from Whitsunday 1881, during which the family had been away from that parish, and there could therefore never be residence for one year of the five which followed Whitsunday 1881. These simple facts gave occasion for the application of the 76th section of the Poor-Law Act, 1845.* Further, it was permissible to add the wife's absence to the husband's, and that question was ruled by authority.[1] It was said to be impossible to do this, but the question was, Had the pauper been residing one year out of the five in the parish of Maybole? To argue that adding periods of presence was analogous to adding periods of absence was fallacious. A lunatic could lose a settlement by absence, though he could not gain one by residence. So the fact of public begging would prevent a man acquiring a settlement in the parish where it was practised, but a man would lose an industrial settlement by absence though he was supporting himself by public begging in another parish. A wife, indeed, took her husband's residential settlement as a derivative settlement, but she took it as he had it, and did not, it might be at the end of almost four years' absence on his part, start at his death to run another period of four years for herself.

Argued for Stewarton;—The wife's settlement derived from her husband was her own, and could only be lost by her own absence for more than four years after its acquisition from the parish, *i.e.*, from Maybole. A new course of five years had to run from the time her person ceased to be merged in her husband's, and the settlement became her own. Two absences of a diverse kind, a husband's and wife's, could not be added to destroy, just as two presences could not be added to establish a settlement.[2] *Kirkwood's* case was later than *Allan* v. *Higgins*, and decided that it was not permissible to add two presences together. There were weighty opinions

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* The Act 8 and 9 Vict. cap. 83 (sec. 76), provides,—" . . . No person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement if during any subsequent period of five years he shall not have resided in such parish or combination continuously for at least one year."

[1] Allan v. Higgins, Dec. 23, 1864, 3 Macph. 309, 37 Scot. Jur. 149.

[2] Kirkwood v. Wylie, Jan. 27, 1865, 3 Macph. 398, 37 Scot. Jur. 196.

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to the same effect in *Hay* v. *Carse*,[1] and the same doctrine was to be found in a very recent case.[2] If, then, a new course of five years ran from the widow's obtaining a settlement from her husband at his death, Maybole would be liable.

Lord Young.—The facts in this case are that the pauper, who is a widow, became a pauper in September 1885. She was then a widow, her husband having been killed by an accident in the preceding March. She and he had resided at Maybole for a period long enough for him to obtain an industrial settlement in that parish, but they left Maybole at Whitsunday 1881, the husband having left Maybole shortly before that, but the wife and children having remained till the Whitsunday.

In March 1885, then, when the husband met with the accident, the period of four years had not elapsed from the time of leaving Maybole, though it had nearly run. It was quite run out in September, when the widow became a pauper. On these facts the question is whether the parish of her settlement at the time she became chargeable in September 1885 is Maybole, where her husband had an industrial settlement, or Stewarton, which is her own birth parish. The judgments of the Sheriffs are opposite, that of the Sheriff-substitute deciding that the parish of settlement is Maybolé, but he came to that conclusion on the ground that the widow became a proper object of relief and received relief within four years from the date of her husband's removal from Maybole, a ground of judgment which the parties are agreed is founded on an erroneous view of a matter of fact, though if the fact were so it would be irresistible.

Again, the Sheriff is of opinion that Dalmellington, the parish of the husband's birth settlement, is liable, but the parties agree that this judgment also cannot be maintained.

The question, then, is whether Maybole is liable, as the Sheriff-substitute held,—but on another ground altogether than he took in his judgment. Maybole was the settlement of the husband at his death, and it accrued to the widow and children when he died. But by September 1885, according to the one party, the provision of the Act of Parliament, which states in what manner a settlement may be lost, had come into effect, because by that time there had been absence by the whole family for more than four years complete—absence without residence in the parish for any one year, and therefore, it is contended, the residential settlement will not survive. In September 1885 it had become impossible that within five years from Whitsunday 1881 there would be one year's residence in Maybole. It is, it is said, destructive of residence in Maybole if you are to take into account the absence of the wife and family after the death of the husband, who died with a residential settlement there.

Now, I think that what the statute contemplated was this. A settlement once acquired by residence shall continue unless the absence has lasted for more than a certain period, but it will be long enough absence to destroy it if there has not been presence for at least one year out of a period of five. After a period of more than four years without any residence it is settled by decision that the settlement is gone, because there can never be then continuous residence for one year of the five. Now, as to joining the continued absence of the widow after the husband died to his own previous absence, I think that that ought to be allowed on principle, and I think that that principle was recognised in the case of *Allan* v. *Higgins*, though, indeed, it is difficult to apply authorities where there is such a charming variety of circumstances, and of judicial opinion about them. I think, and I did not mean to suggest anything to the contrary in the case of *Jackson*, which was cited to us, that if you have the absence by the whole family for the five years without residence for one, that will destroy the settlement though that was the settlement with which the husband died. I do not think it reasonable to say that a new period of five years must begin to run upon his death, though that be on the eve of the expiry of the four years. The fact of absence is the matter to be considered.

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[1] Hay v. Carse, Feb. 24, 1860, 22 D. 872 (at p. 879).

[2] Jackson v. Ireland, Jan. 29, 1879, 6 R. 605.

I therefore think that the husband's residential settlement in Maybole was lost by the absence, and that the settlement of the widow when she became chargeable was in the parish of Stewarton.

LORD CRAIGHILL.—The controversy is now between Maybole, the parish of the husband's residential settlement, and Stewarton, that of the widow's birth. If the residential settlement which the widow derived from her husband was lost by her continued absence from Maybole, the decision must admittedly be against Stewarton. There is no doubt he had a settlement in Maybole, and that she had it at his death. But such a settlement is kept up only on condition of residence for at least one year out of any period of five. I think that the fulfilment of that condition is the only mode of keeping it up. Here the period had nearly run at the husband's death. Two months or so remained available to begin to keep it up, but that depended on whether the widow should return to Maybole before the period of four years had run. She did not return, and I think that the rule of the statute that "no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement if during any subsequent period of five years he shall not have resided in said parish or combination continuously for at least one year," applies to the case. I should have been very sorry to decide in any other way, having regard to the fact that there is authority to the same effect, as the last thing to be desired in a question of poor-law relief is that there should be conflict of decision.

LORD RUTHERFURD CLARK.—I concur. I think the case is ruled by that of *Allan* v. *Higgins*, and that it is very advisable that what has been decided should be adhered to.

LORD JUSTICE-CLERK.—If this were a question of material patrimonial interest I should have been disposed to take time for consideration, as my impression is opposite to the opinions of your Lordships. I think there is strong authority in the opinions of the Judges in previous cases for a different view. But these cases, I must admit, I always hear with some impatience. It is immaterial to the pauper,—some parish must relieve him. Nor is it of consequence to the parochial boards, for the decision we pronounce in favour of a parish to-day may be unfavourable to it in another case to-morrow. But I only say that to excuse myself for not going into the question at length. The rules on the subject are artificial, and the great matter is to have the rule fixed. The unfortunate thing is that it cannot be fixed without a somewhat operose procedure.

THE interlocutor was pronounced:—"Find in fact (1) that the deceased William Arthur removed from the parish of Maybole at

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Whitsunday 1881, and that he and his wife and family had then a residential settlement in that parish; (2) that neither he nor any of his family ever thereafter resided in said parish of Maybole, and that he died on 23d March 1885; (3) that on 21st September in that year, Jane Arthur, his widow, became chargeable as a pauper, being a proper object of parochial relief, and obtained relief from the parish of Ayr; and (4) that the said Jane Arthur was born in the parish of Stewarton: Find in law that her settlement by residence in the parish of Maybole was lost by absence from that parish for more than four years, and that the defender the Inspector of Poor for the parish of Stewarton, the parish of her birth, is liable in repetition to the pursuer, the Inspector of Poor for the parish of Ayr, of the advances sued for, and in relief as craved: Therefore sustain the appeal: Recall the interlocutor of the Sheriff-substitute of 28th March 1887, and the interlocutor of the Sheriff of 4th July 1887: Ordain the defender James Dunlop, Inspector of Poor for the parish of Stewarton, to make payment to the pursuer of the sum of £16, 12s. 7d. sterling, with interest thereon at the rate of £5 per centum per annum, from the date of citation to this action till paid, and to free and relieve the pursuer in all time coming, of all alimentary or other advances made, or which may hereafter be made, for behoof of or on account of the said Jane Arthur and the children of her marriage with the said William Arthur, so long as they or any of them require parochial relief, and so long as their parochial settlement shall continue to be in the parish of Stewarton, with interest on such advances at the rate foresaid, from the dates thereof, till payment: Assoilzies the defenders Alexander Stewart Glass, Inspector of Poor for the parish of Dalmellington, and John Anderson, Inspector of Poor for the parish of Maybole, from the conclusions of the action: Find the defender James Dunlop, as Inspector of Poor for the parish of Stewarton, liable to the pursuer and to the other defenders in expenses in the inferior Court, and in this Court: Remit," &c.

PHILIP, LAING, & TRAIL, S.S.C.—CARMENT, WEDDERBURN, & WATSON, W.S.—
STURROCK & GRAHAM, W.S.—Agents.

No. 37.

W. C. MUIR, Petitioner.—*Sol.-Gen. Robertson—Omond.*
MUIR'S TRUSTEES, Respondents.—*Jameson.*

Dec. 10, 1887.
Muir v. Muir's Trustees.

Trust—Nobile officium—Allowances to minor children.—A testator left a heritable estate, the rental of which was £900 a-year, settled upon his only son in liferent and his children in fee. Of the income of the personal estate, which was £4600, the son received annually about £2300 as an alimentary payment for the support of himself, his wife, and children, the remaining £2300 of income being accumulated by the trustees for the children. In a petition at the son's instance, asking that the trustees should be ordained to contribute out of the free annual income for the suitable education and maintenance of the children (of whom there were seven under nineteen years of age), the Court *authorised* the trustees to pay a sum equal to one-half of the cost of such education in each year, including board when from home, and travelling expenses, the payment by the trustees not to exceed £500 in any one year.

1ST DIVISION.
B.

AN agreement was entered into in 1881 between Mr Muir and the trustees under his father's settlement, under which it was, *inter alia,* arranged (1) that Mr Muir, who was an only child, should make up a title to a landed estate which belonged to his father, the rental of which was about £900, and convey it in accordance with the terms of his father's trust-disposition and settlement of October 1877, *i.e.*, to himself in liferent and his sons in fee successively; (2) that the trustees should pay Mr Muir yearly one-half of the nett revenue of the trust-funds as from 30th May 1880, and that the remainder should be accumulated for his children in accordance with the provisions of his father's trust-disposition.

The amount of the personal estate held by the trustees, as at 30th May 1887, was £139,600, besides accumulations of interest since the truster's death amounting to £21,000.

Mr Muir now presented this petition to the Court asking that the trustees should be ordained to make payment to him, for the suitable maintenance and education of his children (of whom there were seven under nineteen years of age when the petition was heard, viz., two sons and five daughters), out of the free annual income of the estate (other than that portion which was already payable to him), of a sum of £500, to be applied for each of his children in certain stated proportions.

He alleged that his income, both from the proceeds of the trust-estate and from the heritable property, had been seriously diminished; that, on the other hand, his family had been increasing and growing up, and that the expenses connected with their education had become a serious item in his expenditure; and that, accordingly, he found it necessary, in order to maintain and educate them in a manner suitable to their future prospects, to have at his disposal a larger income than he could at present command. He further stated how they were being educated, and what he purposed to do in that way in the future.

The nett income of the trust-estate for the year ending 30th May 1887 was £4623, 12s. 4d., of which there was paid to the petitioner £2311, 16s. 2d., the trustees thus accumulating income on behalf of the children to the extent of above £2300 a-year.

The trustees in answer stated that by the agreement of 1881 it was provided that the payment therein secured to the petitioner should be "strictly alimentary for the support of himself, his wife, and children, until such time as their own provisions, under the settlement or otherwise, vest and become payable," and that the question of the education of the petitioner's children was considered as an element to be taken into account in framing the agreement. They further said that they were willing, if so authorised, to meet the petitioner's wishes to the extent of defraying one-half of the expense of educating the children.

LORD PRESIDENT.—In a case of this kind the first consideration is what is most for the benefit of the children, and I look to see what is the entire income arising from the trust-estate and what part of it is enjoyed by Mr Muir. The nett income arising from the estate is £4623, 12s. 4d., and of this Mr Muir is receiving £2300, while the trustees have been accumulating yearly for the children the balance of £2300, amounting now to upwards of £21,000.

The first question for consideration is, whether it is for the advantage of the children that part of this accumulated income should be applied to the purposes of their education; but in order to determine that question we must also keep in view that Mr Muir is in receipt of a very good income, and therefore I should not be disposed to do anything which would relieve him of the natural burden which falls upon him of educating his own children. But although Mr Muir has a handsome income, still, as it is desirable that the children should receive a superior education, the question is, whether it is fair to lay upon him the whole of the burden while the surplus income is being accumulated for the children in the long run. The proposition of the trustees seems to me to be a fair and just one, that they should provide one half of the sum required and Mr Muir the

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other half. Whether, in that view, the total cost of the children's education is not stated at too low a figure may be a matter worthy of consideration, but, in that view, I am of opinion that our judgment should be that Mr Muir and the trustees should each contribute one-half of whatever sum may be agreed on as the cost of giving the children a first-rate education.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

> THE COURT pronounced this interlocutor:—"Authorise and ordain the respondents . . . to make payment to the petitioner at the 31st January and 31st July of each year of an amount equal to one-half of the sum expended by the petitioner in each year on the education of his children, whether mentioned in the petition or not, including board when from home, and travelling expenses, as the same shall be vouched to the satisfaction of the said trustees, said amount payable by the said trustees not to exceed the sum of £500 in any one year, beginning the first half year's payment of said amount at 31st January 1888 for the half year preceding that date, and the next half year's payment at 31st July 1888, and so forth half-yearly thereafter during the education of the said children, and until they become respectively entitled to their shares of the said trust-estate: Authorise and direct the said trustees to make said payment and also payment of the expenses incurred by the petitioner and respondents in this application, as the same may be taxed by the Auditor of Court, as between agent and client, out of the share of the revenue of the said trust-estate pertaining to the children of the petitioner, and to charge the same as a general payment against the said income account: Declaring that the present arrangement shall take effect till the further orders of the Court, and decern."

MURRAY, BEITH, & MURRAY, W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.

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ELIZABETH FORSYTH AND OTHERS, Pursuers (Reclaimers).—*C. S. Dickson —J. Wilson.*

WILLIAM TURNBULL AND OTHERS, Defenders (Respondents).—*Jameson —Macfarlane.*

Succession—Words importing bequest of heritage—"Means and Effects"—Titles to Lands Act, 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 20.—A testator left a holograph testamentary writing in these terms:—"In order to prevent all dispute after my death regarding the disposal of my property, I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession, or belonging to me at the time of my decease, to be absolutely at her disposal." At the date of the writing the testator had no heritable property but he subsequently acquired heritage. *Held* (*aff.* judgment of Lord Lee, *diss.* Lord Rutherfurd Clark) that the will carried the heritage.

2D DIVISION.
Lord Lee.
B.

PETER CAMERON, dentist, Barony Street, Edinburgh, died on 26th November 1882. He left a widow, but no children. He left a holograph writing, dated 10th April 1871, in these terms:—"In order to prevent all dispute after my death regarding the disposal of my property, I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession, or belonging to me at the time of my decease, to be absolutely at her disposal." At the date of the will he had no heritable property.

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In 1879, he had acquired from the Magistrates of Kinghorn a piece of ground there, by feu-charter taken to himself "and his heirs and successors whomsoever." On this piece of ground he had built a house. Mrs Cameron continued to occupy the house till her death in September 1886. She died intestate.

In June 1887, Mrs Elizabeth Forsyth and others, the heirs-at-law of Mr Cameron, who had made up a title by general service to the subjects at Kinghorn, and who maintained that Mr Cameron's holograph settlement did not carry heritage, raised an action against William Turnbull and others, the heirs-at-law of Mrs Cameron, for declarator that they had no right or title to the subjects at Kinghorn, and to have them removed therefrom.

The defenders pleaded;—(1) The subjects in question having been carried by the holograph will of the said Peter Cameron to his widow, and having become her property, and she having died intestate, the defenders are now entitled thereto as her heirs-at-law.

The Lord Ordinary (Lee) assoilzied the defenders.*

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* "OPINION.—The pursuers are heirs-at-law of the late Peter Cameron, who died on 26th November 1882. They seek by this action to have it found and declared that the defenders (the heirs-at-law of Peter Cameron's widow) have no right to a house in Kinghorn which belonged to him at the time of his death, and ask for decree of removing against them, in order that the pursuers may enter thereto and possess the subjects as their own property.

"As the title of the pursuers is established by the general service, No. 7 of process, and the notarial instrument, No. 9, the question is, whether the defence is established, viz., that the subjects were carried by the holograph will of Peter Cameron? The terms of the will are not in dispute, but it is contended by the pursuers that it has no application to lands, and did not give to the widow a right to the subjects.

"The merits of the defence thus depend on the terms of the will, as affected by the 20th section of the Titles to Land Consolidation Act, 1868.

"The will (dated 10th April 1871) is as follows:"—(Quotes.)

"At the date of the will Peter Cameron was possessed of no right to lands, but in 1879 he acquired the piece of ground in dispute, and built a house upon it. The feu-right was taken to 'the said Peter Cameron and his heirs and successors whomsoever.' He completed no feudal title to it, and his widow also died without making up a title, but the subjects were possessed by him, and afterwards by her, as upon a personal right; and no plea has been stated upon the absence of a completed title as affecting the question.

"If the will be applicable and intended to apply to lands, I think that the feu-charter cannot be said to contain a destination which evacuated, as to this subject, Peter Cameron's testamentary disposition. A man who takes a feu-right in favour of himself takes it also, by the operation of law, in favour of his heirs and successors whomsoever; and the fact that this is expressed in the deed creates, in my opinion, no presumption of an intention to exclude the application of a general settlement to the subject of such a right. The case of *Don* v. *Webster* (Nov. 8, 1876, 4 R. 101), referred to by the Lord Justice-Clerk in dealing with the Leith Street subjects in *Farquharson* v. *Farquharson* (10 R. 1253), was decided as a case of special destination. A destination to heirs whomsoever, it is well settled, is no destination at all.

"The question whether the will purports to convey lands, and contains with reference to such lands any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor or grantee a right to claim and receive the same, is a question of intention; but I think it is acknowledged in all the cases which have occurred that it is not a question to be decided upon conjecture. If, therefore, the only words used had been those bequeathing the whole of the testator's 'means and effects,' I should have been disposed to hold this case ruled by the cases of *Pitcairn* (8 M. 604)

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The pursuers reclaimed, and argued;—The object of the Titles to Lands Act, 1868, sec. 20,* was to enable persons to dispose of heritage by will without using technical language, but it was not intended to give a wider meaning to words which, in their natural sense, applied only to moveables. There must be words clearly specifying what was intended to be

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and *Edmond* (11 M. 348). But these are not the only words, and I think that it is settled by the decisions that if it clearly appears from the context that the testator intended to dispose of his whole property, whether heritable or moveable, the expression 'means and effects' may be sufficient to include lands. In the case of *Urquhart* v. *Dewar* (6 R. 1026) the Lord President expressed his opinion that the question will always be, 'does the deed contain a "word or words," having reference to lands sufficient to express the intention of the testator to pass his heritage by his will? If there be such, either when taken by themselves or in connection with the rest of the will, then I think the lands will be effectually conveyed. . . . I only farther desire to add, by way of caution, that of course words conveying moveables are not sufficient to convey heritable property, unless the wish is clearly implied in the language. They must be words importing that heritable property is meant to be conveyed as well as moveable, or that the whole estate is to be conveyed without distinguishing between the two kinds.' The opinions of the other Judges equally imply that the intention may be gathered either from the words of description themselves, or from the rest of the will.

"The case of *M'Leod's Trustees* v. *M'Luckie* (10 R. 1056) was decided on the same principles. The testator there nominated a 'sole executor and trustee,' and after certain bequests of moveables, directed him 'to sell the remainder of my property, wherever situated, and divide it.' The opinions of the Judges of the Second Division in the cases of *M'Leod's Trustees* (2 R. 481) and of *Aim's Trustee* (8 R. 294) are clearly to the same effect.

"So standing the authorities, the question is, whether the preamble of this will, 'In order to prevent all dispute after my death regarding the disposal of my property,' is not a sufficiently clear expression of the testator's intention to dispose of his whole estate without distinction? My opinion is that the words 'means and estate,' when read in connection with the rest of the will, are intended to be applicable to the whole property belonging to the testator at the time of his death, and that therefore, under the 20th clause of the Act of 1868, the will is equivalent to a general disposition of the subject in question, and created in favour of the testator's widow an obligation upon the heirs and successors of the grantor to make up titles and to convey the same. The testator having been survived by his wife, this obligation is enforceable by the defenders as her successors.

"I therefore sustain the defences and assoilzie the defenders."

* Section 20 of the Titles to Lands Act, 1868, 31 and 32 Vict. c. 101, provides "that . . . no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands . . . which shall be granted by any person after the commencement of this Act shall be held to be invalid as a settlement of the lands to which such deed or writing applies on the ground that the granter has not used, with reference to such lands, the word 'dispone,' or other word or words importing a conveyance *de præsenti;* and where a testamentary deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain, with reference to such lands, any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands within the meaning of the 19th section hereof by the granter of such deed or writing in favour of the grantee thereof."

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conveyed. "Means and effects" did not in common use include lands or houses, and "effects" had been held not to be capable of meaning heritage.[1] It was proposed on the other side to read means and effects in the dispositive part of the will as equivalent to property in the narrative. But that was to control the dispositive words by the narrative, which was not permissible. The testator made the will when all he had was moveable, which accounted for the words he used, and it was reasonable to suppose that he would have made another writing applicable to heritage if he wished to regulate his heritable succession by will. Or it might well be he had intended to make a new will if he ever had any heritage, but had not done it.

Argued for defenders;—It was a question of the testator's intention that required to be decided, and his intention clearly was to give all he had to one person—his wife. "Means" meant means of living, and was a fit word to apply to heritage. The testator set forth that he desired to prevent disputes as to his property by so disposing of it. That purpose applied to all he had, and "means and effects" were meant to be synonymous with property. It was the deed of a man without professional aid, and not professing to use technical language.

At advising,—

LORD JUSTICE-CLERK.—In this case the subject of discussion is a *mortis causa* settlement, written and executed by a non-professional man without the intervention of a law-agent. He does not use, nor intend to use, nor profess to use, technical language in a technical sense. On the contrary, it is plain from the facts that he was not assuming to use them, but was writing as a man desiring without technical words to express the objects which he had in view. The only question is, whether it appears on the face of the instrument what the object was which the maker of it had in view,—for to that we must give effect,—and for my own part, I must say I have not been able, notwithstanding the argument addressed to us, to entertain any doubt as to what he did intend. The will is in favour of the man's wife, and no one else. He says his object is to prevent disputes after his death with regard to the disposition of his "property." I think there is no ambiguity there; and no one reading these words would doubt that he meant to make a settlement of all his property, both heritable and moveable. But he then goes on to express, in the words of bequest, the subject-matter of settlement; he says,—"I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession or belonging to me at the time of my decease." He disposes of his "property" by leaving his whole means and effects to his wife. That that was meant to cover everything I see no reason to doubt. It is said indeed that in the former condition of our law it was necessary to use technical language in conveying land, and that in that state of the law "means and effects" was understood to apply to moveables and not to heritage, and the question is whether they retain that meaning still contrary to their popular meaning. In some judicial opinions that have been quoted to us more weight has, I think, been given to the mere technical meaning of these words than I myself would give. I think it is impossible in a

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[1] Edmond v. Edmond, Jan. 30, 1873, 11 Macph. 348, 45 Scot. Jur. 236; Pitcairn v. Pitcairn, Feb. 25, 1870, 8 Macph. 604, 42 Scot. Jur. 306; and see M'Leod's Trustees v. M'Luckie, June 28, 1883, 10 R. 1056; Urquhart v. Dewar, June 13, 1879, 6 R. 1026 (Lord Shand); Aim's Trustees v. Aim, Dec. 15, 1880, 8 R. 294; Farquharson v. Farquharson, July 19, 1883, 10 R. 1253; Ogg's Curator v. Corner, June 26, 1885, 12 R. 1162; Brown, 1770, M. 5440.

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question of the intention of this man to restrict the meaning of a settlement which he intended to be universal because in some former cases in settlements prepared, not by testators themselves, but by men of business—I think that was the fact with regard to all these cases—the words "means and effects" have been restricted in their application to personal property. They were not, I am convinced, intended to be so restricted in this man's will. While, therefore, I do not doubt there is room for difference of opinion, I have, on the whole, no doubt, for my own part, that the deceased wished to include any heritage of which he might die possessed.

LORD YOUNG.—I think this is a clear case, but for the decisions and *dicta* to which your Lordship has alluded. But even having regard to them I concur with your Lordship, and hesitate to add anything, since almost everything that can be said in a case of this kind must of necessity be to some extent commonplace. We are here construing a will, and it is a commonplace remark that a will must be construed according to the intention of the maker of it, as we find it in the will itself. But that all comes to this, that you must construe it according to the meaning it brings home to your mind, and unfortunately an instrument may convey different meanings to different minds, and I do not think the Act of 1868 gives us aid in this matter. But for it the instrument before us would indeed be impotent with respect to heritage, for before it was passed the law was that words of conveyance and *de præsenti* conveyance were necessary, and that a will was ineffectual to convey heritage. A will is not a conveyance, but only an expression of the testator's intention as to what his executor is to do after his decease. But here the question is not as to the language sufficient to convey property, but as to the sufficiency of the description, as to what was included in the description the testator gave. The Act of 1868 states nothing about the language to be used to describe property in a will, but merely that if it is described so as to let the Court know what the testator intended, then land shall pass under it as well as moveables. Now, but for the decisions, I should have said that there was not, and never was, any technical language which required to be used to describe property, though technical language was formerly required to convey it. I should have said that the ordinary rules of language were the only rules for describing property. But some of these decisions go to this, that the words "means and effects" do not include lands, though they do include bonds and dispositions in security, and the like. Now, there is no statute for that, and if there is any rule of the common law to that effect I confess I do not know where it is to be found, except in these decisions themselves, which, I remark, were not unanimous. But these decisions excite difficulty, no doubt. I should say there was more safety, and if I may so express myself, more good sense in making a rule that "means and effects" do not include land, before 1868, than in doing so after it, because then lands and houses required in order to convey them words of *de præsenti* conveyance. But we are now dealing with the matter in a different spirit, because it is now enacted that if a man expresses his intentions with sufficient distinctness—even if he does so on a sheet of note-paper—that intention will have effect on lands as well as on moveables. I sympathise entirely with your Lordship's observation as to the consideration to be given to the fact that the person who made this will was not acquainted with technical language, and that it was to proclaim that such language was unnecessary that the Act was passed. Now, applying to the present case the loose and general rules I have stated, I draw the conclusion that the maker of this will intended all his property to pass under it. It is not a conveyance; the word "bequeath" does not convey; it is only a direction to an executor. This direction is to have effect as to all the man's "means and effects." I think that expression includes house property, unless there is something to signify the contrary, and the words of this will do not signify anything to the contrary, but lead me to the conclusion that they were meant to include all he had. I therefore come to the conclusion that the deceased used "means and effects" in the later lines of his will in the sense in which he used "property" in the earlier lines of it, and I give the will the same construction as if those two expressions had been transposed.

On these grounds I agree with your Lordship and with the Lord Ordinary.

LORD CRAIGHILL.—I concur. The case is one of some nicety, but I have felt no great difficulty in regard to it. Had the only words been "means and effects," there would have been room for doubt, for in their ordinary meaning those words express moveable property and not heritage, but if we find that the testator intended to include house property a wider meaning will be given to them. The case differs from most of those cited to us in the testator using the word "property" in the opening sentence, in which he says his purpose is "to prevent all dispute after my death in regard to the disposal of my property." It is conceded that "property" will include land as well as moveables, and there is, I think, no escape from holding that he did mean to include his heritage. It would be strange if his purpose being to prevent disputes after his death he intended only to prevent them as to his moveable estate. He meant to prevent them as to heritage also, if he left any. Therefore, the question being what he meant by "means and effects," I think we must read that expression by the light of the word "property," and hold that he meant to include lands under his means and effects. If so, I think the Act of 1868 by its 20th section removes any difficulty. Accordingly we find that if words are used as applicable to lands which in the ordinary meaning of language apply to moveables, there is nothing to prevent the will affecting land. I think that is the case with the will of this testator, and I therefore concur with your Lordship and Lord Young.

LORD RUTHERFURD CLARK.—The deed before us is a will, and before 1868 a man could not dispose of lands without words of present conveyance. But a change was made by that Act, and it was provided that no testamentary deed "purporting" to convey or bequeath land should be void, for certain reasons specified in the Act. The question is whether this will purports to convey and bequeath house property. If it does it will be effectual, if it does not it will be ineffectual to convey the house property. It does not use law language, but bequeaths "the whole means and effects in my possession belonging to me at the time of my decease," and the question is, if "means and effects" include lands. I am sorry to say I have great doubt on the question. In some decisions which were referred to "means and effects" were held not to comprehend lands. I have therefore great difficulty in saying that we are to read a will disposing of "means and effects" as purporting to convey lands under that denomination, and unless I go against these previous decisions I think I must hold this will ineffectual for that purpose. That is the opinion I have formed, and but for

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your Lordships' opinions I should not, I think, have had much hesitation as to it.

THE COURT adhered.

L. M'INTOSH, S.S.C.—SCOTT MONCRIEFF & TRAIL, W.S.—Agents.

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Dec. 16, 1887.
Fraser v.
Hood.

JAMES FRASER, Pursuer (Appellant).—*Fleming.*
JOHN HOOD, Defender (Respondent).—*James Reid.*

Reparation—Master and Servant—Known danger—Employers Liability Act, 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 1—"*Plant*"—*Horse.*—A man who had been in the employment of a carting contractor as carter for several years, was afterwards employed by him as stableman. Some months thereafter he was ordered by his master to tie up a horse which had got loose in its stall. While doing so he was bitten by the horse and severely injured. In an action for damages he averred,—"The horse in question, which was an entire horse, was a vicious and dangerous animal, and on several previous occasions it had attacked, bitten, and severely injured those who were in charge of it." *Held* that his averments shewed that the pursuer was aware that the horse was vicious, and that he incurred danger by entering its stall when it had got loose, and therefore that his action was irrelevant.

Held (*per* Lord Adam) that a horse used by a carting contractor in his business is "plant" in the sense of sec. 1 of the Employers Liability Act, 1880.

1ST DIVISION.
Sheriff of
Forfar.
M.

JAMES FRASER, stableman, Brechin, raised an action for damages against his employer, John Hood, carting contractor, concluding for payment of £100 at common law, and of £140, 8s. (being three years' wages) under the Employers Liability Act, 1880.

He averred,—(Cond. 1) "The pursuer was in the employment of the defender as a carter for about five years till January last, when he was appointed stableman, and continued in that situation until the occurrence of the accident after mentioned. It formed part of the pursuer's duties as stableman to attend to the feeding of the horses kept in Mr Hood's stable, and before leaving for the night to look round all the horses in the stable and see that they were properly fastened up. . . ." (Cond. 2) "On or about the evening of Tuesday, the 31st of May last, the pursuer entered the stable about nine o'clock for the above purpose. He was immediately followed by the defender, who called his attention to the fact that one of the horses had broken loose from its halter, and desired him to fasten it on again. The pursuer proceeded up the stall to do this, but, on his stooping down to lift up the halter, the horse bit and seized his left arm, crushing it severely. This occurred in the presence of the defender. So soon as the pursuer had extricated himself from the horse's grasp, he came out of the stable, and medical aid was procured, when it was found that his arm was broken in several places, and the bone crushed and protruding. . . ." (Cond. 4) "The horse in question, which was an entire horse, was a vicious and dangerous animal, and on several previous occasions it had attacked, bitten, and severely injured those who were in charge of it. On the 6th of June, about a week after the accident above mentioned, it attacked the man in charge of it, and he was obliged to kill it in self-defence. The defender well knew of the vicious and dangerous character of the horse in question. The said horse was usually muzzled when out driving, and in the stall he was secured by two halters, the one a leather band round his neck, the other a halter with blinders. He was frequently in the habit of breaking loose from the last-mentioned halter, and it was this halter which the pursuer was endeavouring to put on when the accident happened. The said halter had been frequently repaired, and it was not strong enough for the purpose."

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The pursuer pleaded;—(1) The pursuer having sustained loss, injury, and damage through the fault or negligence of the defender, or of those for whom he is responsible, is entitled at common law to decree in terms of the first of the alternative conclusions of the petition, with expenses. (2) The pursuer having, while employed as a servant to the defender, been injured by reason of the fault or negligence or defective plant of the defender, or of those for whom he is responsible, is entitled, under the Employers Liability Act, 1880, to decree in terms of the second alternative conclusion of the petition, with expenses.

The defender pleaded contributory negligence, and further (3) The pursuer being in the knowledge of the character of the horse in question, and having continued to work and attend same without objection or complaint to the defender, the defender should be assoilzied, with expenses.

The Sheriff (Robertson) allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

A proposed issue was lodged by the pursuer.

The defender objected to the issue being granted.

Argued for the defender;—There was no relevant case stated at common law. The pursuer knew (cond. 4) that the horse was vicious, and in that knowledge he accepted the employment.[1] A biting horse was one of the ordinary risks of a stableman's employment, and therefore the pursuer could not recover. Under the Employers Liability Act a horse could only be held to be "plant" if it was in actual use. In *Haston's* case, cited by the pursuer, the horse was in actual use.

Argued for the pursuer;—The averments did not shew that the pursuer knew the danger when he undertook the employment. Condescendence 4 was only a statement of the character of the horse, instructed by recent inquiry. It was not an ordinary risk of a stableman to take care of a vicious entire horse. It was further averred on record that the halter was bad. This made a relevant case under the Employers Liability Act, as a halter was undoubtedly plant; but further, a horse was clearly "plant" in the sense of the Act.[2]

At advising,—

LORD PRESIDENT.—This is an action of damages for injuries received from the bite of a horse. The defender is a carting contractor and keeps a number of horses, and the pursuer was at the time of the accident in his employment as a stableman. The occurrence took place on the evening of the 31st May last, and the *species facti* was that the horse got loose from its halter, and the defender desired the pursuer to tie him up. While he was engaged in so doing the accident occurred. The pursuer himself says that the horse, which was an entire one, was a vicious and dangerous animal, and that on several previous occasions it had attacked, bitten, and severely injured those who were in charge of it. The pursuer had been for some time in the employment of the defender as a carter, having only recently been made a stableman, and he therefore obviously knew, what was known to everyone else, that the horse was a dangerous horse, and had attacked, bitten, and severely injured persons in charge of it, and he was therefore aware of the risk he incurred in entering the stall to tie up the horse. He might have refused to do what he was told to do, but he did it willingly and of his own free will. Whether he performed

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[1] Crichton v. Keir & Crichton, Feb. 14, 1863, 1 Macph. 407, 35 Scot. Jur. 247; M'Gee v. Eglinton Iron Co., June 9, 1883, 10 R. 955; Thomas v. Quartermaine, 1886, 18 Q. B. D. 414.

[2] Haston v. Edinburgh Street Tramways Co., March 11, 1887, 14 R. 621; Yarmouth v. France, 1887, 19 Q. B. D. 647.

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the work carelessly or recklessly is not known to us, but at anyrate he of his own free will encountered a known and obvious risk, and therefore cannot recover damages from his employer.

I cannot distinguish this case from that of *M'Gee* v. *Eglinton Iron Co.*, 10 R. 955, and the two cases quoted therein, namely, *Crichton* v. *Keir*, 1 Macph. 407, and *M'Neill* v. *Wallace & Co.*, 15 D. 818, and therefore I consider that the action is irrelevant, and should be dismissed.

LORD MURE concurred.

LORD ADAM.—The pursuer describes the horse as an entire horse, a vicious and dangerous animal that had on several previous occasions attacked, bitten, and severely injured those in charge of it. He further describes how it was muzzled and tied. Besides having been five years in the stable, he had had charge of this horse from the 1st of January up till the 31st of May. He therefore knew the horse and the danger and risk he ran, and on this account I do not consider that he can recover damages. Further, I do not think that the Employers Liability Act of 1880 makes any difference. It was argued that the horse was part of the employer's plant, and I think it was, and that the horse's defective temper was a defect in the plant. That may very possibly be so. But all the Act says is that the workman shall be in the same position in such cases as a third party would have been. But taking it so, this man knew the danger, and wilfully faced it, and therefore I think he can take no benefit from the Act.

LORD SHAND was absent.

THE COURT disallowed the issue, and dismissed the action as irrelevant.

ALFRED SUTHERLAND, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

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ADAM DARLING AND ANOTHER, Pursuers (Respondents).—*M'Kechnie—Shaw.*

JOHN ROSS (Wilson's Trustee), Defender (Reclaimer).—*C. J. Guthrie—Baxter.*

Sale—Right in security—Delivery—Mercantile Law Amendment Act, 1856 (19 *and* 20 *Vict. c.* 60), *sec.* 1.—A bleacher who was in embarrassed circumstances, being desirous to raise money, on 1st February 1886 entered into a "minute of sale" with his brother-in-law and son-in-law, which bore that in consideration of an advance of £400 by them, he sold to them absolutely certain pipes used for conveying water into his bleachfield, declaring that he should be entitled to use them so long as they considered proper on payment of a rent of £20 yearly. The pipes were worth much less than £400. The £400 was not instantly advanced, but the purchasers became parties to a cash-credit with a bank by means of which the bleacher drew out the £400 in instalments. On 5th August 1886 he executed a trust for creditors, without having paid the half year's rent due at Whitsunday for the pipes, and his trustee claimed them. *Held* that there had been a *bona fide* sale, and that the pipes were not part of the trust-estate.

2D DIVISION.
Lord Fraser.
M.

JOHN WILSON, bleacher at Touch, Dunfermline, carried on business there for many years prior to 1886. For some time prior to that year he had been in embarrassed circumstances. He became desirous to raise funds, but his works, being the subject of three bonds, did not afford additional security. He consulted Adam Darling, his brother-in-law, and W. W. Waddell, his son-in-law, as to a fresh loan, and a loan by them over

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certain pipes, which he had laid down beneath a public road to bring water into his works, was considered. They were advised by a law-agent that a loan over them would not be a good security, but that Wilson might convey them to Darling and Waddell by an out-and-out sale for £400, the amount they were willing to advance, if they could safely do so, and that he might retain the use of them on a contract of hiring, paying rent for them. A minute of sale was then (1st February 1886) entered into between Wilson on the first part and Darling and Waddell on the second part, narrating that "whereas the second parties have advanced to or for my behoof the sum of £400 sterling, and in consideration thereof the first party has sold and hereby sells and conveys and makes over to the second parties and their respective heirs, executors, and assignees whomsoever absolutely," the iron pipes, with his whole interest in them, and with full power to them to sell and dispose of them as they might think proper, "declaring that the first party shall be entitled to the use of the said pipes for his said bleachworks, so long as the second parties may consider proper, upon payment to the second parties or their foresaids of the sum of £20 sterling yearly in name of rent or hire, payable in equal portions at the terms of Whitsunday and Martinmas in each year, commencing payment of the first termly payment at the term of Whitsunday next, 1886, for the proportion due preceding that date, and the next term's payment at the term of Martinmas following, and so forth half-yearly and termly during the period the first party may use the said pipes: It is further hereby declared that the second parties shall be entitled to put an end to said use at any time upon giving the first party one month's previous notice in writing: And I assign the rents or hires: And I grant warrandice." At the end of this minute was written a receipt, dated February 1886, by Wilson for £400.

Wilson continued in possession of the pipes as before. Prior to 5th August 1886, when he granted a trust-deed for creditors, he had not paid any "rent" for the pipes. Mr John Ross, solicitor, Dunfermline, the trustee for the creditors, claimed right to the pipes.

Darling and Waddell raised this action against him for declarator that they were absolute proprietors of the pipes, and for interdict against his interfering with them. They called also two manufacturers near Dunfermline, with whom he was negotiating for their obtaining leave to make connections with and draw water through the pipes.

Ross alone defended. He alleged that the transaction founded on by the pursuers as a sale of the pipes to them was a simulate sale for the purpose of attempting to create a security; that the pipes never became the pursuers' property; that the minute did not embody, and was not treated as embodying, any real transaction, but was an attempt to obtain security over moveables which remained in the seller's possession and use and under his control.

He pleaded that the pipes were part of the estate, and also (2) The said deed founded on by the pursuers being a simulate sale, for the purpose of creating a security to the prejudice of prior creditors of the insolvent, the pursuers did not thereby acquire any right in the said pipes, and the defender is entitled to absolvitor. (3) The transaction contained in the said minute being an attempt to create a security over moveables, remaining in the possession and under the control of the seller, the pursuers are not entitled to found thereon.

A proof was allowed to the defender of his averments.

It was proved that the pipes had cost Wilson about £220, and the laying of them about £50. It was also proved that the £400 had not been directly advanced at the date of the transaction to Wilson. What was actually

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done was that Wilson, Darling, and Waddell joined in a cash-credit for that sum, on which Wilson was to operate, and did operate by cheques, initialled according to arrangement among them by Waddell, who was exercising a certain supervision over his affairs. The money was drawn out by him in three instalments, the last of which was on 3d April 1886. The bank were not repaid the amount till 22d June 1887, a week before the diet of proof, when Darling and Waddell paid it up in equal sums. A business account against them had been made out by the agent who prepared and carried through the minute of sale on the footing that they were purchasers of the pipes, and they had also through him entered into negotiations in July and August 1886 with certain manufacturers to let them have for a rent permission to connect their pipes with the pipes in question.

The Lord Ordinary (Fraser) found and declared (against Ross, the compearing defender) in terms of the conclusions, and granted interdict.*

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* "OPINION.—John Wilson, a bleacher at Touch, near Dunfermline, was in embarrassed pecuniary circumstances in the month of February 1886. His bleachworks were covered with bonds, so that he could borrow no more upon the security of them; but he was proprietor of pipes for carrying water, which were laid in the public road leading from Dunfermline to his works. The pursuers in this action are Wilson's brother-in-law, Adam Darling, and his son-in-law, William Wood Waddell. They were willing to assist Wilson, but only upon getting some security, and he had no further security to offer than the pipes of which he was the owner. The parties applied to Mr William Beveridge, solicitor, Dunfermline, who advised them that no security could, without possession, be effected upon moveable property like pipes, and that the only way in which Darling and Waddell could have any security at all would be simply by Wilson selling to them the pipes. The question in the case is, whether or not there was a valid sale. A minute of agreement of sale in writing was entered into between Wilson and the pursuers in February 1886, by which, upon the narrative that the pursuers had advanced to Wilson £400, he sold, 'and hereby sells, and conveys, and makes over' to the pursuers 'the cast-iron pipes for the conveyance of water from the town of Dunfermline to the said Touch Bleachworks'; but it was declared that Wilson should be entitled to the use of the pipes for his bleachworks so long as the pursuers might consider proper, on payment to them of '£20 sterling yearly in name of rent or hire.'

"Now this is declared by the defender to be 'a simulate sale for the purpose of attempting to create a security,' and indeed no sale at all. The Lord Ordinary is of opinion that this position taken up by the defender is not well founded. The difficulties in the way of creating a security over moveable property were clearly foreseen and explained by Mr Beveridge, and with the view of avoiding these difficulties it was agreed that there should be an absolute sale. There was nothing at all illegal or improper in this, even although Wilson had been insolvent. He was perfectly entitled to sell for an adequate price the moveable property which belonged to him. He wanted to get money to carry on his business, which was a very legitimate thing to do; and his brother-in-law and son-in-law were perfectly willing to help him. They paid, no doubt, what, according to the evidence, appears to be more than what the pipes were worth, or at least what they cost to lay down. They were willing to make this sacrifice on behalf of their relative. They did not wish to drive a hard bargain, and the fact that they paid more for the pipes (if these were considered as simply old iron) than they were worth, does not in any way detract from the fact that there was here a *bona fide* sale. As to the good faith of the transaction the Lord Ordinary has no doubt whatever. All the persons who were examined—Beveridge, Wilson, Darling, and Waddell—state that it was intended to make a *bona fide* sale,—that being the only mode in which the transaction could be carried out with the view of giving to Darling and Waddell some kind of return

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The defender reclaimed, and argued;—The true question was whether what took place in February was really a sale. The facts shewed it was not. *Prima facie*, a sale of the piping recently put down to carry on the business was very unlikely. No "rent" was ever paid. Nor indeed was £400 ever advanced at the time of the pretended sale as the minute bore. On the contrary, the lenders or guarantors to the bank simply gave their names to a cash-credit. Again the pipes were never worth £400, the alleged price. They did not cost that when bought new, and placed in position. How could they be worth it if bought and carried away? The £20 of "rent" was just reasonable interest on a loan of £400, and that accounted for the fixing of £20 as the sum. If there was a sale there was no delivery or any equivalent for it. There could be none unless the pipes were taken up and handed over to the new owners. In such cases as *Orr* v. *Tullis*[1] founded on by the pursuers, the subject was one which could be sold or let, and used elsewhere, and the *bona fides* of the transaction was established.

The present case more resembled that of the *Heritable Securities Investment Association* v. *Wingate's Trustee*,[2] where a transaction founded on as creating the relation of landlord and tenant was held to be a mere attempt to create a security over moveables, such as the law would not recognise. This case was distinguished from *M'Bain* v. *Wallace & Company*[3] by *mala fides*, and by the parties' actings being inconsistent with a sale.

Counsel for the pursuers were not called on, except as to the absence of delivery. They argued;—It would be absurd to require, as the defender was obliged to contend, that the pipes should be lifted and handed over to the purchaser, who proposed to let them to the seller. The case of *Leckie*[4] was like the present in this particular. The case of *M'Bain*[3] was entirely in point, and also those of *Orr's Trustee* v. *Tullis*[1] and *Robertson* v. *M'Intyre* (*Robertson's Trustee*).[5]

LORD JUSTICE-CLERK.—I am quite satisfied with the judgment of the Lord Ordinary. It is a question of some nicety how far those pipes, which were laid in the soil, and were never actually delivered over to Darling and Waddell, were the subject of an out-and-out sale. I think it is the result of the cases on this question that if all the possession is given of which the property is capable, and the contract is clear and unreserved, it is not sufficient ground for setting it aside that no delivery was given, because the subject of sale was in a position inconsistent with its being delivered. There is here no doubt as to what the contract was. The object was to give Wilson a certain sum on security of the pipes, and it was necessary in order to that that there should be an out-and-out sale of the pipes. The purchaser was to get complete power over them, except that it was understood that if the seller repaid the price, he was to be allowed to revindicate the property. That was the only distinction between an out-and-out sale and this transaction. There is no ground for saying that in anything it was in bad faith. It was a sale, except that it rested not on the written agreement but on the good faith of parties that if the price were repaid the seller should have back the pipes. The way in which the seller preferred

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for the money they advanced. The case falls within the decision of *Taylor* (*Orr's Trustee*) v. *Tullis* (2d July 1870, 8 Macph. 936)."

[1] Orr's Trustee v. Tullis, July 2, 1870, 8 Macph. 936, 42 Scot. Jur. 566.

[2] July 8, 1880, 7 R. 1094.

[3] Jan. 7, 1881, 8 R. 360, aff. July 27, 1881, 8 R. (H. L.) 106.

[4] Leckie v. Leckie, Nov. 21, 1854, 17 D. 77, 27 Scot. Jur. 13.

[5] March 17, 1882, 9 R. 772.

to take payment of the price was that of getting his friends who were assisting him to unite with him in being bound to the bank under a cash-credit bond for £400. On that credit he drew out the whole £400, and it was ultimately paid up by the purchasers. It does not signify that that payment was not made at the time, but some time after. The important matter is that the purchasers put their names to the cash-credit.

I think the case is on all-fours with that of *M'Bain* v. *Wallace*, and that the Lord Ordinary is right.

LORD YOUNG.—I concur. I think this is a clear case. Certain points which are altogether distinct have in the argument been mixed.

First, as to delivery, the case stands thus. There is a contract of sale irrespective of delivery. Delivery must follow a completed contract of sale. There is here *ex facie* a contract of sale as distinct as language can make it. It is written and signed. But by our law the contract of sale does not pass the property, there must be delivery. Was there such delivery as will pass the property,—constructive delivery? The subject of sale was pipes, which passed under a road, a good subject of property and therefore of sale. Delivery by digging them up, handing them to the purchasers, and then replacing them in the ground, would have been ridiculous. Therefore there must be something else. What was done was to change the title on which the person previously owner took the use of them. Subsequent to the contract he was not the owner of them, but had the use of them as a hirer or lessee. Now, it has been held perfectly good constructive delivery that a new contract should be made between the seller and the purchaser under which the seller begins to possess on a new and lawful contract. Here the seller possessed these pipes after the sale as the buyer's lessee. That was what appeared *ex facie*. Of course it might be all simulate, but so far as the law goes it would be sufficient to pass the property if there were no exception to it in point of fact,—for example, that it was a simulate transaction altogether. Now, the voluntary trustee of Wilson cannot defend the action except on grounds competent to Wilson, and the purchaser could have lifted these pipes and carried them off in spite of Wilson. But his voluntary trustee urges that the alleged sale is bad, because it is only a security. That is quite a legitimate purpose for such a transaction, and that is where the case is indistinguishable from that of *M'Bain*. A disposition giving the lender of money a proprietor's title has always been held by our law a competent form of security. I remember, when a young counsel, arguing an action of declarator against a money-lender who took such a title, and against whom declarator was sought that the title was only a security title, and that the borrower was entitled to have back his property on paying the advance. It was admitted by the money-lender that it was only a security, but he defended himself on the ground that the declarator sought would prejudice the title for which he had bargained, and the Court refused the declarator on that ground, but intimated that they would interfere to give the declarator if he were tendered his money and then refused to give up the property. That same doctrine was applied to the case of moveable property in the case of *M'Bain*. There delivery was dispensed with on the authority of the case of *Duncanson*.[1] It was acknowledged that the transaction was a security, and it was held that the parties had lawfully contracted to accomplish their object by way of a sale. We intimated in our judgment in

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[1] Simpson v. Duncanson, Aug. 2, 1786, M. 14,204.

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the passage I read from my own opinion during the argument in this case, and I think the House of Lords also intimated, that if any attempt were made to use the property title to any other effect than to pay the debt and interest, we should interpose to prevent that, and the lender there accordingly undertook that his title should only be good to the effect of obtaining his debt and interest.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK.—It was acknowledged by the reclaimer that *M'Bain's* case was adverse to him, unless he could distinguish this case from it on certain matters of fact. In his attempt to do so I think he fails on the facts. Therefore there is admittedly a judgment of the House of Lords against him. That makes a simple ground of judgment. I was the Lord Ordinary in the case of *M'Bain*, and am bound now to confess I was wrong in my judgment in it. While, however, I acknowledge my error, I do not, perhaps, see it so plainly as I should do. I therefore follow the judgment in that case simply as an authority which is in point.

THE COURT adhered.

THOMAS CARMICHAEL, S.S.C.—WALLACE & BEGG, W.S.—Agents.

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Sinclair v. Clyne's Trustee.

SIR JOHN G. TOLLEMACHE SINCLAIR, BART., Complainer (Reclaimer).—
Balfour—R. Johnstone.
WILLIAM GORDON OLIVER (Clyne's Trustee).—*D.-F. Mackintosh—Salvesen.*

Lease—Jurisdiction—Compensation—Notice to and consent of landlord—Reference—Interdict—Agricultural Holdings Act, 1883 (46 *and* 47 *Vict. c.* 62), *secs.* 3, 4, 20, *and sched., parts i. and ii.*—A tenant of a farm under a nineteen years' lease died, and his estates were sequestrated and a trustee appointed thereon. The trustee carried on the farm for some time, and when he gave it up gave notice of a claim under the Agricultural Holdings Act, 1883, for improvements. The claim consisted of seven heads. The trustee appointed a referee to judge on the claim in terms of the Act. The landlord also appointed a referee, but limited his powers to judging on the sixth and seventh heads of the claims, on the ground that the first five heads did not fall under the statute, in respect that to some of the improvements his consent had not been obtained, and that notice had not been given to him in terms of the statute that the others were about to be executed. The trustee thereupon applied to the Sheriff to have a referee appointed in place of the one appointed by the landlord, and the appointment was made. The landlord thereupon presented a note of suspension and interdict to have the trustee's referee and the referee appointed by the Sheriff interdicted from proceeding with the reference, alleging that five heads of the claim were outwith the statute. The trustee stated that he was not aware whether the statutory requirements with regard to notice or consent had been observed. The Court (*rev.* judgment of Lord Trayner) *held* that the suspension was competent, and remitted to the Lord Ordinary to pass the note.

Bill-Chamber.
1ST DIVISION.
Lord Trayner.
M.

ALEXANDER CLYNE was tenant of the farm of Weydale Mains, Thurso, belonging to Sir John G. T. Sinclair of Ulbster, Bart., for nineteen years, by virtue of a minute of agreement dated 27th December 1878, from Whitsunday 1879. He occupied the farm till his death on 13th June 1885.

About six months after his death his estates were sequestrated, and Mr William Gordon Oliver was elected trustee in the sequestration.

Mr Oliver carried on the farm till Whitsunday 1887, when he removed from it.

On 8th January 1887 Mr Oliver sent to Sir J. Sinclair's factor a notice

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of claim for compensation for improvements under the Agricultural Holdings Act, 1883. The claim consisted of seven heads.

On 30th May 1887 Sir J. Sinclair's factor sent to Mr Oliver a notice of counter claim in terms of the Act.

On 2d July Mr Oliver appointed Mr George Brown as referee to decide on the claims, and requested Sir John to appoint another referee.

On 8th July 1887 Mr Logan, Sir John's factor, appointed Mr Barnetson as referee, but, on grounds to be afterwards stated, he limited his powers as to dealing with Mr Oliver's claim to the two last heads of the claim, thus excluding the first five heads thereof. Mr Oliver refused to accept this as a proper appointment, and applied to the Sheriff of Caithness-shire, at Wick, under sec. 9 of the Act, to have a referee appointed.

On 17th October the Sheriff-substitute, by interlocutor, held that Sir John Sinclair had not made a proper appointment of a referee, and appointed a Mr Scott to act as referee along with Mr Brown.

On 29th October Sir John Sinclair presented a note of suspension and interdict in the Bill-Chamber, in which he prayed the Court to interdict Mr Oliver "from insisting in or prosecuting and following further the first five items of a pretended notice of claim under the Agricultural Holdings (Scotland) Act, 1883, signed by him and addressed to George Logan, Esq., Thurso East, factor for the said Sir John George Tollemache Sinclair, being '(1) £220 sterling, being the value to the incoming tenant of the large and small byres, pigs-house, hen-house, part of barn, corn-loft, gig-house, erected, and dwelling-house repaired, by the said deceased Alexander Clyne; (2) £15 sterling, being the value to the incoming tenant of eighty chains of flag-fencing, erected by the said deceased Alexander Clyne; (3) £35 sterling, being the value to the incoming tenant of the water-course and mill-dam, made by the said deceased Alexander Clyne; (4) £112, 10s. sterling, being the value to the incoming tenant of 750 chains of drains made on the said farm of Weydale Mains by the said deceased Alexander Clyne; (5) £12, 10s. sterling, being the value to the incoming tenant of fifty chains of ditches made on the said farm by the said deceased Alexander Clyne,' in a pretended reference under said Act, wherein the respondent the said George Brown was nominated referee by the said William Gordon Oliver, trustee foresaid, and the respondent Alexander Robert Scott was appointed by the Sheriff-substitute of Caithness-shire to act as referee along with the said George Brown in said reference; and also to interdict, prohibit, and discharge the respondents the said George Brown and Alexander Robert Scott, as referees foresaid, from entertaining or dealing with or awarding any sum in respect of the foresaid items of claim."

He stated,—"The improvements included in the said five items of claim were executed mainly in implement of the obligations contained in said minute of agreement or lease and additional agreement, and they all fall under the first and second parts of the schedule to the said Act. In so far as they were executed before the commencement of the said Act, the landlord, within one year after the commencement of the Act, has not declared in writing his consent to the making of the improvements in terms of section 2 of said Act.* And in so far as such of them as are specified in the first part of said schedule were executed after the commencement of the said Act, they were so executed without the landlord or his agent duly authorised in that behalf having, previously to the execution of the improvements, and after the passing of the said Act, consented in writing to the execution of such improvements, in terms of section 3 of the said Act; and in so far as such of them as are specified in the second part of said schedule were executed after the commencement of the said Act, no notice in writing was given by the tenant to the landlord or his duly authorised agent of his intention to execute such improvements; and no agreement between the landlord and tenant was ever entered into regarding the same in terms of section 4 of said Act. . . . None of the foresaid five items of claim quoted in the prayer of the note fall to be dealt with under the said Act; and in order to prevent the referees proceeding in a reference which, as regards these items of claim, is *ultra vires*, the present application for interdict has become necessary."

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* Sec. 2 provides that "compensation under this Act shall not be payable in respect of improvements executed before the commencement of this Act, with these exceptions, viz:— . . . (2) Where a tenant has executed an improvement mentioned in the first or second part of this schedule, within ten years previous to the commencement of this Act, and he is not entitled, under any contract or custom, to compensation in respect of such improvement, and the

The respondent averred;—"Explained that the respondent, as trustee on the sequestrated estates of the said Alexander Clyne, has made inquiries with the view of enabling him to answer specifically the additional averments made by the complainer. As the result of these inquiries he has ascertained and avers that the improvements included in the first five items of the claim, so far as not provided for by the agreements referred to in statement 1, were carried out by the deceased Alexander Clyne in consequence of communications between him and Mr Logan, the factor for the respondent. After the death of the said Alexander Clyne, the documents in his possession bearing on said improvement, and including the accounts and vouchers connected therewith, were all taken away by the deceased's brother, David Clyne, by whom they were handed to the said Mr Logan. The respondent has had no means of obtaining from him the documents necessary for establishing the said claim, but intended to recover the same in the course of the reference. In these circumstances, the respondent is not able to say whether the written consents and notices required by the Act in reference to claims under schedules I. and II. were or were not given; but he considered it to be his duty to keep the matter open by including the said items in his claim."

He further averred;—(Stat. 3) "Explained that by the 20th section of the Agricultural Holdings Act it is provided,—'Where the sum claimed for compensation exceeds £100, either party may, within seven days after delivery of the award, appeal against it to the Sheriff, on all or any of the following grounds: (1) That the award is invalid . . . (3) That compensation has been awarded for improvements, acts, or things, or for breaches of stipulations or agreements, or for committing or permitting deterioration in respect of which the party claiming was not entitled to compensation . . . And the Sheriff shall hear and determine the appeal, and may, in his discretion, remit the case to be reheard as to the whole or any part thereof by the referee or referees, or oversman, with such directions as he may think fit . . . The decision of the Sheriff on appeal shall be final.' It will be competent for the complainer, under the above section, to appeal from the award of the referees upon all or any

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landlord, within one year after the commencement of this Act, declares in writing his consent to the making of the improvement."

Section 3 of the Act provides,—"Compensation under this Act shall not be payable in respect of any improvement specified in the first part of the schedule hereto, and executed after the commencement of this Act, unless the landlord or his agent duly authorised on that behalf has, previously to the execution of the improvement, and after the passing of this Act, consented in writing to the execution of such improvement."

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of the claims which are the subject of the present action, should they award any sum in respect thereof, and it would have been competent for him to have appealed from the judgment of the Sheriff-substitute appointing the referee. In these circumstances, it is incompetent to seek to review or set aside the said judgment by means of a note of suspension and interdict in the Bill-Chamber."

The complainer pleaded;—(1) The reference made by the respondent Oliver being *ultra vires*, illegal, and inept, in respect that the first five items of the claim made by him are outwith the scope of the Agricultural Holdings (Scotland) Act, 1883, the complainer is entitled to interdict. (2) The first five items of the claim for the respondent Oliver are illegal and unfounded, and he is not entitled to have the same referred under the Agricultural Holdings (Scotland) Act, in respect (First) the improvements were made under contract with the landlord, who paid the agreed-on compensation therefor; (Second) the landlord did not, within one year after the commencement of the said Act, declare in writing his consent to the making of the improvements, in so far as these were made previous to the commencement of the Act, and neither he nor his agent previously to the execution of the improvements, and after the passing of the Act, consented in writing to the execution of such improvements, in so far as these were executed after the commencement of the Act; and (Third) no notice in writing was given by the tenant to the landlord or his duly authorised agent of his intention to execute such improvements as are specified in the second part of the schedule to the said Act, and no agreement was entered into in regard thereto.

The respondent pleaded;—(1) The present action being incompetent as a method of reviewing the judgment of the Sheriff-substitute referred to in statement 3, the note should be refused, and the respondent found entitled to expenses. (3) The reference in question not being *ultra vires* or illegal, but being admittedly regular as regards certain of the items claimed, the note should be refused.

On 12th November, the Lord Ordinary (Trayner) pronounced an interlocutor recalling the interim interdict previously granted, and refused the note.*

The complainer reclaimed, and argued;—It was conceded that the improvements claimed for under the first five heads of the claims fell under parts i. and ii. of the schedule to the Act, and therefore to bring the claims under the statute either consent of the landlord or notice to the landlord was required. The question then was, whether when it was alleged by the landlord that a claim did not fall under the statute, and no satisfactory answer was given by the tenant to shew that it did, the Court would interfere by way of interdict to stop the reference going on till that preliminary question was settled. If the landlord's contention here was well founded, the arbiter appointed by him was validly appointed, and could competently judge on the remaining heads of the claim; and the arbiter appointed by the Sheriff had no power to act. If the landlord was wrong then the Sheriff's appointment was good. Till it was settled what was the proper tribunal to try the question, it was useless for the reference to proceed. It had been decided that it was not for the arbiters, but for the Court, to decide on the validity of the notice given by a tenant under the Act,[1] and that decision applied equally to the question whether as a matter of fact the consent of the landlord had been given to improvements which required his consent. The notice of claim ought to specify for what kind of improvements compensation was claimed; and further, that the statutory requirements with regard to the claims had been satisfied. Here there was no averment either on the claim or on record that notice had been given to the landlord, or his consent obtained.

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* "NOTE.—The respondent has made a claim against the complainer, under the Agricultural Holdings (Scotland) Act, 1883, and the complainer has intimated a counter claim. As parties could not agree upon their respective claims, the respondent appointed a referee, and called on the complainer to appoint another, who should, in terms of the Act, determine what, if anything, was due, under the said claims or either of them. The complainer appointed a referee, but excluded from the reference several of the heads of the claim maintained by the respondent. The latter thereupon applied to the Sheriff to appoint a referee on behalf of the complainer, on the ground that the complainer had not himself made an appointment as craved. The purpose of the present note is to have the referees interdicted from proceeding with the reference, on the ground that the respondent's claim (to the extent referred to) does not fall within the statute. I am of opinion that I cannot entertain the present complaint. It is the duty of the referees to determine how far either of the claims can be given effect to, and they will do so after having heard parties, and taken such evidence as they may deem necessary or proper. If they go wrong in their decision, by allowing claims not warranted by the statute, or otherwise, the complainer can appeal to the Sheriff, whose judgment on such an appeal will be final. The present complaint is really an attempt to obtain a decision in the Bill-Chamber or Court of Session upon one of the questions which the statute has remitted to the Sheriff for decision, and which therefore should be decided only by the Sheriff."

Argued for the respondent;—Under section 20 of the Act the Sheriff was given power to deal with questions of this kind in the first instance. Were the case allowed to go on before the arbiters it would appear in the proceedings whether this claim was within the statute or not. The Court ought not to assume that the Sheriff and the arbiters would go wrong in a question of law. The respondent would have before the arbiters an opportunity of producing written evidence that notice or consent had been given in due form. This question was not raised, or at least not argued, in the Inner-House in *Hunter's* case, as both parties wished to have the decision of the Court on the merits.

LORD PRESIDENT.—The proceedings in this case commenced with a notice of claim under the Agricultural Holdings Act made by the respondent, who is the trustee for the late tenant of a farm. The claim consisted of seven heads. The respondent thereafter appointed Mr Brown as his arbiter for the determination of the claim, and the complainer, the landlord, appointed Mr Barnetson as his arbiter, qualifying the appointment, however, by saying that he was only appointed to try the 6th and 7th heads of the claim, because, in his view, the first five heads were not under the statute, and could not competently be made by the respondent. The respondent then applied to the Sheriff to appoint another arbiter, on the ground that the landlord's appointment was not good in respect of the limitation, and the Sheriff-substitute, assenting to that view, appointed Mr Scott as arbiter.

If the complainer is right in holding that the first five heads of the claim are incompetent, and that only the last two can be competently sent to arbitration, then the appointment of Mr Barnetson is good and valid. If, on the other hand, he is wrong in that view, then the appointment of Mr Scott by the Sheriff-substitute is good and valid, and therefore in the one case the tribunal to try the merits of the claim will be Brown and Scott, in the other case it will be Brown and Barnetson. Now, to allow the reference to go on when it is yet in

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[1] Hunter v. Barron's Trustees, May 13, 1886, 13 R. 883. See also Lord Advocate v. Police Commissioners of Perth, Dec. 7, 1869, 8 Macph. 244, 42 Scot. Jur. 106.

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doubt whether Brown and Scott or Brown and Barnetson shall be the a seems to me a proposal of such a nature as to afford a solution of the question now before us. Nothing, I think, could be more inconvenient c incompetent than to allow the reference to go on till it has been decided which of the two sets of arbiters is the proper tribunal to try the cas indeed, the objection of the complainer to the first five heads of the clai manifestly frivolous, or not sufficiently disclosed, I should be inclined to gard it, and to allow the reference to go on on the footing that the arbi pointed by the Sheriff along with Mr Brown formed the proper tribunal, is impossible, looking at the record, to hold that the objection here is a the nature of a frivolous objection. The allegations of the complainer a distinct, that as regards the first five heads the statute requires in the o that written consent, in the other that written notice, should have been while in point of fact neither the one nor the other has been given. not a frivolous objection. Considerable weight, too, is added to the sta when we look at the respondent's answers. There is no doubt that if w complainer avers is true the respondent has no case, and the only answer the respondent gives is that he does not know whether written consent or notice was given, but that he will try to prove that such was the cas apology for making such a statement is that he is only an assignee for cr and that the person whom he represents is now dead, and that there evidence among the deceased's papers that such consent or notice had ev given. In these circumstances I think it would be, to say the least, exce inexpedient to allow the reference to go on until that question of fact i mined. I think therefore we ought to pass the note and grant interim in The objection to our doing so is founded on section 20 of the Act, which appeals to be taken to the Sheriff when the sum claimed exceeds £1 may be proper and competent when the arbiters have entered on the ex of their functions to appeal to the Sheriff, but what security have we h the arbiters have any power at all to try the question? We have none; contrary, that question remains to be determined. I think that the com of this Court to interfere rests on this. There is a relevant averment t first five heads of this claim are without the statute, in short, that the negatives the existence of such claims and forbids them to be brought f I think, therefore, the competency of our taking up the case is bey question.

LORD MURE.—The simple question we have to decide is, whether th shall be passed, and interim interdict granted. If the objection stated complainer to the first five heads of the claim is well founded, it woul competent for the arbiters to entertain them, for he alleges that the st requirements which have to be gone through before such claims can be tained have not been complied with. The objection is very clearly stat I do not think any satisfactory answer has been given to it. The resp very frankly admits that he is not in possession of any written eviden petent to shew that those heads of his claim are competent. In such stances to refuse this note would, in my opinion, be to allow an incon proceeding to go on. In any circumstances I should have been in fa passing the note, but further, I think that the case of *Hunter* v. *Barron' tees* (13 R. 883) is an authority which we ought to follow.

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LORD ADAM.—I concur. The 7th section of the Act says,—"Every such notice or counter claim shall state, as far as reasonably may be, the particulars and amount of the intended claim." I should think that under that section, whatever the practice may be, so many particulars should be set forth as will shew that the claim is relevant. The claim, as stated here, may be relevant or irrelevant, legal or illegal; that is the result of the way in which it is stated. It is candidly admitted that the respondent does not know whether the claim is relevant or not. He says,—"Let me go to the arbiters with my claim. If it is a good claim, then the arbiters are the proper tribunal to try the question, if not, then they cannot be arbiters at all." That is one consequence of the claim being stated as it is here, and I can fancy a great many more which it is not necessary now to state. I think that in exercising our discretion it would be most inexpedient to send such a case to the arbiters.

LORD SHAND was absent.

THE COURT recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to pass the note, and to grant interim interdict.

HAMILTON, KINNEAR, & BEATSON, W.S.—THOMAS DALGLEISH, S.S.C.—Agents.

No. 42.

Dec. 20, 1887.
Nixon v. Rowand.

HENRY NIXON (Inspector of Port-Glasgow), Pursuer (Respondent).—*D.-F. Mackintosh—Wallace.*

ROBERT ROWAND (Inspector of Burgh Parish of Paisley), Defender (Reclaimer).—*M'Kechnie—James Clark.*

Poor—Settlement—Lunatic.—In an action brought by a relieving parish against the parish of the pauper's birth, it was pleaded in defence that the pauper, in respect of idiocy and imbecility, was incapable of having a settlement other than her father's. It was proved that the pauper, a woman twenty-four years of age, was a congenital imbecile, but not an idiot, that she was incapable of earning a living, and could not learn either to write or to go a message, and that she could not dress herself or do ordinary housework without superintendence. The Court *held* on the proof that she was not in such mental condition as to be a perpetual pupil, and therefore was capable of having a settlement of her own, which, in the circumstances, was that of her birth.

2D DIVISION.
M.

IN January 1887 the parish of Port-Glasgow raised an action for relief of certain sums expended in relieving a woman named Bridget Tonner against the Burgh Parish of Paisley, as being the parish of her birth. She had been deserted by her father, an Irishman, who had no settlement in Scotland, and relieved by Port-Glasgow. She was about twenty-four years of age.

The Burgh Parish of Paisley stated that she was "a congenital idiot, imbecile from birth, and incapable of earning a subsistence for herself, and of acquiring a settlement in her own right," and pleaded,—(4) In respect of the idiocy and imbecility of the pauper she takes her father's settlement, and the defender is not liable to relieve the pursuer.

At the proof there were examined relatives of the pauper, and a neighbour who had known her all her life. Their evidence was to the effect that she was physically quite strong, but that she could never learn to read or write, or go a message and bring correct change, or know the difference between coins. She could be trusted to attend to a child while some other person was present, but could not be left with one, nor could she sew or light a fire or lamp, or sweep a room in a proper manner. She could not read the clock, or even make a guess at the time of day. She

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could dress herself, but even as to that required supervision. It had not been found possible to give her any idea of religion.

The defender, who led in the proof, examined Dr Clouston, physician to the Royal Edinburgh Asylum for the Insane and Dr Littlejohn of Edinburgh, who had examined the pauper, and were of opinion that she was a congenital imbecile. They stated that between congenital imbecility and idiocy medical science did not draw a marked line, and that the pauper was distinguished from an idiot by her capacity to speak so well as she did, her speech being articulate and quite intelligible, but "an undeveloped speech—the speech of an imbecile." They found that she had no idea of the time of day, or of the day of the week or month, and thought she was unfit to be trusted with children, or to do simple household work, even under superintendence. They also found her unable to understand simple questions, or to make the same statement twice on a simple matter of fact, or distinguish between a threepenny piece and a sixpence.

The pursuer examined a medical man who had known the pauper and seen her at intervals of several years. He thought her improved since she was fifteen, and had found that she knew coins from each other, and could do simple household work, though she was mentally weak and "silly." The medical officer at the Larbert Institution for Imbeciles, who had recently examined her, also thought her "feeble-minded, but nothing approaching an idiot." She could count up to three, and if she had had better surroundings and training could, he thought, have counted further. The superintendent of the same institution, who had known the pauper a number of years before the proof, thought her a high type of a weak-minded person, and that her faculties were still capable of development.

The Lord Ordinary (Kinnear) decerned against the defender in terms of the conclusions of the summons.*

The defender reclaimed, and argued;—The pauper was a perpetual pupil, incapable of acquiring a settlement. If a perpetual pupil she must follow her father's settlement, for it had been decided by a majority of the whole Court, in *Caldwell* v. *Dempster*,[1] that a pupil born in Scotland and becoming chargeable by its parent's desertion—that

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* "NOTE.—It is admitted that the pauper had not acquired a residential settlement in her own right when she first became chargeable.

"But it is said that she had a derivative settlement in Port-Glasgow through her mother. The mother died in May 1879, when the pauper was sixteen years of age, and the father, who had deserted his wife and child in 1864, but had returned in 1878, and had been living in family with them in Port-Glasgow, again deserted his child upon the death of the wife, and has not since been heard of. When the pauper first became chargeable, therefore, she had attained the age of puberty. Her mother had died, and she had been deserted by her father. In these circumstances I think the cases of *Craig* v. *Greig and Macdonald*, 1 Macph. 1172, and *M'Lennan* v. *Waite*, 10 Macph. 908, are in point, and that the pauper's settlement must be held to have been in the parish of her own birth in preference to any derivative settlement she may have had previously.

"It is said that by reason of her mental weakness she was incapable of acquiring a settlement in her own right, and must therefore take the settlement of her father, which is not in Scotland. I think the case of *Cassels* v. *Sommerville*, 12 R. 1155, is conclusive upon that point. That decision, as I understand it, establishes a general rule which, in the common interest of all parishes, ought not to be departed from except upon grounds of distinction much more substantial than any that can be found in the circumstances of the present case."

[1] July 20, 1883, 10 R. 1263; Watson v. Caie and Macdonald, Nov. 19, 1878, 6 R. 202; Milne v. Henderson and Smith, Dec. 3, 1879, 7 R. 317; Lawson v. Gunn, Nov. 21, 1876, 4 R. 151.

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parent having no settlement in Scotland—did not become chargeable to its birth parish. The Lord Ordinary seemed to think the case of *Cassells*[1] laid down a rule, but it was quite special. The pauper there was much superior in mental condition to the pauper in the present case. He could do a message and work in a garden, and aid in using a hand-barrow; a decision about such a person laid down no rule which could here be applied.

Argued for the pursuer;—The case of *Cassells* was sufficiently like the present at least to make it undesirable to attempt to set up distinctions between them. The rule was that only an absolute idiot could be regarded as incapable of having any settlement, and as merely dependent on the father's. This pauper was certainly not an absolute idiot, and that was sufficient.

The Court were of opinion on the evidence that the condition of the pauper was substantially the same as that of the pauper in the case of *Cassells* v. *Somerville and Scott*, and that the case was therefore ruled by that authority.

THE COURT adhered.

ADAM SHIELL, S.S.C.—D. LISTER SHAND, W.S.—Agents.

No. 43.

Dec. 20, 1887.*
Lord Home v. Lyell.

EARL OF HOME, Pursuer (Reclaimer).—*Darling—Low.*
MISS SOPHIA GEORGIANA LYELL, Defender (Respondent).—*D.-F. Mackintosh—Murray.*

EARL OF HOME, Pursuer (Reclaimer).—*Darling—Low.*
GEORGE AULDJO JAMIESON (Lyell's Judicial Factor), Defender (Respondent).—*D.-F. Mackintosh—Murray.*

Superior and Vassal—Conveyancing Act, 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4—*Infeftment in trust—Radical right.*—In 1836 the heir then in possession of an estate under a fee-simple destination, dated in 1783, in favour of a series of heirs varying in some respects from the legal order of succession, on the narrative that he had resolved to execute a new settlement of his lands and estate, conveyed, *mortis causa*, the estate to his children *nominatim* and to the survivors or survivor of them in trust for the purpose of managing the estate and of dividing the rents among themselves so long as one or more of them existed, and at the termination of the trust "then to and in favour of my heir-at-law at that time in fee." It was further provided, that if it should happen that the last survivor of the children was also the truster's heir-at-law, then, or if that event should not happen, then on the death of that last survivor, the trust should come to an end, and the subjects fall and belong to the truster's heir-at-law at the time of that event. The trustees were further given ordinary powers of administration, but they were prohibited from burdening or selling the subjects.

On the death of the granter in 1852, A, his eldest son, completed his title by precept of *clare constat* as heir of provision to his father under the deed of 1783. The trustees were also infeft under this trust-disposition in terms of the precept contained in the deed, which directed sasine to be given to them, "in trust as trustees for the ends and purposes, and under the declarations, burdens, conditions, and provisions before specified, and upon the termination of this trust . . . then to my heir-at-law at that time in fee."

A having died in 1875, the superior brought an action against the sole surviving trustee under the deed of 1836, concluding for declarator that on A's death a casualty of a year's rent became due by the defender as a singular suc-

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[1] Cassells v. Somerville and Scott, June 24, 1885, 12 R. 1155.

* Decided Dec. 9, 1887.

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cessor of the last vassal and impliedly entered with the superior in virtue 4th section of the Conveyancing Act of 1874.

Held that the trust which was created by the deed of 1836 was purely porary in its nature, and a mere burden on the fee of the estate, whic vested in A, and on A's death passed into his *hereditas jacens*.

In another action by the superior founding upon a *mortis causa* dispo of other subjects granted by the vassal of even date with the former, wher trustees were empowered to sell the subjects conveyed for the benefit o ditors, with a direction, in the event of any of the lands remaining unso convey them to the testamentary trustees in similar terms with the fi similar judgment was pronounced.

1st Division.
Lord Kinnear.
B.

THE estate of Kinnordy was purchased by Mr Charles Lyell in and he was infeft therein by instrument of sasine in the same year. disposition and settlement, dated in 1783, he conveyed the estate t eldest son, Charles Lyell, second of Kinnordy, and the heirs whoms of his body, whom failing, to the other persons therein named. Charles Lyell, second of Kinnordy, was infeft upon that dispositio settlement in 1796, and was duly entered with the superior by ch of confirmation in his favour, dated 28th December 1802.

By his trust-disposition and settlement, dated 28th May 1836 Charles Lyell, second of Kinnordy, disponed, conveyed, and made the subjects in question to his wife, who predeceased him, "in liferen her liferent use allenarly, during all the days of her life after my dea the event of her surviving me, but always with and under the burdens ditions, and provisions hereinafter written, and also under this conc and declaration, as it is hereby specially provided and declared, that the death of my said spouse the whole rents then current o lands and others after described shall belong to and fall unde trust hereinafter created, and no part of said current rents shal or pertain to the executors of my said spouse as her executry, law or practice to the contrary notwithstanding, and upon the of the said Mrs Frances Lyell, or in the event of her predeceasing n and in favour of Charles Lyell, Thomas Lyell, Henry Lyell, Frances Marianna Lyell, Caroline Lyell, Eleanor Lyell, Maria Lyell, and S Georgiana Lyell (being the whole surviving children of the mar between me and the said Mrs Frances Lyell), and the survivors o vivor of them in trust as trustees for the ends and purposes after tioned (the majority of the survivors being a quorum for executing trust), and upon the termination of this trust in the manner and a period hereinafter expressed, then to and in favour of my heir-at-la that time in fee."

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The second purpose was,—"With regard to the other trust lands estate before described and conveyed (except the said mansion-house Mains of Kinnordy and others foresaid), I direct my said trustees, the survivor of them, to retain and manage the same in trust so lo there shall exist either more than one of my said children, trustees said themselves, or one of them, along with my heir-at-law in a diff person from my last surviving child, and to divide the whole free ren annual returns from the estate, after paying all expenses, annuities, other deductions, into equal shares (excepting only the produce from of wood), two of which equal shares I direct to be paid over to my

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cessor of the last vassal and impliedly entered with the superior in virtue
4th section of the Conveyancing Act of 1874.

Held that the trust which was created by the deed of 1836 was purel
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In another action by the superior founding upon a *mortis causa* disp
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1st Division.
Lord Kinnear.
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The third purpose was,—"If it shall happen that the last survivor of my said children shall also be my heir-at-law for the time, then and in that event this trust shall cease and determine, or if that shall not happen, then upon the death of the last survivor of my said children this trust shall cease and determine, and upon the termination of this trust on either of these events, the whole lands and estates before described and disponed shall fall and belong to my said heir-at-law at the period of that event, heritably and irredeemably, with power to my said heir-at-law to expede services, make and grant all deeds, and adopt all proceedings for fully and absolutely vesting the whole of said lands and estates in his, her, or their person, but in no case shall it be competent to dissolve this trust sooner than on either of the events aforesaid, it being my express wish and directions that the same shall be kept up till that period, and that the person or persons possessing at that period the character of my heir-at-law, and no previous heir, shall succeed absolutely to the said lands and estates."

The trustees were further authorised to enter vassals in the lands held under the truster as superior, and to grant leases for any period not exceeding nineteen years, but they were prohibited from selling or alienating any part of the estate, and from mortgaging or burdening it in any way. The truster further came under this obligation,—"In which lands, &c., I bind and oblige myself, my heirs and successors, duly and validly to infeft and seise the said Mrs Frances Smith or Lyell, my spouse, in liferent, for her liferent use as aforesaid, under the burdens, conditions, and provisions before written, and upon the death of the said Mrs Frances Lyell, or in the event of her predeceasing me, the said Charles Lyell," &c. (naming the trustees) "and the survivors or survivor of them, in trust, as trustees, for the ends and purposes, and under the declarations, burdens, conditions, and provisions before specified, and upon the termination of this trust, in the manner and at the period hereinbefore expressed, then my heir-at-law at that time in fee, and that by two several infeftments and manners of holding," &c. The precept directed sasine to be given to the trustees, "and the survivors or survivor of them, in trust, as trustees for the ends and purposes and under the declarations, burdens, conditions, and provisions before specified . . . and upon the termination of this trust in the manner and at the period herein before expressed, then to my heir-at-law at that time, in fee."

On the death of Mr Charles Lyell, second of Kinnordy, in 1852, his eldest son, Sir Charles Lyell, applied to the then superior and obtained

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cessor of the last vassal and impliedly entered with the superior in virtue of the 4th section of the Conveyancing Act of 1874.

Held that the trust which was created by the deed of 1836 was purely temporary in its nature, and a mere burden on the fee of the estate, which was vested in A, and on A's death passed into his *hereditas jacens*.

In another action by the superior founding upon a *mortis causa* disposition of other subjects granted by the vassal of even date with the former, where the trustees were empowered to sell the subjects conveyed for the benefit of creditors, with a direction, in the event of any of the lands remaining unsold, to convey them to the testamentary trustees in similar terms with the first, a similar judgment was pronounced.

1st Division.
Lord Kinnear.
B.

THE estate of Kinnordy was purchased by Mr Charles Lyell in 1782, and he was infeft therein by instrument of sasine in the same year. By disposition and settlement, dated in 1783, he conveyed the estate to his eldest son, Charles Lyell, second of Kinnordy, and the heirs whomsoever of his body, whom failing, to the other persons therein named. Mr Charles Lyell, second of Kinnordy, was infeft upon that disposition and settlement in 1796, and was duly entered with the superior by charter of confirmation in his favour, dated 28th December 1802.

By his trust-disposition and settlement, dated 28th May 1836, Mr Charles Lyell, second of Kinnordy, disponed, conveyed, and made over the subjects in question to his wife, who predeceased him, "in liferent, for her liferent use allenarly, during all the days of her life after my death in the event of her surviving me, but always with and under the burdens, conditions, and provisions hereinafter written, and also under this condition and declaration, as it is hereby specially provided and declared, that upon the death of my said spouse the whole rents then current of the lands and others after described shall belong to and fall under the trust hereinafter created, and no part of said current rents shall fall or pertain to the executors of my said spouse as her executry, any law or practice to the contrary notwithstanding, and upon the death of the said Mrs Frances Lyell, or in the event of her predeceasing me, to and in favour of Charles Lyell, Thomas Lyell, Henry Lyell, Frances Lyell, Marianna Lyell, Caroline Lyell, Eleanor Lyell, Maria Lyell, and Sophia Georgiana Lyell (being the whole surviving children of the marriage between me and the said Mrs Frances Lyell), and the survivors or survivor of them in trust as trustees for the ends and purposes after mentioned (the majority of the survivors being a quorum for executing this trust), and upon the termination of this trust in the manner and at the period hereinafter expressed, then to and in favour of my heir-at-law at that time in fee."

The purposes of the trust were, First, that the truster's heir-at-law for the time, so long as that character should be in a person other than his daughters, and in the event of his daughters becoming his heirs-at-law, then his eldest surviving daughter for the time, should have the liferent use of the mansion-house of Kinnordy.

The second purpose was,—"With regard to the other trust lands and estate before described and conveyed (except the said mansion-house and Mains of Kinnordy and others foresaid), I direct my said trustees, and the survivor of them, to retain and manage the same in trust so long as there shall exist either more than one of my said children, trustees foresaid themselves, or one of them, along with my heir-at-law in a different person from my last surviving child, and to divide the whole free rents or annual returns from the estate, after paying all expenses, annuities, and other deductions, into equal shares (excepting only the produce from sales of wood), two of which equal shares I direct to be paid over to my heir-

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On the death of Mr Charles Lyell, second of Kinnordy, in 1852, his eldest son, Sir Charles Lyell, applied to the then superior and obtained

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a precept of *clare constat* in his favour, as the eldest son, and nearest and lawful heir of provision to his father under his grandfather's disposition and settlement of 1783. In virtue of this entry he paid a casualty of relief to the superior. Sir Charles Lyell died on 22d February 1875.

The trustees were also infeft on 8th July 1852 in terms of the precept in the trust-deed above quoted.

Lord Home, the superior of the lands in question, now brought an action for payment of a composition of one year's rent of the subjects—stated at £5000—against Miss Sophia Georgiana Lyell, the sole surviving trustee under the deed of 1836.

The pursuer averred that Sir Charles had merely a defeasible mid-superiority, and that on his death in 1875, the trustees, being already the proprietors duly infeft in the subjects, became impliedly entered with the superior, subject to his right to enforce payment of the casualty due on entry by virtue of that Act, the Conveyancing (Scotland) Act, 1874. They further stated that the destination contained in the settlement of 1783 had been evacuated by the disposition of 1836.

The defender stated in answer that the disposition of 1836 conferred no power upon the trustees to transmit to anyone, and formed a mere burden on the title of the heir-at-law. She further explained "that the heir-at-law of the late Sir Charles Lyell, and also of the deceased Charles Lyell, is Leonard Lyell of Kinnordy, who is likewise heir of provision under the disposition and settlement and under the destination in the charter of confirmation [of 1802]. He is willing to obtain a precept of *clare constat* from the pursuer, or, if the pursuer will not grant such precept, he will procure himself duly served as heir, and in either case he will pay relief-duty to the pursuer."

The pursuer pleaded, *inter alia*;—(1) A casualty of one year's rent of the lands described in the summons having become due to the pursuer, as superior thereof, by the defender, upon the death of the said Sir Charles Lyell, the previous vassal, the pursuer is entitled to decree as concluded for.

The defender pleaded, *inter alia*;—(2) The infeftment of the defender being merely a burden upon the radical and proper title to the estate, and the heir being willing to enter to said radical and proper title with payment of a relief-duty, the defender should be assoilzied. (3) The defender by the terms of her title holding only for the heir of the investiture, and having no power of transmission to any but the said heir, the pursuer is not entitled to more than relief-duty.

The Lord Ordinary (Kinnear), on 14th June 1887, pronounced this interlocutor:—" Finds that Sir Charles Lyell, the last entered vassal, was not divested of his radical right in the lands libelled by the infeftment of the trustees under his father's trust-disposition and settlement; that the said right passed at his death into his *hæreditas jacens*, and may be taken up by the service of his heir: And in respect of the minute for Leonard Lyell" (offering to enter either by writ of *clare* or by service) " supersedes farther consideration of the cause for one month, and grants leave to reclaim."*

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* "OPINION.—The question in this case is, Whether the defender has been entered with the superior, by force of the Conveyancing Act of 1874, as a singular successor of the last vassal, so as to exclude the heir of the standing investiture, and to incur liability for a composition of a year's rent? and it depends for its solution on the feudal effect of a trust-disposition executed in 1836 by the father and predecessor of the last entered vassal.

"The truster, Charles Lyell (the second) of Kinnordy, was infeft as immediate disponee under a trust-disposition and settlement executed by his father, Charles Lyell (the first), in 1783, and was entered with the superior by charter

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There was also another action at the instance of Lord Home against Mr George Auldjo Jamieson, the judicial factor acting under another trust-

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of confirmation, confirming the disposition and the infeftment following upon it in 1802. The disposition and settlement, so confirmed, is in favour of a series of heirs, varying in some respects from the legal order of succession; and the destination which it contains was undoubtedly the rule of the existing investiture, as regards succession, when the Act of 1874 came into operation. It was, however, a simple destination which Charles Lyell (the second) was at liberty to defeat; and it is said that he altered it by his trust-disposition and settlement of 1836, so that the implied entry of the trustees under that deed has effected a change in the investiture, and entitled the superior to a composition as for the entry of a singular successor. The answer is, that the trust right is a mere temporary burden, and that the infeftment of the trustees is therefore no feudal impediment to the entry of the heir.

"The trust-disposition and settlement contains a conveyance to the granter's wife in liferent, and, on her death, to his children, who are called *nominatim* in trust; and, upon the termination of the trust, to the granter's heir-at-law at that time in fee. The trust is created for the sole purpose of making provision, out of the rents of the estate, for the children of the truster, and upon the death of the last child, who shall not be heir-at-law, the trust is to come to an end, and the right of the heir-at-law is to become absolute. The deed contains procuratory of resignation and precept of sasine, authorising the infeftment of the children who are specially named 'in trust, and as trustees for the uses and purposes, and under the conditions' specified in the deed; and also authorising infeftment, at the end of the trust, of the heir-at-law at that time, in fee.

"On the death of the truster in 1852, his eldest son, Sir Charles Lyell, completed a title by infeftment on a precept of *clare constat* in his favour, as the eldest son and nearest and lawful heir of provision to his father under the settlement of 1783; and in July 1852, the whole surviving children of the truster, eight in number, took infeftment as trustees, upon the precept contained in the trust-disposition and settlement of 1836. It is not stated whether the sasine of the heir or of the trustees was first in date, and it is immaterial, because in either case the feudal effect of the two infeftments will be the same. The pursuer maintains that by their infeftment upon the precept the trustees divested the truster and his heirs of the *dominium utile*, leaving a bare midsuperiority, which was well taken up by Sir Charles Lyell; that they continued to hold base under Sir Charles until the passing of the Act of 1874, when, by the operation of the 4th section of that statute, the midsuperiority was extinguished, and the trustees were entered with the pursuer as their immediate superior. If this was in truth the effect of the trustees' infeftment, it follows, upon the authority of *Lamont* v. *Rankine*, that there is now no room for the entry of Sir Charles Lyell's heir, and that the defender must pay a composition as singular successor.

"The first question therefore is, Whether the truster and his heirs have been divested? It is settled law that a mere trust infeftment does not divest the granter, but operates merely as a burden upon his title. But the pursuer says that this is not a mere trust infeftment, because the disposition and settlement was intended to alter the existing destination, and is effectual for that purpose; and the trustees are therefore holding for the heirs of the new destination, which, according to the argument, has been already enfranchised by the implied confirmation of their infeftment.

"The whole case appears to me to depend upon the soundness of this proposition, and I am of opinion that it cannot be sustained. I am unable, however, to assent to the first point which the defender takes in answer to it. It is said that there is no change in the destination, because the 'heir-at-law,' as used in the trust-disposition and settlement, must be construed to mean heir of the investiture. But 'heir-at-law' is a technical term, which means, in its ordinary acceptation, the heir *provisione legis*, as distinguished from the heir of a particular destination. There is nothing in the deed to indicate that it was intended in any other than its technical sense, and I think it would be contrary to settled

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disposition and settlement by Mr Charles Lyell, second of Kinnordy, of even date with the deed founded on in the first action, viz., 28th May

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rules of construction to force upon it a meaning which it does not naturally bear, merely because the title of the granter of the deed contains a destination differing from the legal order of succession.

"There may have been cases where the word 'heir,' when used in relation to accessory rights, has been interpreted by reference to other deeds, but in the construction of a special settlement, such as the present, the technical meaning of words descriptive of the class of heirs who are to succeed must prevail, unless it can be controlled by other words occurring in the same deed. This was decided in the case of the *Duke of Hamilton* v. *Douglas*, M. 4369, and the decision rests upon principles that are applicable to the construction of all written instruments.

"Nor does it appear to me to be very material to the present question that the characters of heir-at-law and heir of the investiture are at present united in the person of Mr Leonard Lyell. He may or may not be the heir-at-law at the time the trust comes to an end; and it is a sufficient foundation for the pursuer's argument if, at the time when the trustees are said to have been entered, it was possible, according to the conception of the trust, that they might be holding for an heir who should not be the heir of the investiture. Now, there appears to be only one event, but still there is an event, in which the characters of heir of the investiture and heir-at-law might be in different persons at the termination of the trust. The heir-at-law of the truster at that time must be either his last surviving child, or the direct descendant of a predeceasing child. But by the destination of the settlement of 1783 heirs-portioners are excluded, and they are not excluded by the settlement of 1836. It follows that by the latter settlement the estate might be carried to persons who are not the heirs of the investiture, and it is of no importance to the question whether this is a probable or a possible result in the event which has actually happened.

"But, whatever may be the character of the heir who shall take at the termination of the trust, the important question is, Whether the full fee of the estate to which he will then have right is now vested in the trustees? I am not sure that this is exactly what is meant by the pursuer's proposition that the trustees are 'holding for the heir.' That is a very vague phrase, and the pursuer's counsel did not define with any precision the meaning which he attaches to it. But if it does not mean that the fee which the heir is ultimately to take is now in the last surviving trustee, it has no bearing upon the question of the heir's right to enter. If it does mean this, it would appear to me to follow that the heir when his right emerges must take it through or from the trustee by conveyance or by succession; and the best way of testing the soundness of the proposition will therefore be to inquire whether it is possible for the heir to complete a title by either of these methods.

"Now, it is certain that he cannot obtain a title by conveyance from the trustees, because they have no power to convey; and except in the event of the characters of heir-at-law and of last surviving child of the truster being combined in the same person, the trust is to be extinguished by the death of the last trustee before the right of the heir-at-law can be ascertained. A conveyance from the trustees, therefore, to the heir-at-law would be altogether inept and ineffectual. But then it is suggested that the trustees are infeft as the first members of a destination, and that upon the death of the last trustee the heir-at-law may make up a title by special service as heir of provision to her. I think it a sufficient answer that the infeftment of the trustees is expressly qualified as an infeftment in trust, which is to come to an end upon the death of the last trustee. It has long been settled law that where a trust expires with the last survivor of the trustees the feudal title cannot be taken up by his heir even for the purpose of a reconveyance to the truster—*Drummond*, M. 16,206; *Gillespie* v. *Robertson*, 2 Shaw, 795. But this is a much stronger case, for not only is the trustee's title to be extinguished on the death of the last survivor, but the whole purposes of the trust, and all the rights created by it, are to be exhausted upon the occurrence of that event. It appears to me to be altogether contrary

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1836, and dealing with different subjects from those dealt with in the latter. In this deed a power of sale was given to the trustees over

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to the most elementary principles to represent the estate in the trustees as an estate of inheritance which can pass by succession to their heirs; and it is just as impossible that it should be taken up by heirs of provision as by heirs of law. The truster's heir-at-law is not to take an absolute right in the estate until the trust is at an end. But when that event happens he is to take in his own right as a disponee, and not by way of succession to the trustees.

"But if it be clear that the trustees were infeft in trust only, and under a trust so qualified that the fee of the estate cannot pass to their heirs, it follows of necessity that their infeftment left the fee in Sir Charles Lyell, the last entered vassal. It has been settled law, ever since the case of *Campbell* v. *Edderline's Creditors* (Morr. App. Adjud. No. 11), that an infeftment in trust for special purposes does not completely divest the granter, but leaves the radical fee in him, so that on his death it may be adjudged as *in hæreditate jacente*, or taken up by the service of an heir in special. The rule has been applied in a great variety of cases, the most important of which are cited in the opinion of the Lord Justice-Clerk in *Gilmour* v. *Gilmour*, 11 Macph. 856; and the legal principles on which it rests are fully expounded in two very weighty judgments of Lord Moncreiff in the cases of *M'Millan* v. *Campbell*, 9 S. 551, 7 W. & S. 441, and *Giles* v. *Lindsay*, 6 D. 771. But the present is even a clearer case for the application of the rule than *Campbell* v. *Edderline* or *M'Millan* v. *Campbell*. For in these cases the trust-deed might have become the regulating instrument for the investiture of the estate, and in the present case, although a change of the investiture may be intended by the truster, the trust infeftment can never be made available for the purpose of effecting the change. The trust is to subsist only so long as shall be necessary for securing provisions out of the estate to children other than the heir-at-law; when that purpose is served it is to be extinguished *ipso facto*, without the necessity for any conveyance or reconveyance; in the meantime the trustees are to have no other powers, even of management, than are indispensable for the execution of the trust; and not only have they no power of conveyance, but they are expressly prohibited 'from taking grassums or premiums for leases, and from selling or disponing any part of the estate, and from burdening it with debt.' And all due precaution is taken to secure that the conditions and limitations upon their title shall be effectual, because by the terms of the procuratory and precept they are to be infeft in trust as trustees for the purposes and under the conditions and provisions before specified, which are appointed to be engrossed in the charters and infeftments to follow hereon. The series of decisions to which I have referred leaves no room for question as to the feudal effect of an infeftment in these terms. As a trust for special and temporary purposes, it left the granter undivested of the radical right, so that his heir might be served heir in special upon his original title, or adjudication might be led against his *hæreditas jacens*.

"It follows that the right vested in Sir Charles Lyell by his infeftment on the precept of *clare constat* was not, as the pursuer supposes, a bare midsuperiority, but the substantial right of property in the estate, under burden of the disposition and settlement. The fee must necessarily have been in him, because it was not in the trustees, and there was no other person in existence who could have it. But for the passing of the Act of 1874, therefore, there could be no question that upon his death the fee passed into his *hæreditas jacens*, and was open to be taken up, under the same burden as it stood in him, by his nephew Mr Leonard Lyell as his heir of provision. But the 4th section of the Act of 1874 makes no difference if the fee in Sir Charles was not a bare midsuperiority. It enters the proprietor infeft with the nearest superior whose estate of superiority in the lands would not have been defeasible at the will of such proprietor. But the trust infeftment makes no real division of the truster's estate, so as to separate the *dominium utile* from a midsuperiority. It leaves the entire estate in him as it stood before, or in the heir who takes it up from his *hæreditas jacens*, subject only to the transient burden of the trust; and no

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the subjects conveyed in order to satisfy certain debts and provisions therein specified, but in the event of any part of the lands remaining

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part of the estate is defeasible at the will of the trustees, whether the form by which the trust is made real is an *a me* or a *de me* holding.

"It appears to be very doubtful, therefore, whether the Act of 1874 is applicable to the case, so as to put the trustees in the position of holding directly of the superior. But if they do hold directly of him, they hold only to the extent of their right, and their infeftment is still nothing more than a burden upon the substantial fee. It is of no consequence to the rule as laid down in *Campbell* v. *Edderline* whether trustees hold of the truster or of his superior. The principle is that their infeftment, in whatever form, does not evacuate the infeftment of the granter, and therefore cannot exclude the infeftment of the granter's heir. This is brought out very clearly in the opinion of Lord Corehouse in *Melville* v. *Preston*, 16 S. 457. It was a question, in that case, whether trustees under a trust-disposition which had been executed by Sir Robert Preston of Valleyfield, under the burden of an entail, could make up a feudal title to the lands, notwithstanding that the entail had been already feudalised in the person of the institute. And upon that question Lord Corehouse observes,—'As to the feudal difficulty pleaded by the defender, it is without foundation. It is true there cannot be two co-existing and co-ordinate infeftments in fee-simple in one and the same estate; but nothing is more common than to have an infeftment in fee-simple burdened either with an entail or a trust. . . . These are not cases of two co-ordinate and co-existing infeftments in the same fee.' And accordingly the completion of the one title by infeftment interposes no feudal impediment to the completion of the other by infeftment also.

"It is argued, however, that although the infeftment of the trustee might not exclude the heir, if the deed contained nothing more than the conveyance in the trust, the conveyance to the granter's heir-at-law will have a very different effect, because it necessarily operates a change in the investiture. But the change has not yet been effected, and it is very doubtful whether it could ever be effected, without the intervention of the heir of the existing investiture. I assume that the beneficial interest is well given to the heir-at-law, if that character shall belong to a different person from the heir of the investiture when the trust comes to an end. But taking that for granted, the question is whether the conveyance is of itself effectual as a feudal transmission of the estate. The 20th section of the Titles Act of 1868 and the 27th section of the Conveyancing Act of 1874 have no application to a disposition executed in 1836 and coming into operation by the death of the granter in 1852. The feudal effect of the deed, therefore, must be determined according to the law as it stood before the passing of these Acts; and by the law as then established a proprietor infeft could only infeft a disponee by the warrants contained in a *de presenti* conveyance in favour of a person capable of taking an immediate right. A precept for the infeftment of persons who cannot be ascertained, and who may not be in existence when the deed comes into operation, was altogether inept and ineffectual. It appears to me, therefore, that there is only one method by which the disponee, if he has a good right at all, will be able to combine his right with the feudal title. He cannot obtain a conveyance from the trustee, because she has no power to convey; he cannot serve heir of provision to her, because she has no right that will pass into her *hereditas jacens;* he cannot execute the precept in his own favour. The only means by which he can feudalise his right is by adjudication in implement directed against the heir of the investiture. But that means that he can charge the heir to enter, by treating the disposition in his own favour as an obligation upon the heir. And if the heir can enter when the trust is at an end, in order to give effect to his ancestor's conveyance, it follows that the investiture has not been changed, and that he can enter now, because the fee is vacant by the death of the last vassal.

"But if, contrary to the opinion I have indicated, it should be held that the precept is a good warrant for the infeftment of the disponee, that will not in

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unsold, it was provided that they should be conveyed to the trustees under the previous deed, "and that in the same terms and under the same con-

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the slightest degree affect the present title of the heir of the investiture as in a question with the superior. The right of the disponee will still be purely personal until he chooses to take infeftment, and if he should be content to stand on his personal title, and to leave the fee vacant for the heir of the investiture, there will be nothing in the state of the titles, or of the substantial rights of the parties, to prevent the heir from entering. It is said that the deed is confirmed, and that the superior cannot but be entitled to found upon a conveyance which the statute supposes him to have recognised. But assuming the implied confirmation to have taken effect, I cannot read the statute as importing a confirmation of anything in the title of a proprietor infeft, excepting only the infeftment and its conditions, and the rights and titles which are necessary to support it. If the deed contains two several rights, upon one of which infeftment has passed, while the other remains personal, the implied confirmation of the feudalised right can have no operation upon the personal. The infeftment of the liferenter alone, under a conveyance to one in liferent and another in fee, is a familiar illustration; and there can be no question that such an infeftment, either before or after the passing of the Conveyancing Act, leaves the fee remaining upon the old investiture. This was well settled under the old law, and it was held by the majority of the Judges in *Hope* v. *Hamilton*, 10 R. 1127, to be equally clear in a question under the Conveyancing Act of 1874. Lord Shand, in that case, proceeded upon a different ground, but I do not understand his Lordship to have dissented from the opinion of the other Judges, or to indicate any doubt of the soundness of the distinction between an unfeudalised right, which may import a change in the destination, and the feudal operation, which changes the investiture. The material point is that the superior has no concern with the rights which may be created by his vassal, until the persons in whose favour they may be conceived are brought into direct relation with him by infeftment or a demand for infeftment of and under him. On the same principle it would appear to follow that the implied confirmation of a trust infeftment can have no operation whatever upon the unfeudalised right to the substantial fee. And, therefore, if Sir Charles Lyell had been the last surviving trustee, and the character of heir-at-law and heir of the investiture had been in different persons at his death, I see no ground upon which the superior would have been entitled to plead upon the disposition to the heir-at-law as against the demand of the heir of the investiture for an entry, if the heir-at-law were content, for whatever reason, to waive his right. The case of the *Duke of Hamilton* v. *Guild,* 10 R. 1117, would have been directly in point. But if that be so, the heir of the investiture must be equally entitled to enter to the fee left vacant by Sir Charles' death, when the right of the heir-at-law has not yet been ascertained.

"The cases of *Hill* v. *Grindlay* and of *Lamont* v. *Rankine* are, in my opinion, inapplicable. In these cases the deeds which were confirmed, actually or by implication, were deeds creating a new investiture. As Lord Curriehill points out, 'the trustees on obtaining the charter which they demanded might have used it to create the direct relation of superior and vassal between the superior and a third party, even after the death of the heir, without any farther payment being made to the superior.' In the present case the trustee can never by the exercise of any right in her bring any new vassal into feudal relation with the superior. The infeftment of the trustee is a mere burden which has no effect upon the investiture; and if the investiture should be changed at all by the operation of the trust-disposition and settlement, it will be in virtue of a right which has not yet been feudalised. The superior may be entitled to a composition when the change takes place, if the fee is then vacant. But, in the meantime, he must, in my opinion, be content with relief-duty on the entry of the heir.

"The other case, at the instance of the same superior against the judicial factor upon a trust for creditors, depends upon the same considerations. There

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ditions, clauses, provisions, and declarations in every respect as are contained in the said trust-disposition and settlement."

None of the trustees under this deed having accepted office, a judicial factor had been appointed in the trust on 9th March 1850. Sir Charles having executed a disposition and conveyance of the subjects contained in the deed of 1836 to the judicial factor, the latter was infeft thereon in July 1854, and this action was now brought against him for payment of a casualty of a year's rent, Sir Charles having died in 1875, and the defender being now impliedly entered with the superior by virtue of the Conveyancing Act of 1874.

As already stated with reference to the other action, Sir Charles Lyell obtained a precept of *clare constat* in August 1852, and infeftment followed, he paying a casualty of relief.

The pleadings of parties were similar to those in the preceding action.

The Lord Ordinary (Kinnear), on 14th June 1887, pronounced a similar interlocutor to that in the former action, and his ground of judgment will be found in the last paragraph of his note to the first interlocutor.

The pursuer reclaimed in both cases.

Before the cases were opened the defender was allowed to add the following new plea in each:—"In respect of the provisions of the Act 50 and 51 Vict. cap. 69 (Conveyancing (Scotland) Acts Amendment Act, 1887), the defender is liable in relief-duty only."

Argued for the pursuer;—I. In regard to the defender's new plea, (1) the Conveyancing Amendment Act of 1887 was not retroactive. It did not affect transactions already made, or actions already raised, or interests already vested at the date of the passing of the statute.[1] It was not necessary to the rejection of the plea to hold that the statute could only apply to deeds which came into operation after its date. The words of the 1st section of the Act of 1887 were not wider than those of the 39th section of the Act of 1874, which were the subject of decision in this connection in the case of *Gardner*. (2) The terms of the 1st section of the Act of 1887 were inapplicable to the facts of this case. "Heir" in that section meant "heir-at-law," and "heir-at-law" only. It was here sought to make it applicable to an heir of investiture, or a selected beneficiary, *i.e.*, a person who should be in the position of heir-at-law at a certain date.

II. The intention of the trust-disposition and settlement of 1836 by Mr Charles Lyell the second clearly was to evacuate the old destination under the deed of 1783 and to create a new one. A destination over to a person who may be "my heir-at-law at that time" was the same as a destination over to a third person.[2] The person entitled to take could not

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is a power of sale for payment of debts, but the same power existed in the case of *Edderline*, and in many of the long series of decided cases which followed it; and it is perfectly well settled that until the power is exercised, the trust for creditors is still a mere burden. A more material point of distinction is that there is no conveyance of such part of the lands as may remain unsold by which the rights of the heirs of the investiture can be affected. The trustee for creditors is to convey to the trustees under the trust-disposition and settlement, but when the purposes of this last trust have been served, there is no farther conveyance, and no direction or power to the trustees to convey. The heir of the investiture, therefore, is not divested."

[1] Urquhart v. Urquhart, July 14, 1853, H. L. 1 Macq. 658, 15 D. (H. L.) 49, 25 Scot. Jur. 537; Gardner v. Lucas, Feb. 8, 1878, 5 R. 638, 15 S. L. R. 359, affd. H. L. 5 R. 105; Kerr v. Marquis of Ailsa, June 12, 1852, 14 D. 864, affd. June 13, 1854, 17 D. (H. L.) 11, 1 Macq. 736.

[2] Murray v. Gregory's Trustees, Jan. 21, 1887, 14 R. 368.

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be ascertained until the death of the last survivor of the trustees; and although it was true that Mr Leonard Lyell was both heir-at-law and heir of the investiture at present, these two characters might be in different persons when the succession ultimately opened. For instance, if Mr Leonard Lyell predeceased the last surviving trustee, and left daughters only, the fee would go, under the trust-disposition, to them as heirs-portioners—but under the old destination heirs-portioners were excluded. The old destination was therefore altered by the deed of 1836, upon the precept contained in which the trustees under it obtained infeftment in 1852. By that infeftment the truster and his heirs were divested of the *dominium utile* of the estate, leaving to Sir Charles Lyell a bare mid-superiority; and on the passing of the Conveyancing Act of 1874 the trustees became impliedly entered with the superior, and were liable in the composition now sued for as at the date of the death of Sir Charles in 1875.[1] The Lord Ordinary would have admitted that this argument, founded upon the cases cited above, ruled the present case, if there had been a power in the deed of 1836 to the surviving trustee to convey to the heir, or if the destination had been to the trustees and the heir of the survivor of them. But because his Lordship found in that deed no means by which the estate could be conveyed to the ultimate disponee, he held that the present case was differentiated from those cited above, and that the truster was not divested by the infeftment of the trustees, who, he held, were mere incumbrancers for temporary purposes only. In the case of *Campbell* v. *Edderline*,[2] on which the Lord Ordinary founded, the trust was created for the granter's behoof. So too in *M'Millan* v. *Campbell*.[3] These cases were thus distinguishable from the present, where the deed was a *mortis causa* trust, and this distinction was well known to the law.[4] The case of *Giles* v. *Lindsay*[5] belonged to a different category—the question there being as to the effect of an *ex facie* absolute feu-disposition which had been granted for a particular purpose only. In *Gilmour* v. *Gilmours*[6] the Lord Justice-Clerk (Moncreiff) (11 Macph. 858) drew a distinction between *mortis causa* and *inter vivos* trusts, which applied here. In a *mortis causa* disposition like the present nothing was left in the *hæreditas jacens* of the truster. The fee was in the trustees, who held for the heir who might ultimately be entitled to succeed. Where heirs were not mentioned, the trust-estate remained after the death of the last surviving trustee in his *hæreditas jacens*,[7] and his heir might be sued in a declarator of trust and adjudication with a view to the making up of a title. The cases of *Drummond* and *Gillespie*, which were cited on the other side, supported this contention. Under the 43d section of the Conveyancing Act of 1874 (37 and 38 Vict. cap. 94) the heir-at-law of the last surviving trustee might make up a title as trustee in his room to facilitate the carrying through of the remaining purposes of the trust, or

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[1] Lamont v. Rankine's Trustees, Feb. 28, 1879, 6 R. 739, affd. Feb. 27, 1880, 7 R. (H. L.) 10; Grindlay v. Hill, Jan. 18, 1810, F. C.; Ferrier's Trustees v. Bayley, May 26, 1877, 4 R. 738; Rossmore's Trustees v. Brownlie, Nov. 23, 1877, 5 R. 201; Sturrock v. Carruthers' Trustees, May 21, 1880, 7 R. 799.

[2] Jan. 14, 1801, M. App., Adjudication, 11.

[3] March 4, 1831, 9 S. 551, affd. Aug. 14, 1834, 7 W. and S. Apps. 441.

[4] *Cf.* Macdowall and Selkrig v. Russell, Feb. 6, 1824, 2 S. 682.

[5] Feb. 27, 1844, 6 D. 771.

[6] July 3, 1873, 11 Macph. 853, 45 Scot. Jur. 521.

[7] Bell's Principles, 2001; Drummond v. Mackenzie, M. 16,206; Gillespie v. Robertson, March 11, 1824, 2 S. 795; Gordon's Trustees v. Harper, Dec. 4, 1821, 1 S. 185, 1 Ross' Leading Cases, 499.

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the provisions of the 14th section of the Trusts Act, 1867 (30
Vict. cap. 97), might be taken advantage of.

III. The Lord Ordinary had departed from the rule which was recc
in cases of this kind. If there was on the face of the deed, as the
here, a clear intention on the truster's part to make a new settlen
his estate, the law would not regard the trustees as incumbrancer
because there was merely a coupling awanting.[1] For instance, if tl
been a case under the old law, and the trustees had gone to the sı
asking a charter of confirmation on payment of relief-duty, the sı
would have said that the substance of the deed was that the
had given away his estate for a new settlement under a new i
ture.

If there was a difficulty it was only a technical one. The whole
of cases, beginning with *Frog's Creditors*,[2] supported the view that
than hold that a fee was *in pendente* the Court would invent a fiar, w
a fiduciary one or otherwise. Indeed, the invention of the theor
fiduciary fiar was due to the necessity of satisfying the right of the sı
to have a vassal. There was no case in which an attempt to disp
the fee had been denied effect because of the existence of interpose
rents. The Lord President put such a case in his opinion in *Cum*
R. 944) only to reject it. Further, the deed of 1836, as had been p
out, was a complete family settlement, altering the previous inve
—which was in favour of the view that the trustees' right was not
liferent merely.[3]

Second Action.—In regard to the second action, the distinctions we
the trustee for creditors was to hand over the balance, after servir
purposes of the trust, to the trustees under the trust-dispositio
settlement. There was further a power of sale, and the grante
thus undoubtedly divested of his estate. This case was *a fortiori*
first.

Argued for the defender;—I. On the construction of the deed o
it was important to notice at the outset that the only event in whi
characters of heir of the investiture and of heir-at-law could be i
ferent persons would be the event of Mr Leonard Lyell predec
the last surviving trustee and leaving daughters, who would take
the deed of 1836 as heirs-portioners, while under the earlier deed
portioners were excluded. The heir of investiture and the heir-
being thus the same person, only relief-duty could, in the meanti
anyrate, be claimed until it appeared whether the heir-at-law wa
heir of investiture.[4] That was upon the footing that the Lord Ord
was right in holding that the words "heir-at-law" meant somethin
ferent from "heir of investiture."

II. Looking to the terms of the deed itself, there was no mach
provided in it by which the trustees could convey to the heir-a
The conveyance to him was independent of the trustees altogether.
was an all-important fact, because the fallacy on the other side wa

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[1] Mackintosh v. Mackintosh, March 5, 1886, 13 R. 692.

[2] Frog's Creditors v. His Children, Nov. 25, 1735, M. 4262; Newla
Newlands' Creditors, Feb. 7, 1794, affd. April 26, 1798, M. 4294; Cum
Cumstie's Creditors, June 30, 1876, 3 R. 921; Ferguson v. Ferguson, Ma
1875, 2 R. 627; Douglas v. Thomson, Jan. 7, 1870, 8 Macph. 374, 42 Sco
173.

[3] Mein v. Taylor, Feb. 23, 1830, 4 W. and S. 24; Ramsay v. Beveridge,
3, 1854, 16 D. 764.

[4] Marquis of Hastings v. Oswald, May 27, 1859, 21 D. 871, 31 Scot. Ju

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they had treated the infeftment as that of the heir-at-law, which, they argued, had been impliedly effected on the passing of the Conveyancing Act of 1874. But the infeftment thus produced was an infeftment of the trustees only, and it was a burdening and not an evacuating infeftment. The dispositive and executive clauses of the deed recognised the conveyance to the trustees as a separate conveyance from that to the heir-at-law, just as if there had been two deeds. This case was therefore really *a fortiori* of the case of *Campbell* v. *Edderline's* creditor.[1] There were several points of distinction between the present case and that of *Grindlay* v. *Hill*,[2] which had been cited on the other side. In the latter (1) there was a power of sale; (2) the trustees did not hold for the heir only, but for others as well; (3) there was a direction to convey; (4) what the trustees asked was a charter which *omnium consensu* would have been assignable.[3] It had been attempted on the other side to establish a canon of law that the question whether an infeftment was to be considered a burdening or evacuating infeftment depended on the consideration whether the deed was one *inter vivos* or *mortis causa*, and Lord Justice-Clerk Moncreiff's opinion in *Gilmour's* case had been founded on.[4] But the case of *Giles* v. *Lindsay*[5] had not been quoted in the case of *Gilmour*, and the opinions of the Court in that case were quite inconsistent with the Lord Justice-Clerk's opinion in *Gilmour*. The trust in the case of *Melville* v. *Preston*[6] was very like the trust in the present case, and was a case of a *mortis causa* disposition. Further, there was here, under the deed of 1836, a direct disposition to the heir, but no way of making up his title. It was true, as had been argued on the other side, that the heir of a deceased trustee was called in a process of declarator and adjudication which was brought by a beneficiary, where the trust-deed contained no destination to the heirs of the last surviving trustee, in order to have the trust-estate adjudged to him, but this was solely for the purpose of allowing the heir to state any claim to be recouped, or other defence which might have been open to the deceased. There was no feudal fee to be taken out of the deceased trustee. But here the truster never had been divested. There could not be divestiture without another infeftment, vesting the person infeft with the full fee. It was not enough that there was a fiduciary fee in the trustees, seeing that the trust was temporary in its nature, and that the trustee's infeftment was not an infeftment on behalf of the heir.[7] If such an infeftment had been taken, it would not have been in conformity with the precept contained in the deed.[8] The presumption was always against the divestiture of the granter where the trust was for temporary purposes only. The principle of *Cumstie's* case[9] had never been extended to cases of trust-dispositions for behoof of creditors, nor to other temporary or burdening dispositions.

III. The next question was whether there was a good conveyance to the heir. Under the old law,—*i.e.*, prior to the Titles Act of 1868, and the Conveyancing Act of 1874—it was settled that a *de præsenti* conveyance to a person not named was good, but the precept in his favour could not be made effectual except by declarator and adjudication or by service.[1] The precept here therefore, in so far as it was in favour of the heir, was unexecuted, and all that was confirmed by the Act of 1874 was the sasine of the trustees.

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[1] Morr. App., Adjud. No. 11.

[2] Jan. 18, 1810, F. C.

[3] Lord Curriehill's opinion in Lamont v. Rankine, Feb. 28, 1879, 6 R. 741; also in Sturrock v. Carruthers' Trustees (reported on other points May 21, 1880, 7 R. 799), Session Papers, vol. 681, No. 136.

[4] 11 Macph. 858.

[5] 6 D. 771.

[6] Feb. 8, 1838, 16 S. 457.

[7] Duke of Hamilton v. Guild, July 6, 1883, 10 R. 1117; Hope v. Duke of Hamilton, July 6, 1883, 10 R. 1122.

[8] Barstow v. Stewart, Feb. 18, 1858, 16 D. 612.

[9] 3 R. 921.

IV. The Act of 1887 was retrospective. There was no room here for the presumption against the retrospective effect of legislation.[2] The Act itself expressly bore (sec. 1) to deal with infeftments completed prior to its passing. It was said that the section did not cover the present case, because the word "heir," which alone was used there, had a restricted signification, and meant "heir-at-law." But surely it included a case where trustees held for the person who would be entitled to serve as heir-at-law.

Second Action.—There was nothing which could be held to distinguish it from the first. The power of sale which was given to the trustees was immaterial for that purpose.

At advising,—

Lord President.—This is an action at the instance of Lord Home, superior of the lands of Kinnordy against Miss Sophia Georgiana Lyell, who is the last survivor of certain trustees who became infeft in the lands in question in 1852. It is maintained by the pursuer that on the passing of the Conveyancing Act of 1874 the infeftment of 1852 had the effect of entering the defender with the superior as his vassal, and he now therefore demands a composition of a year's rent from the defender as a singular successor of the last entered vassal. The Lord Ordinary has found that "Sir Charles Lyell, the last entered vassal, was not divested of his radical right in the lands libelled by the infeftment of the trustees under his father's trust-disposition and settlement; that the said right passed at his death into his *hæreditas jacens*, and may be taken up by the service of his heir," and he has superseded farther consideration of the cause in order that Mr Leonard Lyell, as heir of provision, may enter on completing his title either by precept of *clare* or by service.

To determine the question at issue, it is necessary to go back in the history of the estate and of the titles to it. The estate was purchased in 1782 by Mr Charles Lyell, who by *mortis causa* deed, dated in 1783, settled it upon his eldest son, Charles Lyell, second of Kinnordy, and a series of heirs, the destination being one which departed in some respects from the legal order of succession. The second Mr Charles Lyell was infeft upon that disposition and settlement in 1796, and he was entered with the then superior by charter of confirmation dated in 1802 on payment of a year's rent as composition, which of course had the effect of enfranchising the series of heirs named in the destination of the disposition of 1796. Upon the death of the second Mr Charles Lyell, in 1852, his eldest son Sir Charles Lyell, third of Kinnordy, entered as heir of investiture by precept of *clare constat* obtained from the superior in 1852. He died in 1875, and the next heir of the investiture is Mr Leonard Lyell, who is also heir-at-law to the heir of the investiture last infeft.

If the destination in the deed of 1783, to which I have referred, is not

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[1] Bell's Principles, 876; Menzies' Lectures on Conveyancing (3d edit.), 561; Ross' Leading Cases (Land Rights), ii. 18.

[2] Maxwell on Interpretation of Statutes (2d edit.), p. 266.

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evacuated, it is not easy to see how the pursuer's contention can be maintained, because in that case the person clearly entitled to enter as heir is Mr Leonard Lyell, who, as I have said, is the next heir of the investiture. But it is said that the destination has been evacuated by a deed which was executed by the second Mr Charles Lyell in 1836,—upon which the trustees therein named were infeft in 1852,—the same year in which Sir Charles Lyell entered as vassal under the investiture.

It is manifest that the whole question turns upon the terms of the deed of 1836 and the infeftment thereon by the trustees in 1852. If that deed had the effect of transferring to the trustees the fee and property of the estate, then their infeftment operated to divest the truster and his heirs of the *dominium utile* of the estate, leaving a bare midsuperiority, which was well taken up by Sir Charles Lyell. So matters stood until the passing of the Conveyancing Act of 1874, the 4th section of which,—according to the decisions which have been pronounced,—had the effect of extinguishing the midsuperiority, and making the defender, according to the contention of the pursuer, hold direct of the superior, Lord Home. On the other hand, if the *dominium utile* was not vested in the person of the defender as the last survivor of the trustees, then the pursuer has no claim to the composition he now seeks.

The deed of 1836 is a very peculiar one. The granter dispones, conveys, and makes over in the first place in favour of his wife "in liferent, for her liferent use allenarly, during all the days of her life after my death, in the event of her surviving me," &c.; but as the lady predeceased her husband, that portion of the deed never came into operation. The second part of the conveyance is,—"Upon the death of my said spouse the whole rents then current of the lands and others after described shall belong to and fall under the trust hereinafter created, and no part of said current rents shall fall or pertain to the executors of my said spouse as her executry, any law or practice to the contrary notwithstanding, and upon the death of the said Mrs Frances Lyell, or in the event of her predeceasing me, to and in favour of Charles Lyell, Thomas Lyell, Henry Lyell, Frances Lyell, Marianna Lyell, Caroline Lyell, Eleanor Lyell, Maria Lyell, and Sophia Georgiana Lyell (being the whole surviving children of the marriage between me and the said Mrs Frances Lyell), and the survivors or survivor of them in trust as trustees for the ends and purposes after mentioned (the majority of the survivors being a quorum for executing this trust), and upon the termination of this trust in the manner and at the period hereinafter expressed, then to and in favour of my heir-at-law at that time in fee."

I do not think there is any difficulty in understanding the meaning and intention of the maker of the deed. His intention is that the estate shall be held in trust for a certain period by his whole children, and at the termination of the trust,—on the death of the last survivor,—the estate is to go in fee to the person who may then be in the position of heir-at-law to the truster. The nature of the trust must be ascertained from the other portions of the deed, and may be shortly expressed thus,—that the whole of the children are to enjoy among them the rents of the estate, so long as they or any of them survive,—they are all to take possession of and to administer the property and divide the rents among them, and the survivors and survivor are to do the same. But as soon as the last survivor dies, the trust is to come to an end. The trustees have no power of sale under the deed,—nor can they burden the subjects. They have nothing but ordinary powers of administration, and the enjoyment of the rents for their own lives and those of the survivors and survivor. That being the nature of the trust, the question is, what is the effect of it?

But before answering that question it is desirable to keep in view what is to take place when the trust comes to an end. The estate is then to fall and belong to the person who shall be the truster's heir-at-law at the period of that event. He is not named in the deed, for the reason that he cannot be ascertained until the event occurs, and the expiration of the trust has come about. Further, the trustees are not authorised to convey to that heir; on the contrary, his right depends upon a direct conveyance to him by the granter of the deed on the expiration of the trust. What the effect of that provision is may possibly give rise to a question some day, although it is not necessary to decide the point now. Again, the deed provides that if the last surviving trustee happens to be heir-at-law of the granter, then he is to take the fee of the estate under the operation of this clause; but if he be not so, then the person must be found who answers the description of the granter's heir-at-law at that time.

It is clear that under this deed no proper fee and no property ever vested in the trustees at all. The trust is, perhaps, more than any other trust which we have had before us, of the nature of a purely temporary trust; it is not even like a trust for creditors, where the trustees have powers of sale, and where the granter is not divested of the radical fee unless that power is exercised. There has been no operating upon the estate here by the trustees, excepting only so far as ordinary administration and the enjoyment of the rents for their own benefit is concerned. I can therefore come to no other conclusion than that this trust created a mere temporary burden upon the estate, and that the fee remained in the *hæreditas jacens* of the son of the granter of the deed, I mean of Sir Charles Lyell, who was himself entered as heir. It may happen in a certain, not very likely, event that the heir-at-law of the truster will not be the heir of investiture when the trust comes to an end. They may be different persons, and a question may then arise which is to be preferred, whether the heir of investiture is to take, or the person who has got a right to the formal conveyance, which may be effectual as an obligation in his favour, though there is no conveyance. It is out of the question to determine that point now. In all human probability the necessity of determining it will never arise. All we have to decide now is, whether Miss Sophia Georgiana Lyell, who is the sole surviving trustee, is clothed with the right of fee in the land, in consequence of which she can be made to enter with the superior as a singular successor, or becomes entered by the operation of the Act of 1874. I am of opinion that there is no such fee in her, and that there never was, and therefore, upon the same ground as the Lord Ordinary, I am for adhering to the Lord Ordinary's interlocutor.

Lord Mure.—I am of the same opinion. The main question here raised for decision is whether the trustees under the trust-deed of 1836 founded upon were infeft as proprietors in fee of this estate at the time of the passing of the Conveyancing Act of 1874, and are now duly entered with the superior in respect of the provisions of the 4th section of the statute. The words of the section are, that "every proprietor who is at the commencement of this Act or thereafter shall be duly infeft in the lands shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior." I understand the words "duly infeft" to mean "duly infeft in fee," and the question we have to decide is, whether the present trustees come under this description. I am of opinion that they do not. The trustees seem to me to have been appointed mainly for the administration and management of this property. There is no express conveyance of the estate to them in fee, nor any express mention of the fee till the time of the expiry of the trust, when it is to belong to the heir-at-law of the truster as at that period. The powers of the trustees, moreover, are limited in important respects, and I can find nothing in the trust-deed to shew, or even to indicate, that there was any intention on the part of the testator to vest the fee in the trustees. On the contrary, it appears to be very anxiously provided that the trustees shall not act as proprietors of the estate, because they are prohibited from selling or burdening it, and they have no power to dispone. Neither in words, therefore, nor on any fair construction of the deed, can it be said that they are proprietors of the fee of the estate. Upon that simple ground I concur with your Lordship in thinking that the Lord Ordinary has come to a right conclusion; and I may add that I concur with his Lordship substantially in the views which he has expressed in his note as to where the fee of the estate has been since the death of the truster.

LORD ADAM.—A great many questions of more or less interest have been argued to us in this case, but I agree with your Lordships in thinking that the grounds upon which we ought to decide it lie within a narrow compass.

It is common ground between the parties that Sir Charles Lyell was the vassal last entered in the fee, and that by an infeftment dated in 1852. That being so, on 22d February 1875, which was the date of his death, the fee of the subjects passed into his *hæreditas jacens*, and still remains there, unless it can be shewn that it has been taken out of it by the infeftment of the trustees under the deed of 1836, and the operation of the Conveyancing Act of 1874. There is thus raised the simple question whether the infeftment of 1836 was or was not an infeftment in fee. It is clear that no infeftment of the trustees could have the effect of entering them with the superior unless it was an infeftment in the fee.

The question therefore turns upon the effect of the infeftment of the trustees under the deed of 1836. We have not had the infeftment produced, but it is said to be exactly in the terms of the precept of sasine, and if valid must have been so. If this is so, the infeftment was to the truster's widow in liferent for her liferent use, and upon her death to the trustees and the survivors or survivor of them in trust, for the ends and purposes, and under the declarations, burdens, conditions, and provisions contained in the deed—there being no mention, we were told, of the heir-at-law. We are therefore taken back to the deed to see what the trust purposes were. I shall not analyse it again, but it seems to me clear, as your Lordship has pointed out, that its purposes were of a purely temporary nature, and that they were all to come to an end at the death of the last survivor of the trustees, or sooner if the last survivor happened to be the heir-at-law. That being the nature of the infeftment, it appears to me that it is no more than a burden upon the fee. There is no conveyance of the fee to the trustees. The conveyance is direct to the heir-at-law, and this being so, it is impossible to say that the surviving trustee is infeft in the fee of the subjects. It is clear, therefore, that the effect of the statute cannot be to enter the sur-

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viving trustee as vassal in the fee, and accordingly the defender is not liable in the composition which is now demanded.

I therefore think the Lord Ordinary's judgment is quite right. The superior is entitled to have a vassal, but I am clearly of opinion that he cannot have the surviving trustee entered.

LORD SHAND was absent.

THE COURT adhered.

GIBSON & STRATHERN, W.S.—DUNDAS & WILSON, W.S.—Agents.

No. 44.

Dec. 21, 1887.
Dunbar v. Wilson & Dunlop's Trustee.

SIR WILLIAM DUNBAR, BART. (Balfour Hay's *Curator Bonis*), Pursuer (Reclaimer).—*Sol.-Gen. Robertson—C. S. Dickson.*
GEORGE TODD CHIENE (Wilson & Dunlop's Trustee), Defender (Respondent).—*Gloag—J. C. Lorimer.*

Agent and Client—Negotiorum gestor—Remuneration of agent.—A landed proprietor having become insane, his brother, without judicial or other authority, managed his estate with the assistance of the law-agents who had previously managed the estate for the proprietor. After two years a *curator bonis* was appointed to the proprietor. In an action of accounting brought by the curator against the law-agents, the pursuer maintained that the defenders must be regarded as pro-curators, and were not entitled to credit for professional charges. *Held* that the law-agents were entitled to the ordinary remuneration for their services.

2D DIVISION.
Lord Kinnear.
B.

EDMUND PATERSON BALFOUR HAY of Mugdrum and other estates, on attaining majority in 1869, executed a factory and commission in favour of his mother, who had previously managed his estate as his curator. During her management she had been advised by Mr George Wilson, S.S.C. (of the firm of Wilson & Dunlop, W.S.), who had long been the agent for the Mugdrum estate.

Mrs Paterson died on 6th September 1873. On her death, Mr Hay being of weak mind, it became necessary to make a new arrangement for the management of Mugdrum. On 16th October Mr Hay signed a trust-deed in favour of Sir William Dunbar, Mr Peter Hay Paterson (the granter's brother), and Lord Elibank, but as on that day a medical certificate of Mr Hay's mental unsoundness had been obtained, Mr Wilson thought it inexpedient to treat the trust-deed as delivered, and intimated this to Sir William Dunbar, whose view, however, was that it should be acted upon. Mr Wilson retained the deed in his possession as undelivered, in order that the matter might receive further consideration. It was, however, necessary to make arrangements for payments in connection with Mugdrum at the ensuing Martinmas term. Mr Wilson, for this purpose, arranged to open an account with a bank at Newburgh, into which he paid the whole rents collected, and upon which Mr P. H. Paterson operated. Mr Wilson intimated this arrangement to Sir W. Dunbar on 24th November, who then took up the position that these arrangements amounted to a practical setting aside of the trust-deed, and the setting up of a management outside it, and intimated, on 18th December 1873, that in his view the responsibility would rest with those (Mr P. H. Paterson and Mr Wilson) who so acted. Meantime the arrangement by which Mr P. H. Paterson managed the estate continued. In January 1875 it appeared that Mr P. H. Paterson's affairs were embarrassed, and Mr Wilson found it necessary to bring his management to an end in February 1875.

Sir William Dunbar was in July 1875 appointed *curator bonis* to Mr Balfour Hay. Messrs Wilson & Dunlop acted under him as factors and law-agents. They had not been paid any business account or factors' fees during Mr Paterson's management, nor had they retained such from the rents they collected.

Sir William Dunbar considered that he ought not to pay their charges applicable to that period, on the ground that they were acting without any proper authority in the management of the estate.

In 1878 the affairs of Wilson & Dunlop became embarrassed in consequence of the failure of the City of Glasgow Bank, in which one of the partners held shares, and they and the individual partners executed a trust-deed in favour of Mr George Todd Chiene, C.A., as trustee.

Sir William raised an action in May 1884 for an accounting by Mr Chiene as trustee for the intromissions of Messrs Wilson & Dunlop with the affairs of Mr Hay between Mrs Paterson's death on 6th September 1873 and his own appointment in July 1875. Mr Chiene maintained in defence that Wilson & Dunlop having accounted for their intromissions to Mr Paterson were not bound to account again to Sir William.

A proof was led, in which the facts already narrated were disclosed.

A remit was thereafter made to an accountant to examine the accounts. Sir William Dunbar maintained before the accountant, *inter alia*, that no credit should be given to Wilson & Dunlop's trustee in the accounting for their business charges and factors' fees between 6th September 1873 and July 1875.

The accountant rejected this contention and gave the defender credit for these charges, and the Lord Ordinary (Kinnear), on 14th July 1887, repelled objections to his report, and approved thereof subject to taxation of the business accounts and factors' fees as they should be taxed by the Auditor.*

Sir William Dunbar reclaimed. The only point argued which was of general importance was that relating to the question whether the charges of Messrs Wilson & Dunlop for the period between Mrs Paterson's death and the appointment of Sir William Dunbar ought to be allowed.

The defender did not in the Inner-House dispute his liability to account to the curator.

Argued for Sir William Dunbar;—The proof shewed that Wilson & Dunlop had intromitted with the estate under an arrangement of an unreasonable character, in the face of objections from Sir William Dunbar,

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* "OPINION.—The first question for consideration upon these reports is whether Messrs Wilson & Dunlop are to be treated as pro-curators, so as to render them liable for omissions and therefore for rents drawn directly by Mr Peter Paterson from the tenants of Mugdrum House and others, and to debar them from claiming remuneration for their professional services.

"I am unable to assent to the pursuer's argument upon this point. I think Mr Wilson and his firm did not assume the character of curators, but acted in the totally different character of factors and agents. They had held that position under the ward and his mother, and continued to hold it after Mr Peter Paterson had assumed the position of a pro-curator. The evidence shews that they were aware, or ought to have been aware, of the defective title of Mr Peter Paterson; and they cannot therefore discharge themselves of their intromissions with the rents by a proof of payments to him, except in so far as the monies paid to him were applied for the benefit of the ward or his estate. But they are not liable for his intromissions with moneys which did not pass through their hands; and I think they are entitled to set off against the pursuer's claims in this action the sums which may be shewn to be due to them for professional services, of which the estate has had the benefit. I can have no doubt that Mr Wilson acted throughout in good faith, and in the interest, as he believed, of the ward. I see no good ground for holding that he thrust himself into a position in which he must be held in law to have acted gratuitously. . . ."

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a relative interested in Mr Balfour Hay. The management had been that of Peter Hay Paterson, an unsuitable person, not skilled in business, and acting under no regular appointment whatever. He did not act under the trust-deed, for it was treated as abortive. He was not *curator bonis,* nor did he even apply for that office. In short, he had no authority at all. It appeared from the proof that, whatever they might have thought of his being one of three trustees, as the trust-deed had contemplated, neither the late Mrs Paterson nor the ward himself ever would have approved of his being in sole management. When he got into difficulties Mr Wilson simply took the matter out of his hands. That shewed that Mr Wilson was not acting as an ordinary law-agent, but as himself the factor. A law-agent acting as factor was not entitled to charge a business account against the estate.[1] The whole actings of Mr P. H. Paterson being unauthorised and incompetent, his agents—if that was the true position of Messrs Wilson & Dunlop—could not charge the estate of Mr Balfour Hay for their services under him.[2]

Argued for the respondent;—The charges were good, and were justly due. They were the charges of the family agent, who had continued to act on the employment of Mr P. H. Paterson, who had assumed the management of the estate in consequence of Mr Balfour Hay's mental condition. The relatives were against judicial management. The trust-deed they had agreed to take had been rendered of, at least, doubtful validity, and there was no better way to take than had been taken. All the relatives, and even Sir William Dunbar himself, had acquiesced in the management of the ward's brother. The accounting shewed that the estate had been the gainer by the services of Wilson & Dunlop. Even on the principle of *quantum meruit* the remuneration was due.

At advising,—

LORD JUSTICE-CLERK.—This case has been fully stated, though not more so than it deserved. I am not disposed to disturb the verdict of the Lord Ordinary now that we have fully heard the whole matter.

The circumstances under which the action is brought are peculiar. I think, having fully examined them, that they are briefly these. The proprietor of Mugdrum—Mr Balfour Hay—had become incapable of transacting his own affairs. The estate had for a long time been in the hands of Messrs Wilson & Dunlop, as factors and agents upon it, and up to 1873 it had been managed by Mrs Paterson, the mother of the proprietor, they acting as her agents. She died in that year, and the question arose as to the future management. A brother of the proprietor, Mr Paterson, took some part in the management, and Messrs Wilson & Dunlop continued to act for a time without direct authority so as to provide for the ensuing term of Martinmas 1873. But that could not go on for ever, and negotiations took place which ended in Mr Hay executing a trust-deed, under which the trustees were to be Mr Paterson, Sir William Dunbar, and another, but in consequence of what transpired afterwards the deed was, by common consent, never acted upon. Sir William Dunbar expressly declined to act upon it, and so from 1873 to 1875 no one had any proper authority to manage the estate. It seems, however, that Mr Paterson assumed that right, and with the acquiescence of the persons who might have had a title to interfere,

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[1] Mitchell v. Burness, July 20, 1878, 5 R. 1124.

[2] Lord Macdonald, Nov. 13, 1780, M. 13,437; Kennedy v. Rutherglen, Jan. 25, 1860, 22 D. 567, 32 Scot. Jur. 202; Fulton v. Fulton, March 21, 1864, 2 Macph. 893, 36 Scot. Jur. 449.

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and in particular with the acquiescence of Sir William Dunbar. Messrs Wilson & Dunlop then continued to act, though it is right to say not without Sir William lodging a *caveat* to the effect that if they continued to do so troublesome questions might yet arise. From 1873, then, to 1875, there was no authority but Paterson's, and he took on himself to give instructions. But then there occurred circumstances, to which I need not allude, which made it necessary to bring his management to an end, and the result was the appointment of Sir W. Dunbar to take judicial management, and he has brought this process to have a full accounting by Messrs Wilson & Dunlop for their intromissions with the estate.

The accountant has gone fully into the accounts. One source of complaint arises out of a fact mentioned by him in his report, viz., that cheques on the bank account which had been opened in Mr Paterson's name for the estate were not, as they certainly should have been, drawn by Mr Paterson solely for the purposes of the estate and of the ward. That account had been opened by Mr Wilson in Paterson's name for the purposes of the estate and of the ward only, and Mr Wilson paid all the sums collected from the estate into it, but the accountant gives the statement with regard to the operations upon it to which I have referred. Now in that state of matters it was necessary to have an accounting to clear up the affairs of the estate. In saying so, I am far from making any reflections on Messrs Wilson & Dunlop. It might no doubt have gone hardly with them if in the state of the management I have explained funds of the estate had disappeared, but so far as they were concerned, the estate was kept entire, and whatever the operations of Mr Paterson may have been, at all events Messrs Wilson & Dunlop have not caused any loss to the estate, and there is no ground for reflection as to their intromissions. It is, therefore, not necessary to consider what might have been the result of ultroneous, or at at all events not properly authorised acting, if there had been a deficiency.

(His Lordship then referred to two specific objections which had been stated by the pursuer to the view of the accountant, and proceeded)—On the question then whether Wilson & Dunlop were entitled to their remuneration for their business actings, I think that while there are no doubt cases in which questions of the kind have been decided adversely to the agent, the business done here was done in *bona fide*, and I am clear that these charges should be allowed.

LORD YOUNG.—I also think the interlocutor should be affirmed.

The action is a simple count and reckoning brought by the judicial factor against Wilson & Dunlop to account for their intromissions with Mugdrum during a certain period. Before the Lord Ordinary they said they acted on the employment of Paterson, and having accounted to him were not bound to account over again to the pursuer. If Paterson had had a title to manage the estate, they would have been discharged by accounting to him, and this action would have been excluded. The Lord Ordinary allowed proof to see if that was the state of fact, and he then decided that Paterson had no title to manage, and that they must therefore account to Sir William Dunbar, and so the accounting went on and was remitted to an accountant on the footing that they were to have no credit for rents which they drew, "except in so far as the monies paid to Paterson were applied for the benefit of the ward or his estate." I think that was perfectly right. I put the question early in the debate if it was

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disputed, and I was told it was not. The accounting then was on that footing, and the plea that Messrs Wilson & Dunlop were sufficiently discharged by having accounted to Paterson was repelled.

On the accounting, so taken, the parties were fully heard before the accountant, and his final report contains his views, and the Lord Ordinary approved of these views.

The curator maintained that Wilson & Dunlop were not entitled to be paid their professional remuneration for their services, and that was the only use made before us of the undoubted fact that during the period of the services in question there was no legal guardian of the ward. There could be no other use made of it when once it had been decided that they were only to have credit in so far as the estate had received the money they had uplifted. On this point I concur entirely with the Lord Ordinary. It may be said that there is no proper guardian yet. The man has not been cognosced. But we are not sticklers for strict procedure in such a matter, and when all those concerned are agreed that a *curator bonis* should be appointed we appoint one. But short of that, and it is a frequent case, if a man is not able to manage his affairs, and has a relative who is willing to take the responsibility, there are many instances in which, without their coming to the Court, the family agent is consulted, and the management goes on with his assistance. To say that he must be punished because he does not insist on the parties coming to the Court for a proper judicial management is, I think, extravagant. I cannot therefore censure Messrs Wilson & Dunlop because they countenanced the brother in acting in the management of the estate. I cannot say that in anything they did they acted improperly and ought to be punished by having their charges disallowed. It is not in any respect a case of people thrusting themselves forward to act, to whom it may be said that they were not entitled to interfere, and therefore ought not to be remunerated for doing so. They were the family agents acting for the estate, and ought to have the proper charges as allowed by the Auditor. I therefore agree in affirming the interlocutor of the Lord Ordinary.

LORD CRAIGHILL.—I concur in all that has been said by your Lordship and Lord Young.

LORD RUTHERFURD CLARK.—(After referring to the question whether in fact the amount spent on the ward's maintenance has been excessive)—As to the law charges of Messrs Wilson & Dunlop, I am of opinion that they were properly incurred for necessary business of the estate, and that the agents who did this business ought to have the proper remuneration for it as fixed by the Auditor.

THE COURT refused the reclaiming note, and remitted to the Lord Ordinary to proceed with the action.

MACANDREW, WRIGHT, & MURRAY, W.S.—DAVIDSON & SYME, W.S.—Agents.

No. 45.

Dec. 22, 1887.
Steel Company of Scotland v. Tancred, Arrol, & Co.

THE STEEL COMPANY OF SCOTLAND, Pursuers (Respondents).—*Sir Charles Pearson—Murray.*
TANCRED, ARROL, & COMPANY, Defenders (Reclaimers).—*Balfour—Jameson.*

Arbitration—Reference to unnamed arbiter—Person holding an office for the time being.—Held that a clause of reference referring "any question that may arise as to the meaning or intent of this contract" to "the engineer of the F. B. Railway Company for the time being" was ineffectual, in respect there was no nomination of a referee inferring a *delectus personæ* on the part of the contracting parties.

Proof—Custom—Usage of trade.—Held that averments of custom of trade cannot be admitted to probation in order to construe a written contract clearly expressed.

A steel company contracted to supply "the whole of the steel required by" a firm of contractors in the building of a bridge, "the estimated quantity of steel to be 30,000 tons, more or less." In an action at the instance of the steel company against the contractors to have it declared that they were entitled to supply, and the defenders were bound to take from them all the steel necessary for the bridge, the contractors averred that according to the custom of the steel trade the contract was a contract only for the estimated quantity, with a margin of variation not exceeding 5 per cent. *Held* (*rev.* judgment of Lord Trayner) that the words of the contract being plain and unambiguous the averment was not relevant to be admitted to probation.

1ST DIVISION.
Lord Trayner.
B.

MESSRS TANCRED, ARROL, & COMPANY, Forth Bridge Works, South Queensferry, contracted to construct the bridge over the Firth of Forth at Queensferry.

On 27th February 1883 the Steel Company of Scotland sent the following letter to Messrs Tancred, Arrol, & Company,—"Gentlemen,—We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices, viz." Then followed a schedule of prices. The letter further contained this clause,—"The estimated quantity of the steel we understand to be 30,000 tons, more or less."

On 7th March 1883 Messrs Tancred, Arrol, & Company returned the following reply:—"Gentlemen,—We hereby accept your offer, dated 27th February, to supply the whole of the steel required by us for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices, viz." The prices were then specified. Under head "General conditions," it was stipulated,—"The work and material herein described or referred to is to be executed and supplied in strict accordance with the specification attached to our contract for the construction of the Forth Bridge, and to the entire satisfaction, in all respects, of the engineer for the time being of the Forth Bridge Ry. Coy., who shall have full liberty at all times to inspect, in person or by deputy, the entire process of manufacture, and to reject any of the material or portions of the work which in his judgment are inferior or unsatisfactory, or not in accordance with the said specification, and his decision is to be final and conclusive. You will provide at your own cost all requisite apparatus and labour for the purpose of testing the steel. No part of the work will be considered as being in accordance with the contract until the engineer or his deputy shall have given his certificate in writing that it is satisfactory, but if the same be afterwards found to be defective, or not in accordance with the contract, it may, notwithstanding such certificate, be liable to rejection at our works. You agree at your own cost and charge to satisfy all royalties or claims in respect of any patent rights affecting any part of the works. . . .

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"We are to have the power to cancel this contract should our contract for the erection of the bridge be from any cause determined, as provided in our principal contract with the company, upon the condition that we give you three calendar months' previous notice in writing, and supply you with specifications for those three months to keep you fairly employed for that time, and upon the further condition that we will pay to you the contract price for all steel you may complete according to specification at or before the expiry of such notice, whether the steel be delivered or not within that time.

"Further, we undertake to pay you the amount of loss (if any) you may sustain by the cancelment of your contract or materials (pig iron, ores, &c.), which you may have purchased before notice as against this contract. . . .

"The steel to be manufactured at the works of the Steel Company of Scotland (Limited), and deliveries are to be made at such times and in such quantities as we may, from time to time, require, and to extend over four years, unless otherwise specially agreed, or unless the contract be cancelled as already provided, it being understood that we will furnish specifications so that deliveries shall be as nearly as possible made in equal monthly quantities over the period named.

"The estimated quantity of steel we understand to be 30,000 tons, more or less. Any question that may arise as to the meaning or intent of this contract to be settled, in the case of difference, by the engineer of the Forth Bridge Railway Company for the time being, whose decision shall be binding upon both parties."

Following on this offer and acceptance the Steel Company supplied steel up to 31st May 1887, to the extent of 26,230 tons.

On 28th June 1887 the Steel Company raised an action in the Court of Session against Messrs Tancred, Arrol, & Company, concluding for declarator "that the pursuers are entitled to supply and that the defenders are bound to take from the pursuers the whole of the steel required in the construction of the Forth Bridge at present being constructed at Queensferry, and that at the prices and subject to the terms and conditions contained in offer by the pursuers, dated 27th February, and acceptance thereof by the defenders, dated 7th March 1883, and the defenders should be decerned to make payment to the pursuers of the sum of £100,000 sterling, as the damages due to the pursuers in respect of the defenders having supplied themselves elsewhere with steel needed for the construction of the said bridge."

They averred that the defenders "have been supplying themselves with steel for the purpose of being used in the construction of the said bridge from other sources, over and above the said excepted amount of 12,000 tons, as to which no question is raised. This they may have been doing at prices considerably under the contract prices above mentioned." This 12,000 tons had been already contracted for with other parties when the contract was entered into.

The defenders averred in their statement of facts,—(Stat. 3) "The work contracted to be done by the defenders was, as stated in their contract with the Forth Bridge Railway Company, 'of great magnitude, and of a special, novel, and exceptional character.' The railway company's engineer had full power to alter the plans and specification of the work, and to increase or diminish the quantities; and the limit of time and the estimate of quantity were introduced to limit and explain the general words used at the beginning of the letters." (Stat. 4) "By the custom and practice of the iron and steel trade in Glasgow, as well as elsewhere, a contract for the supply of a quantity of manufactured iron or

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steel, in which the quantity to be supplied is described as the whole iron or steel which is or may be required for a particular purpose, and which also contains a clause expressing the estimated quantity to be delivered and taken under said contract, is regarded and held to be a contract only for the estimated quantity so expressed. According to the said custom and practice, the contract libelled is a contract for 30,000 tons of steel, more or less. The words 'more or less' in said contract are by the said custom and practice understood to mean, and were intended by the parties to mean, that the quantity delivered should not exceed or fall short of the estimated quantity by more than 5 per cent. The parties have, since the contract was made between them, acted on the footing that if the defenders took 30,000 tons of steel from the pursuers, they might get any extras elsewhere as not being within the contract of the parties. The pursuers have consistently read the contract between them and the defenders in the way contended for by the latter, and when the present questions arose they endeavoured to get the defenders to amplify the contract on the allegation that there was an agreement, subsequent to that now founded on, to take all extra steel from them, however much it might exceed 30,000 tons." (Stat. 5) "In particular, the contract founded on embraced, *inter alia*, steel rivet bars. These were specified with the view to the defenders manufacturing the rivets themselves at the Forth Bridge works, but they subsequently found that it would be more convenient to buy them in a manufactured form. They accordingly, on or about 12th September 1884, ordered 700 tons of steel rivets from the Clyde rivet works, providing in their contract that the steel should be obtained from one of two makers, viz., the pursuers or D. Colville & Sons, Motherwell. The Clyde Rivet Company accordingly purchased steel for making said rivets from the pursuers at the market rate then current, which was much lower than the rate in said contract. This steel was tested at the pursuers' works on behalf of the defenders, and the pursuers were well aware that the rivets to be made from it were for use at the Forth Bridge. The pursuers' manager at first objected to what was being done, on the ground that this steel fell within the contract in question. The defenders, however, informed the pursuers that 30,000 tons of steel would be taken under the contract, and that being so, that the contract would be satisfied. This view was acquiesced in by the pursuers, and the steel was sold to the Clyde Rivet Company as before mentioned. Subsequently the following additional quantities of steel were purchased by the defenders from the Clyde Rivet Works Company, viz.:—

March 25, 1886—500 tons @ £6, 5s., less 5 per cent.
Jany. 24, 1887—250 „ £6, 10s., less 5 per cent.

All the said steel was purchased by the Clyde Rivet Works Company from the pursuers, who were quite aware that it was intended for use in the construction of the Forth Bridge Railway. The steel was tested at pursuers' works on behalf of the defenders."

In articles 6-9 the defenders averred other cases of purchases of steel from companies other than the pursuers' with the acquiescence of the pursuers.

They averred further,—(Stat. 9) "The defenders have always been ready and willing to implement the contract between the pursuers and them. They commenced to the work of constructing the Forth Bridge as soon as was possible after the completion of the contract in question, and commenced to order deliveries of steel from the pursuers in terms of the contract, but the pursuers repeatedly failed to make deliveries timeously, and the defenders were put to loss and inconvenience by such failure, and they repeatedly remonstrated with the pursuers for not forwarding

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steel timeously, so as to enable the work at the bridge to proceed regularly. They would have taken from pursuers by 7th March 1887 not less than 32,000 tons of steel, but for delay on the pursuers' part in giving delivery. The period of the duration of the contract expired on said last-mentioned date. At no time did the pursuers complain of deliveries not being specified or ordered by the defenders in terms of the contract, but acquiesced in the orders as given by the defenders, and, as above explained, failed to overtake even these orders in due time. By the contract founded on by the pursuers all questions between the parties are to be referred to the engineer of the Forth Bridge Railway Company for the time being. The defenders hereby offer to take from pursuers not less than 32,000 tons as aforesaid, and also offer to take from them all such steel for such purposes and at such times as the engineer shall consider the pursuers under the said contract have right to supply."

They further averred that Sir John Fowler was "the engineer of the Forth Bridge Railway Company" at the date of the contract, and that he was so still. This was admitted.

The pursuers pleaded;—(1) The pursuers being able and willing to supply the whole of the steel required for the construction of the Forth Bridge other than the 12,000 tons excepted as aforesaid, the defenders are bound to take the same from the pursuers in terms of the contract constituted by said offer and acceptance. (2) The defenders having committed a breach of said contract, are liable in damages to the pursuers. (3) The facts averred by the defenders, *et separatim*, the averment as to custom in statement 4, are not relevant to be admitted to probation.

The defenders pleaded, *inter alia;*—(1) This action is excluded in respect that the questions raised herein, and in particular the questions how far and under what circumstances the defenders are bound to take further supplies of steel from the pursuers, fall to be determined by the engineer of the Forth Bridge Railway Company, as arbiter under the contract between the parties; in any view, these questions fall to be remitted to the said arbiter. (5) The pursuers are debarred by their own actings under the said contract, and by *rei interventus*, from maintaining the declaratory conclusions of the summons. (6) On a sound construction of the contract of parties the pursuers were not thereby bound to deliver to the defenders, nor the defenders to take from the pursuers, more than 30,000 tons of steel, more or less, for use in the construction of the Forth Bridge. (7) According to the custom and practice of the iron and steel trade, as well as on a reasonable construction of the words of the contract, the expression, 30,000 tons, more or less, does not cover more than 5 per cent of variation on either side from the specified number of tons. (8) The period during which, according to the contract of parties, deliveries of steel were to be made having expired, the declaratory conclusions of the summons ought to be refused.

On 26th November 1887 the Lord Ordinary (Trayner) pronounced this interlocutor:—"Repels the first plea in law for the defenders: Before answer, allows to the defenders a proof of their averments contained in their statement of facts Nos. 4 to 9 inclusive, and to the pursuers a conjunct probation, said proof to proceed on a day to be afterwards fixed."

The defenders reclaimed.

Argued for the reclaimers;—(1) It was admitted that in a reference clause the arbiter must be named, where disputes which might in the future arise were to be sent to reference. Here, however, there was an equivalent for the nomination of the arbiter. Sir John Fowler was "the engineer of the Forth Bridge Railway Company" at the date of the contract, and was so still. He was the person chosen at the time, and so

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long as he filled the position of engineer to the railway company the rule of law that there must be a *delectus personæ* was satisfied. The rule that the arbiter must be named had suffered some relaxation,[1] and where a specific individual was so clearly pointed at, if further relaxation was required it should be made. If, as in *Bremner's* case, a body of persons might effectually be named there was no reason why a person holding an office should not also be named. The dispute here was executorial of the contract, and therefore the nomination of a particular arbiter was not required.[2] (2) The contract here was not clear without proof as to the custom of the trade. A custom quite different from the *ex facie* meaning of the words was alleged, a custom which amounted to an unspecified term adjected to the words of the contract. The contract was not about a species—the whole steel required,—but about a quantity, viz., a margin of 5 per cent or thereby over or under the specified amount, 30,000 tons. (3) The averments in articles 5-9 of the defenders' statement of facts would, if proved, amount to a positive bar against the pursuers claiming their full right under the contract. They shewed that the pursuers knew the defenders were departing from what was said to be the strict reading of the contract, and had acquiesced in that departure.

Argued for the respondents;—The dispute here was not on a matter of fact as in *Merry & Cuninghame's* case. It was a dispute purely on the legal effect of the contract, and not in any way ancillary to or executorial of it. The contract need not stop until this question was settled. The pursuers did not ask for interdict. The rule was absolute that where disputes which might arise under a contract were referred to arbitration the arbiter must be named.[3] The case of *Bremner* (Elgin Lunacy Board) did not alter the rule. The decision there proceeded on the fact that the dispute in question had already arisen at the date of the contract, and the reference, which was to a "society," was treated as being to a single named referee. (2) The averment as to the custom of trade was not relevant to go to proof. Proof of custom was only allowed in a contract of this kind when there were technical words to explain,[4] or where it was offered to prove that the custom added an unexpressed term to the contract. The English cases afforded no analogy, as the Courts of that country had gone much further in allowing proof than the Court of Session.[5] The defenders themselves acknowledged that the work to be done was "novel," and therefore no usage of trade could apply. The mention of 30,000 tons in the offer was simply an estimate, and was necessary in a contract of such magnitude. The contract was one to sell all the steel required. The quantity was to be defined by the requirements of the defenders.[6] With regard to the averments as to the actings of parties, there was no case in which proof of the kind proposed had been allowed with a view to controlling a written contract. The argument on that point could only come to this, that the reclaimers had

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[1] Smith v. Duff, Feb. 28, 1843, 5 D. 749 (see Lord Mackenzie's opinion, p. 752), 15 Scot. Jur. 345; Bremner v. Elder (Elgin Board of Lunacy case), June 24, 1875, 2 R. (H. L.) 136; Wm. Dixon, Limited, v. Jones, Heard, & Ingram, March 19, 1884, 11 R. 739.

[2] Howden v. Dobie, March 16, 1882, 9 R. 758; Merry & Cuninghame v. Brown, July 15, 1859, 21 D. 1337, 31 Scot. Jur. 733.

[3] Buchanan v. Muirhead, June 25, 1799, Fac. Coll. & M. 14,593; Bell on Arbitration, pp. 85-86, and cases there cited.

[4] Calder v. Aitchison & Co., Sept. 10, 1831, 5 W. & S. 410.

[5] Smith's Leading Cases (9th ed.) 577; Myers v. Sarl, 1860, 3 Ell. & Ell. 306.

[6] Gwillim v. Daniel, 1835, 5 Tyrwhitt, 644; Brawley v. United States, 1877, 6 Otto, 168; M'Connel v. Murphy, 1873, L. R., 5 P. C. 203.

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not insisted in their rights before the full quantity of the estimate had been delivered.

At advising,—

Lord President.—The first question under this reclaiming note is raised by the first plea in law for the defender, which is to the effect that the dispute between the parties falls to be settled by arbitration. The contract is for the supply of the steel required for building the Forth Bridge, and the clause referred to as being a good reference of the dispute is in these terms:—"Any question that may arise as to the meaning or intent of this contract to be settled in the case of difference by the engineer of the Forth Bridge Railway Company for the time being, whose decision shall be binding upon both parties." No person is named in the clause, and the only description of the referee is that he is to be "the engineer of the Forth Bridge Railway Company for the time being."

The dispute which has arisen is whether the contractors, the Steel Company of Scotland are entitled to supply the whole steel required for the bridge, and that depends on the words of the contract itself. If the reference is good otherwise, the dispute, I think, falls under the general description of questions which are to be referred to arbitration.

The objection to the clause of reference is that no referee is named, and that, therefore, there is not such *delectus personæ* as the law of Scotland requires. The reference is not one of a dispute already come into existence when the contract was made, but of all disputes "that may arise" as to the meaning of the contract. Now, I hold this to be a point which is entirely settled by authority, and I quite agree with the Lord Ordinary that the defenders' first plea in law must be repelled.

What may be called the leading case on this point is the case of *Buchanan* v. *Muirhead*, June 25, 1799, M. 14,593, which was decided in 1799. That was an unanimous decision of the Court, and it must not be forgotten that the Court was at that time very strong,—the Court of which we all know so much in the history of the law of Scotland as being presided over by Sir Ilay Campbell. In that case the reference was to the "chairman, deputy-chairman, and secretary for the time being of the Chamber of Commerce and Manufacturers of the city of Glasgow," and the subject of the reference was of "all disputes relating to the affairs of the company, which should arise among the partners,"—that is, of the partnership constituted by the contract. In that case as here the clause of reference occurred in a contract, and the matters which were referred were disputes which might arise. Now, the Chamber of Commerce or any of its members were probably very well fitted to determine such questions as might arise, but still the reference was held to be bad. The ground on which that judgment proceeded is thus stated:—"The case does not hinge upon the supposed difference between an obligation to enter into submission and an actual reference. The difficulty in supporting the plea of the defender arises from the reference being not to an individual but to a description of persons who as well as the point to be decided must necessarily have been indefinite at the date of the contract." That seems to me to express perfectly accurately and precisely the grounds on which such a reference ought not to be sustained. It is unnecessary to investigate the subsequent authorities. They are very numerous, and have all been made the subject of judicial decision within the last few years, but perhaps the most authoritative statement of the law is to be found in the judgment

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of Lord Chancellor Cairns in the case of the *Elgin Lunacy Board* v. *Bremner*, 24th June 1875, 2 R. (H. L.) 136. The reference in that case was sustained, being of a different kind from that which we have here, but dealing with the general principle the Lord Chancellor said,—"Your Lordships have heard an elaborate argument to shew that in Scotland there must, as regards the arbiters, be a *delectus personæ;* and you were referred to authorities which shew that where there is a contract beforehand to refer to the arbitration of individuals not named, or of individuals filling an official position, or of individuals composing a fluctuating body, and where therefore at the time the contract is made to refer to arbitration future disputes which may not arise for years there can be no *delectus personæ*, there a contract of that kind cannot be urged and founded on to oust the regular jurisdiction of the Courts of law. I should be sorry to express any opinion adverse to those decisions, or tending to throw any doubt upon the propriety of those decisions." He then goes on to say that that principle does not apply to the case then before the House. I think therefore that the matter here is entirely closed by authority, and that the Lord Ordinary had no choice but to sustain the objection to the reference.

An argument was founded on the circumstance that the engineer of the Forth Bridge Railway Company at the time at which the contract was entered into happens to be the same person who now fills that position, and it was thence argued that there was in effect a *delectus personæ.* But we cannot judge of the competency of the reference by what has happened since; we must look at it as at the time it was entered into, and at that time it was just as uncertain whether and when any dispute would arise as it was who would be the engineer of the company at the time if any such dispute did arise. That matter makes to my mind no difference whatever in the case.

The only other point of any difficulty in the case is that raised by the defenders' averments in statement 4. The Lord Ordinary has admitted those statements to probation, and on that point I am sorry I cannot agree with him.

That statement is to the effect that by the custom of trade, and of the particular trade in question, a contract such as we have here is understood to mean something different from what is expressed in the contract.

The dispute, as I have said, is whether the pursuers are entitled to supply the whole steel required for the Forth Bridge. The contract is very express on the subject. The offer is in these terms:—"Gentlemen,—We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices, viz."

The acceptance is:—"Gentlemen,—We hereby accept your offer, dated 7th February, to supply the whole of the steel required by us for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices, viz."

The 12,000 tons of plates, it is explained, had already been contracted for with different companies other than the pursuers', and therefore it was necessary to except that portion from the general description. That exception only makes the language of the contract more distinct and conclusive as to the extent of the subject to be supplied. It is "the whole steel," subject to an exception. No doubt in another part of the contract the pursuers are informed what is the estimate of the parties contracting with them, as to the amount of steel which would be required. "The estimated quantity of the steel, we understand, is

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30,000 tons, more or less." It is contended that that limits the supply to 30,000 tons, but that is, in my opinion, quite inadmissible. The supply required was very large, and the defenders themselves inform us in their statement of facts that the work contracted to be done is of "great magnitude, and of a special, novel, and exceptional character," and "the railway company's engineer had full power to alter the plans and specification of the work, and to increase or diminish the quantities." That seems to me to afford a very good reason why the pursuers would require to be informed what was a probable estimate of the amount of steel required, because they had to make arrangements so as to be ready to give a supply from time to time, and therefore I think an estimate was almost indispensable. If there were to be any doubt as to the sort of quantity which would be required, the pursuers might have been put to great disadvantage, and have had demands made on them at times and for quantities which no one could expect to be asked for on a short notice. That is the reason why we find an estimate in the contract.

I find, therefore, no difficulty in construing this contract without extraneous aid, but the defender says that it means something different, his statement being,—(Stat. 4) "By the custom and practice of the iron and steel trade in Glasgow, as well as elsewhere, a contract for the supply of a quantity of manufactured iron or steel, in which the quantity to be supplied is described as the whole iron or steel which is or may be required for a particular purpose, and which also contains a clause expressing the estimated quantity to be delivered and taken under said contract, is regarded and held to be a contract only for the estimated quantity so expressed." I think that it is not admissible to send that averment to probation, because it is irrelevant. It is an attempt to set up a custom to contradict the plain and unambiguous terms of the contract. There are no technical words in the contract; it is not alleged that the words "whole of the steel required by you" are technical. They are used in their ordinary sense, and therefore it is impossible to admit evidence of custom to contradict the plain words of the contract on any such ground. It is said, however, that custom may be proved to shew that something else is implied in the contract beyond what is expressed,—that is, that it is a condition of every such contract that the part of the contractor is only to supply the estimated quantity. That is, I think, only a disguising of the same object as I have already adverted to in different words. The doctrine on which this rests is very well settled, so well that it is almost needless to cite any cases upon it. They are, however, very well summed up in Dickson on Evidence (Grierson's edition) at par. 1095 (2d edition, sec. 234). I cannot, I think, do better than quote his words. He is speaking of mercantile contracts in especial,—"Unless the terms of the writing are technical, the evidence of mercantile men will not be admitted to explain it, because the construction of a written contract is for the Court, not for the jury. And if the writing is so copious and precise in its stipulations as to shew that it is a record of the whole agreement relating to the point in issue, and not merely a statement of some of its heads, the rest being left to usage of trade, the Court will give effect to the agreement as recorded, and will not allow stipulations to be added to it by a proof of usage. The sphere of this kind of evidence is therefore limited to interpreting any technical words in the document, and supplying any customary conditions which the parties may be presumed to have tacitly agreed to." He adds in the following section, and it is no unnecessary precaution, quoting the opinion of Lord Jus-

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Justice-Clerk Hope in *Mackenzie* v. *Dunlop*, 16 D. 129, aff. 1856, 3 Macq. 22,[1]—"There can be no doubt that we have never in Scotland gone so far as they have done in England in admitting evidence of understanding or usage in order to construe thereby a written document." And Mr Dickson adds,—"Nor does there seem to be any reason for abandoning our own principles for the more lax rules of English law; since among the Judges and text writers of that country there is a strong feeling towards limiting the admission of this kind of proof." In the last sentence he refers to the tendency of some of the more recent judgments in the Courts of England. I have therefore no doubt that applying these doctrines the averments in ans. 4, so far as they relate to custom, cannot be remitted to probation.

But the Lord Ordinary has further allowed a proof of the defenders' averments in arts. 5-9 of their statement of facts. The import of those articles is that in their execution of this contract the pursuers have abandoned their position that they were entitled to supply the whole steel required for the bridge, and that they have submitted to see the material supplied by other companies, and also have agreed to supply it themselves, either directly or indirectly, to other persons by special arrangement at the current price of the day, instead of at the contract price. I can quite understand that a person having such a contract as this may still so comport himself in the execution of it as to bar himself from insisting in the full terms of the contract, and if these statements are established, the pursuer will probably be barred from insisting in his present claim. I am therefore for adhering to the Lord Ordinary's interlocutor, except in so far as it allows proof of the averments relating to custom in art. 4 of the defenders' statement.

LORD MURE.—On the first point here raised, viz., the validity of the reference, I quite concur. As your Lordship has remarked, it has been settled, ever since the case of *Buchanan* (M. 14,593), that a reference to an unnamed party is bad, and that having been for so long settled I am rather surprised that parties should go on framing clauses of reference in that way, apparently without consulting their legal adviser, who would have told them that such a reference was not a binding submission according to the law of Scotland.

On the second question I am of opinion that the averments in the defenders' statements, 5-9, ought to be sent to proof; but I agree that the defenders ought not to be allowed a proof of their allegations as to custom of trade in their 4th statement, even as amended. For it has also, as I conceive, been deliberately settled, not so far back as the date of *Buchanan's* case, but since 1826, that you cannot cut down the language of a written contract by proving a usage of trade to the contrary, unless there are words of technical import used in the contract which require explanation. But there are no words of that description here, and what we have to consider is simply whether evidence of an alleged custom or usage can be admitted to prove that the plain words of a contract ought to bear a different meaning from that which the words import. In addition to the authorities referred to by your Lordship I may mention the case of *Gordon*

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[1] Mackenzie v. Dunlop, Dec. 7, 1853, 16 D. 129, 25 Scot. Jur. 558, H. L. July 29, 1856, 3 Macq. 22, 26 Scot. Jur. 64, Paters. Ap. 669.

In the notes to the later editions of Dickson on Evidence it is wrongly stated that this judgment was reversed in the House of Lords. The judgment was affirmed on the ground that the evidence of usage was insufficient.

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of Cluny v. *Robertson* (May 19, 1826, 2 W. and S. 115), in which the decision of this Court giving effect to custom as sufficient to controvert the words of a deed was reversed by the House of Lords. The case being one of importance, the whole Court here were consulted, and with the exception of Lord Cringletie, held that the words used in a lease relative to the consumption of fodder upon a farm might be controlled by an admitted custom or usage to a contrary effect. But that decision was reversed by the House of Lords, and shews, I think, that proof of an alleged custom such as that here proposed ought not to be allowed.

Lord Adam.—It is quite settled in the law of Scotland that an obligation in a contract to refer *ab ante* possible or contingent questions to a person unknown is not valid. There are numerous cases to that effect. This clause is exactly in that position. The reference is to "the engineer of the Forth Bridge Railway Company for the time being." At the date of the contract no one knew who the engineer might be when a dispute might arise, and therefore the clause falls under the ordinary rule. I have no doubt whatever on that point.

The second question is quite different; it is, Whether we are to admit to proof an alleged custom of trade? According to my understanding of the law such a proof is only admissible either to explain technical terms, whether those terms are *ex facie* technical or are raised into that position by averment, or where it is proposed to add to the contract an unexpressed term with reference to which it is offered to be shewn that the parties contracted. Neither of these things are present here. There are no technical terms used, and it is not proposed to add any unexpressed term to the contract. This, then, is simply, in my opinion, an offer to prove a custom for the purpose of enabling the Court to interpret the plain untechnical words of the written contract. Such a course is inadmissible. It is the duty of the Court to interpret the words of the contract, but I have not at this stage applied my mind to that question, and only say that there are no words here which require a proof of custom of trade to interpret them.

With reference to the proof of the defenders' averments in arts. 5-8 of their statement, I concur.

Lord Shand was absent.

> **The Court** pronounced this interlocutor:—"Alter said interlocutor in so far as it allows a proof of the averments of custom and practice of trade contained in the fourth article of the defenders' statement of facts: *Quoad ultra* adhere to said interlocutor, and remit to the Lord Ordinary to proceed," &c.

Tods, Murray, & Jamieson, W.S.—Millar, Robson, & Innes, S.S.C.—Agents.

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Sutherland v. Taylor.

ANN SUTHERLAND, Petitioner.—*Craigie.*
J. TAYLOR, Respondent.—*Salvesen.*

Parent and Child—Custody of illegitimate child—Mother's right to custody.—The mother of an illegitimate child gave the child over when two months old to a stranger and his wife to adopt, on the agreement that they should bring it up as their own "in all time coming." Eighteen months afterwards the mother presented a petition to the Court praying for the custody of the child. It was proved that the mother had no settled place of abode and no means of supporting the child, and a medical certificate was produced to the effect that the child was in a very delicate state of health and shewed symptoms of dangerous disease,

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and that it was "very essential that she should have (as she has at present) generous diet, warm clothing, and careful nursing, otherwise her bodily condition would certainly deteriorate, and her health and life be seriously endangered." It was further proved that the child was well attended to and had careful nursing in its present home. *Held* that while the mother was the only person who had a legal title to the custody of the child the Court were bound to consider the interests of the latter in any question as to its custody, and that in the present case the petition should be refused.

1st Division.
B.

On 21st March 1886 Ann Sutherland gave birth to an illegitimate female child. In May following, Mr Taylor and his wife, who had no family, advertised for a child to adopt, and Sutherland wrote asking Mr Taylor to call upon her. It was agreed that he should take the immediate custody of the child and adopt it permanently as his own. She paid him £100 for the maintenance of the child,—a sum which was furnished by the reputed father of the child, and Taylor gave her a written acknowledgment that he would maintain and bring up the child respectably as his own and at his own expense "in all time coming." On 9th June following, the child was baptised.

On 3d November 1887, Sutherland presented a petition to the First Division of the Court, asking for the custody of the child.

Taylor in his answers stated the above-mentioned facts, and he further averred:—"The child has been and is now extremely delicate in bodily health. In consequence it has not been able yet to be vaccinated. The doctor who has attended the child on 8th November 1887 granted a certificate in the following terms:—'I have attended Ethel Kate Sutherland since July 22d 1886 up to the present date. When I saw her at first she was in poor condition, and had a rash on some parts of her body. I have treated her all along for congenital syphilis, and she has much improved under the treatment adopted. The child has been frequently under my observation, and I have always noticed that she has been well fed, well and warmly clothed, and has had all the care and attention that could be given to a child. She is at present suffering from bronchial catarrh, and could not be safely removed from her present home yet for two weeks. GEORGE GUTHRIE, M.B., C.M.' Since the respondent got the custody of the child, the petitioner has not had anything to do with it, and has not manifested the slightest interest in it. . . . The respondent has ascertained, and now avers, that the petitioner is living in an attic in Rose Street; she has no visible means of supporting herself, and has no means to support the child, far less to provide it with the clothing, medicine, and other things essential for the preservation of its life and health in its present extremely delicate condition. It is believed and averred that it would be against the child's moral well-being if the petitioner had the custody of it."

On 26th November 1887, the Court pronounced an interlocutor appointing the petitioner to state in a minute her places of residence at and since the birth of the child, her occupation and means of subsistence during the same period, and what provision she proposed to make for the custody and maintenance of the child if delivered to her.

In obedience to that interlocutor she put in a minute, mentioning various places in Edinburgh in which she had resided, part of the time in service, and further stating that she had returned from her father's house in Aberdeenshire to her present abode in Rose Street, the object of her doing so being to get delivery of her child. "She also begs to state (1) that during the period she remained at 11A Hanover Street, Edinburgh, she was able to live in every comfort, the father of her child contributing whatever was necessary for her and her child's support and comfort, and

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her own relatives being also able and willing to give her any assistance if she required any; (2) that while she was at home she lived in family with her father; (3) that while she was in employment at Comely Bank she had her wages and board; and (4) that since her return to Edinburgh in August 1887 the father of her child has supplied her with funds, and her own relatives have also assisted her. The petitioner has also some means of her own. She succeeded about two years ago to part of the estate of a deceased aunt, and she has allowed her means to remain in her father's hands. The petitioner has learned the business or trade of a dressmaker, and could, if necessary, go into business for herself, or get employment as a dressmaker.

"The petitioner is quite ready and prepared to do whatever may be considered best for the physical and moral well-being of her child. Her present home at 77 Rose Street is perfectly comfortable. It is not squalid or disagreeable either in itself or its surroundings. If, however, the petitioner's present residence is considered to be unsuitable for the child, she is quite ready and prepared to change her residence to any place which may be considered more suitable, or to go and live with her father. The child's father, as well as the petitioner's father and other relatives, are ready to contribute whatever may be necessary for the support of the petitioner and her child, in addition to what she takes from her own means for that purpose. The petitioner's father is able and willing to support her and her child in his own house, or elsewhere."

In answer to that minute the respondent stated, *inter alia*, that the place where the petitioner was now living was squalid and unhealthy, and that the yearly rent was only £3; that her mother was dead, and that her father was a tenant crofter with a farm of from only thirty to forty acres in extent, his rent being £30 per annum; that he had married a second wife, who was still alive, and that he had seven of a family, five of them being the offspring of the second marriage, and residing with him.

It appeared that the statement made by the petitioner that she had succeeded to certain means from an aunt was erroneous, and that it was from two uncles, and not from an aunt, that the alleged succession had come, but that no further information as to the amount or nature of the bequest could be obtained from her. The reputed father of the child was ascertained to have gone abroad in bad health.

A further letter from Dr Guthrie was produced, in which he stated that the child was still in a very poor state of health, but that "she has much improved under the treatment adopted, combined with the good food and careful attention and nursing she has received. . . . The manifestation of further symptoms depends much upon the health of the child, and it is very essential that she should have (as she has at present) generous diet, warm clothing, and careful nursing, otherwise her bodily condition would certainly deteriorate, and her health and life be seriously endangered."

Argued for the petitioner;—The agreement of May 1886 between her and the respondent could last only during her pleasure. A mother could not deprive herself of the right to the custody of her illegitimate child. This case was *a fortiori* of that of *Macpherson*,[1] because there the respondent was the putative father of the child. No relevant answer was made to the petitioner's claim. It had been held in England that even where a mother was admittedly living an immoral life she must have the custody of her child, or rather she might have her child for the purpose of handing it over to a third party.[1] Inquiry in the case was incompetent, or at least inexpedient.[2]

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[1] Macpherson v. Leishman, June 4, 1887, 14 R. 780; *cf.* also Buie v. Steven, Dec. 5, 1863, 2 Macph. 208 (L. J.-C. Inglis, p. 222).

The respondent argued;—There were two points of distinction between this and *Macpherson's* case.[3] In the first place, here the agreement was in terms a permanent one. A permanent arrangement, when made, ought to be given effect to. There was no illegality in it. And in the second place, the mother was not a proper custodier of her child. It would be deleterious to the physical as well as to the moral welfare of the child to transfer it to the petitioner. If a disreputable parent were allowed to recall an agreement like that which had been made here, it would come to be used as a means of extortion. If the agreement were binding on the respondent, it must be so also on the petitioner. The principle which applied in the case of legitimate children was applicable here also;[4] and the mother's character was always taken into consideration by the Court in questions relating to the custody of children. The Court had ordained mothers to part with the custody of their children; much more would they refuse this petition when there were allegations against the mother, and none against the respondent. The interests of the child were of paramount importance,[5] and no provision was here proposed by the petitioner for the future maintenance of the child. The respondent had no interest but that of the future welfare of the child.

At advising,—

LORD PRESIDENT.—This is a petition by the mother of an illegitimate child for the delivery of the child into her custody. No one can doubt that the petitioner has the only true legal title to the custody of the child. An illegitimate child has no father, and for this reason it is that the mother alone is entitled to its custody and control. In this case, too, the child is very young—it was born on the 21st March 1886—so that in addition to her legal title, the mother is also the natural custodier of a child of that early age. *Prima facie*, then, everything is in favour of the petitioner's claim. But in questions relating to the custody of children there are other considerations which the Court must keep in view beyond the question of the mere legal title to the custody. The Court have always considered as of paramount importance the interests of the child itself, particularly in regard to its health, its future prospects, and its moral education.

This is a very peculiar case in some of its aspects, and one is induced to inquire how the mother came to part with the custody of her child. This leads one into a somewhat strange history. The mother delivered over the child to the respondent and his wife when it was two months old, and before it was baptised. This was done under an arrangement that the respondent and his wife were to adopt the child as their own, they being childless, and that the child was to remain permanently with them, the petitioner not being in a condition to support the child, and being apparently very willing to be quit of it.

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[1] The Queen v. Nash, Feb. 1883, L. R., 10 Q. B. D. 454.

[2] Nicolson v. Nicolson, July 20, 1869, 7 Macph. 1118, 41 Scot. Jur. 613.

[3] 14 R. 780.

[4] Gulland v. Henderson, March 16, 1878, 5 R. 768; Muir v. Wylie, July 18, 1868, 6 Macph. 1125, 40 Scot. Jur. 631; Denny v. M'Nish, Jan. 16, 1863, 1 Macph. 268, 35 Scot. Jur. 183.

[5] Symington v. Symington, March 18, 1875, 2 R. (H. L.) 41.

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The child was in very delicate health from causes of a painful nature, and it is not disputed that while with the respondent it has received very careful attention.

The question therefore is, whether it is consistent with the welfare and interests of the child, and particularly with its health and chances of life, that it be given over to its natural and legal custodier or not. With the answers for the respondent, we have had presented to us a medical certificate from a gentleman who has for some time attended professionally in the respondent's family, and which, therefore, is of peculiar value. He says of the child upon the 8th November,—"When I saw her at first she was in poor condition, and had a rash on some parts of her body. I have treated her all along for congenital syphilis, and she has much improved under the treatment adopted. The child has been frequently under my observation, and I have always noticed that she has been well fed, well and warmly clothed, and has had all the care and attention that could be given to a child. She is at present suffering from bronchial catarrh, and could not be safely removed from her present home yet for two weeks."

This and other circumstances which came out at the first hearing of the case induced the Court to order the pursuer to give in a minute stating her present place of abode, and where she had lodged during the time between the birth of the child and the presenting of the petition, and also what her means of subsistence were. A minute has been put in, which only discloses that the petitioner has been leading a somewhat wandering and restless life, and that she has no apparent means for maintaining or taking charge of so delicate a child—with this exception, that she stated that she had lately succeeded to some money from an aunt. The amount of this legacy was not stated, but from her place of abode and present mode of living, and her whole surroundings, she is evidently not in a condition to keep such a child in comfort and safety. Since then it has transpired from correspondence which has taken place between the agents for the parties, that there was some mistake in the statement in the minute, and that in place of getting money from an aunt the money came not from an aunt but from two uncles. Although asked to explain this, she has refused further explanation of any kind, and therefore we are safe in assuming that this alleged succession is quite a delusion, and that the pursuer is in very straitened circumstances, and little capable of bearing an additional burden upon her resources. This bears out still further the fact of her unfitness to take care of the child. It is perhaps fortunate that we have a still later certificate from the same medical gentleman, bringing down his opinion to the 24th of November, in which he says that the present condition and health of the child is fairly good, but he mentions several dangerous and unpleasant symptoms. The report proceeds thus,—"The manifestation of further symptoms depends much upon the health of the child, and it is very essential that she should have (as she has at present) generous diet, warm clothing, and careful nursing, otherwise her bodily condition would certainly deteriorate, and her health and life be seriously endangered."

I think we thus have sufficient materials before us to lead us to the conclusion that if the child were handed over by the respondent to the petitioner, it could not get "generous diet, warm clothing, and careful nursing." On these grounds, then, to deliver over the child to the petitioner would be to imperil its life, or certainly to very seriously endanger its health, and I therefore think

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that there are good and sufficient reasons here which overcome the legal title of the petitioner. The interests of the child are sufficient to warrant us in declining to give effect to the present petition.

I am therefore for refusing the prayer of the petitioner.

LORD MURE.—I am of the same opinion. As your Lordship has remarked, the case is a very peculiar one. By an arrangement between the petitioner and the reputed father of the child it was delivered over to the respondent, upon his undertaking for a certain consideration, to adopt it, and a sum of money, amounting to £100, was provided for that purpose. That arrangement has been quite satisfactory in all respects, and the child appears to have been thoroughly well cared for by the respondent, who has, as I have said, been paid for its upbringing. The question is whether that arrangement is now to be put an end to, on the ground that the mother is the legal custodier of her illegitimate child. In ordinary cases, no doubt, the title of the mother would be conclusive, but, on the other hand, the Court is bound to look to the interests of the child, and I am satisfied that in the present case to transfer the custody from the respondent to the mother would be to imperil its life. The second certificate which is before us is very important, and cannot be disregarded. Accordingly, in the special circumstances of the case, I agree with your Lordship.

LORD ADAM.—There is no doubt that the petitioner—the mother—is the only person who has a legal title to the custody of her child, and looking to the age of the child there is no doubt that she is also the natural person to whom the custody and guardianship of the child ought to be given. Nothing but a very strong case can overcome this natural right. But I think we have such a case here. I think the medical certificate shews that to hand over the child under present circumstances to the petitioner would endanger and imperil its health. The health of the child is of paramount importance, and on that ground I concur with your Lordship that the petition must be refused.

LORD SHAND was absent.

THE COURT refused the prayer of the petition.

WILLIAM GUNN, S.S.C.—D. HOWARD SMITH, Solicitor—Agents.

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Dec. 22, 1887.
Gould v. Gould.

ISAAC GOULD, Pursuer (Reclaimer).—*Forsyth.*
MRS ANN GARDINER OR GOULD, Defender.

Husband and Wife—Divorce—Desertion.—It is not an answer to a husband's action of divorce on account of his wife's desertion, that she has left him because he had superseded her in the management of a shop belonging to him.

2D DIVISION.
Lord M'Laren.
I.

ON 7th March 1887, Isaac Gould, baker, Markinch, brought an action against his wife for divorce on the ground of desertion.

The action was undefended.

The following is the result of the evidence led at the proof:—

The pursuer deponed,—"I was married to the defender on 25th December 1860. . . . At that date I had two daughters by a former marriage staying with me. They were then six or seven years of age. The defender treated them very badly. The elder died in 1867, and the younger ultimately left the house on account of the defender's bad treat-

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ment. . . . The defender had a fearfully wild temper. She was very easily excited. She struck me many a time. After our marriage the defender attended at the counter of my shop. I was not satisfied with the drawings while she did so, as I was gradually getting into an unsatisfactory condition financially. I frequently spoke to the defender regarding the shortcomings. In reply, she told me to better myself if I could. I ultimately sent for my daughter who was then in service in England. She came, but did not reside in my house; she resided with her aunt next door, and did not interfere with my house. I noticed that my drawings immediately improved after my daughter came to the shop. The defender frequently left me before 1875 for periods of three or four months at a time. She had a son at the sea, and when he came home she went very often to London to stay with him. (Q.) You objected to her going from home? (A.) I had no objections to her going away for a short time, but there was no necessity for her staying away for four months, when a week might have done. When I remonstrated with her, she told me to better myself if I could. . . . The defender left me finally in March or April 1875. The cause of her leaving me was my bringing my daughter home to attend the shop; my wife did not remain with me for more than a fortnight or three weeks after that. My wife removed everything in the house belonging to her when she went away." By the Court.—"(Q.) That must have been with your consent? (A.) She would take it whether I would or not. I was not going to fight with her. She had a marriage-contract entitling her to retain all her own property." Examination continued—". . . I remonstrated with my wife for going away, and told her to stay, but she said she would go in spite of me. I have seen her once or twice since then. She called on me on one occasion a month or two after she left. That was for the purpose of looking over the house to see if there was anything remaining. I had been kind to the defender while she stayed with me. She was never in want of money for domestic purposes. There have been no children of the marriage between the defender and me. At the time of our marriage she was about forty years of age. I believe the defender has been living in Cupar-Fife since she left me. I have not spoken to her, except on the one occasion, since 1875."

The defender deponed:—"I left the pursuer for his ill-usage of me—coming home at untimeous hours, and his falsehoods. He said I struck him. That is not true. He came one night and threatened me, and I told him that if he offered to put a hand upon me I would take the poker to him, supposing I was put in Cupar jail for it, but I never struck him. (Q.) When you left him, had you formed any intention not to return? (A.) He never asked me. I don't know what I would have done if he had asked me; it would just have depended upon circumstances. I wrote to his agent that I wished I had never seen his face, and did not care if I never saw it again. The letter now shewn me is my letter. I have never offered to go back. (Q.) Are you now willing to go back and stay with him? (A.) It just depends on how he would treat me. I have passed him in Markinch since I left him. He said it was a fine day. I don't think I made any answer. I never tried to avoid him." By the Court.—"I kept pursuer's shop for a great many years. He was in difficulties when I married him, and I gave him £48 when my mother died, which he was to pay me back, and I got £18. I attended to the shop, gave out the bread, took the money and put it in the till, and never heard a word about robbing the till until after I left him. (Q.) What was the occasion of his daughter coming back to her father's house? (A.) I told him to get some person to keep his shop, for I could not live with him.

It is not true that I left him because he had deprived me of the charge of the shop; it was on account of his ill-usage. He said I had robbed the till, and was ill to his children. . . . There is no foundation for these charges." By pursuer's counsel.—"A man named James Drummond came to my house on one occasion. He did not bring a message asking me to return to my husband."

Drummond deponed,—"I remember defender leaving pursuer in 1875. He was very anxious that she should come back to his house again, and a few months after she left I went, at his request, and saw her, and told her that he wished her to return to stay with him. She said No."

On 9th July 1887 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the pursuer has failed to prove facts and circumstances relevant to infer that the defender had wilfully and maliciously deserted him for four years and upwards previous to the raising of the present action; therefore dismisses the action; and decerns." *

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* "OPINION.—If it were possible to deal with consistorial cases in the way that all other cases are dealt with, by giving effect to what both parties desire, I should have very little difficulty in dealing with this case; but that is not the mode in which the law prescribes that actions of divorce shall be considered. It is nothing to the purpose that both parties may be willing to be divorced. I must consider whether there were grounds for divorce commencing at the time when separation *de facto* took place, and continued during the statutory period of four years. Now, according to the pursuer's own statement, he had allowed his wife to take charge of the shop that he kept as a baker during the whole period of their married cohabitation, and I can hardly think that there can be any real foundation for his complaint against her of pilfering money without his knowledge, because that could not have gone on for fifteen years without being found out, or some action being taken by him upon it. But after fifteen years' service as manager of his shop, he, whether upon communication with her or without communication—she says without communication to her—of his reasons, sent for his daughter and deposed his wife from her position as manager of the shop, and put his daughter in her place. She not unnaturally resented this conduct, and left his house. She would not consent to remain there in a subordinate position to her step-daughter. She now says that she knew nothing of this charge of pilfering until afterwards, which is very likely quite true, but she knew that her step-daughter was coming there, and she now says—and this raises the only conflict of evidence in the case—that she was quite willing his daughter should come to take her place, because she was no longer able to work in the shop. But I think I must take the pursuer's own statement, as if not necessarily the more reliable one, at least the one by which he is bound, and it is that he had superseded his wife in the charge of the shop, and that in consequence of that she left him. Well, it may be that she was not entitled to leave him on that ground, but certainly it is a ground that one must have a very considerable sympathy with, and I can hardly look upon her leaving in such circumstances as a deliberate act of desertion. Well, then, according to the law of divorce, the desertion must be continued notwithstanding the remonstrances of the other spouse, and in opposition to his or her wishes; but I have no sufficient evidence that Mrs Gould's absence from her husband's house was continued in opposition to his wishes. One witness says that he had taken a message from the husband to the wife, asking her to return. She denies the statement, and gives a different version of that matter. But there were other ways that might have been tried. The pursuer might have seen his wife or written to her, and expressed regret for anything he had done that had contributed to the separation, and offered a reconciliation. Letters of that kind have often been put in evidence in cases of divorce for desertion, and where they appear to be written in good faith great weight is always allowed to them. In the present case, the result of my consideration of the evidence is, that in the first place, Mrs Gould left her husband, not from any purpose of wilful desertion, but from

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The pursuer reclaimed.

After the hearing had proceeded some length, the case was adjourned in order that the pursuer might lead additional proof regarding the alleged message by Drummond, as to which the pursuer himself had not been examined.

The pursuer then gave this further evidence:—"I remember sending a message to my wife shortly after she left me in 1875, by Mr James Drummond, who was in the habit of coming about my house. I told him to go to my wife, and tell her I was anxious for her to return. He went to see my wife with the view of inducing her to return to me. I thought he could do that better than if I went myself. He reported the result to me, saying that she said she would never return, and that when she left me she did not mean to come back."

Drummond was also re-examined, and corroborated the pursuer's evidence.

After farther argument,—

LORD CRAIGHILL.—(After narrating the facts)—In this state of the facts, the only matters to which it is necessary that I should advert are, first, as to the cause of the defender leaving her husband's home. The pursuer thinks that she left because she was superseded in the management of the shop, and the Lord Ordinary also takes that view in his note. I have no sympathy with that view as an answer to an action by the husband for divorce on account of his wife's desertion. The husband was master in his own house, and if he thought fit to appoint another than his wife to conduct his business he was quite entitled to do so, and it is no excuse for the wife leaving her husband's house that he did so appoint someone else to conduct his business.

Then next in regard to the matter as to which additional proof was allowed. Speaking for myself, I do not know that I should have thought it necessary to order additional proof, because I could not have held that the pursuer's right of divorce had been lost even if he did not send after his wife when she left his house. The Lord Ordinary however felt a difficulty on that point, and the Court in consequence thought that additional evidence might be desirable, as it might clear away the difficulty, and such evidence was ordered accordingly. It appears to me that the result of the evidence which has been led is to displace this ground of the Lord Ordinary's judgment also, and to leave us free to form our own opinions on the case. On the whole matter I think that the defender had no excuse for leaving her husband's house, and that he is accordingly entitled to decree.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The LORD JUSTICE-CLERK and LORD YOUNG were absent.

THE COURT recalled the Lord Ordinary's interlocutor, and granted decree of divorce.

WATT & ANDERSON, S.S.C., Agents.

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natural feelings of resentment caused by his conduct towards her, and that the pursuer has not since then done what was incumbent upon him to induce her to repent and to resume conjugal cohabitation.

"With regard to the other cases which have been cited, while of course it is always very useful to know the views that are taken by the Court of Appeal upon any legal question, I cannot look upon a decision in one case of fact as a precedent or authority for the decision of another question of fact, and, in the view I take, there is no question of law here, and I must give my opinion upon the facts as I find them. I shall therefore dismiss the action."

No. 48.

Dec. 22, 1887.
Murray's Trustees v. Bloxsom's Trustees.

WILLIAM LEES AND OTHERS (Mr and Mrs Murray's Marriage-Contract Trustees), First Parties.—*Balfour—Jameson.*
FREDERICK LYON PLAYFAIR AND OTHERS (Mrs Murray's Trustees), Second Parties.—*Balfour—Jameson.*
WILLIAM LEES AND ANOTHER (Mr and Mrs Bloxsom's Marriage-Contract Trustees), Third Parties.—*D.-F. Mackintosh—J. A. Reid.*
WILLIAM GIBSON BLOXSOM, Fourth Party.
ANDREW FORRESTER, W.S. (*Curator ad litem* for Children of Mr and Mrs Bloxsom), Fifth Party.—*R. V. Campbell.*

Marriage-contract—Vesting.—In an antenuptial marriage-contract the husband bound himself to pay an annuity of £150 to his wife, if she survived him, and to pay £4000 to the children of the marriage at the first term after the death of the survivor of the spouses. In security of these provisions he bound himself to convey to trustees an insurance policy for £4000, declaring that if he should predecease his wife the trustees should have power to purchase an annuity of £150 for her, and that the children's provisions should in that event be restricted to the balance of the £4000, and be payable to them at majority or marriage. It was further provided that in the event of there being no children, or of all predeceasing the survivor of the spouses, without lawful issue, the sum should be held for the husband's own heirs and assignees. There were children of the marriage, which was dissolved by the death of the husband. *Held* that the right of the children vested at the husband's death.

Wardlaw v. *Wardlaw's Trustees*, 7th July 1880, 7 R. 1070, *followed.*

Succession—Vesting of provisions—Parent and child—Payment to father for behoof of pupil children—Alimentary provision.—A testatrix directed her trustees to "hold and apply, pay, divide, and convey" the residue of her estate to and for behoof of her lawful children, the lawful issue of a predeceasing child being entitled to the interest which such child would have taken had it survived; "declaring that the provisions, so far as in favour of or descending upon females," should be purely alimentary, and exclusive of the *jus mariti* and right of administration of any husbands they might marry. She further directed the trustees to hold the income of the children's shares, or such part as the trustees should think necessary, for the education and maintenance of the children, "and to retain the capital in their own hands under the trust hereby constituted until they can pay it over to trustees under a marriage-contract, or otherwise, appointed by my children respectively, under trust which shall prescribe that the said income and produce shall be alimentary for my said children and the capital provided to their issue; declaring that my said trustees and executors shall only be effectually discharged by the trustees under such last-mentioned trusts."

The testatrix left three daughters. One of them predeceased her leaving a son and daughter, who were in pupillarity.

Held (1) that the share which would have belonged to the predeceasing daughter if she had survived vested in her children at the death of the testatrix; (2) that so far as it belonged to the granddaughter it could not be regarded as alimentary; and (3) that the father of the pupils, as their tutor and administrator, was entitled to receive and discharge it, and the trustees of the testatrix were bound to pay it over to him on his receipt.

2D DIVISION.
M.

BY antenuptial contract of marriage between Mr Charles Wilson Murray and Miss Mary Bayne Playfair, dated 28th March 1853, Mr Murray bound himself to pay an annuity of £150 to his wife in the event of her surviving him, and further bound and obliged himself, his heirs, executors, and successors "to make payment to the child or children of the said intended marriage of the sum of £4000, and that at the first term of Whitsunday or Martinmas after his the said Charles Wilson Murray's death, if he shall survive the said Mary Bayne Playfair, or at the first term of Whitsunday or Martinmas after her death, if she shall survive him." In security of the provisions for his widow and children Mr Murray bound

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himself to convey to the trustees a policy of insurance for £4000 on his life and maintain it in force; declaring that if he should predecease his wife the trustees should have power to purchase an annuity of £150 for her, and that the sum of £4000 provided to the child or children should be in that event restricted to the amount which might remain of it after purchasing the annuity, "and in which event also the foresaid provisions in favour of the child or children of the marriage shall be payable to such child or children respectively on the marriage or majority of such child or each of such children, whichever of these events shall first happen, unless such child or children shall have attained majority or been married previous to the decease of the said Charles Wilson Murray: And in the event of there being no children of the marriage, or of the child or children of said marriage predeceasing without lawful issue the last survivor of said spouses, then the sum or sums which may come into the hands of the said trustees under said policy of assurance shall, after providing for said annuity, be held by them for behoof of the heirs and assignees of the said Charles Wilson Murray."

Mrs Murray on her part conveyed her estate to the marriage-contract trustees for purposes specified, it being *inter alia* declared that in the event of there being more than one child of the marriage surviving at the period of the death of the last survivor of the spouses, the trustees should convey her whole estate to the children in such proportions as Mr Murray might appoint, and failing such appointment, then equally, and in the event of there being no children of the marriage, or of the child or children predeceasing without lawful issue the last survivor of the spouses, "then the said trustees . . . shall convey and make over the said heritable and moveable estate to her own heirs and assignees." The funds thus conveyed by Mrs Murray in the marriage-contract amounted at the date of this special case to about £9352.

There were three children born of the marriage, Jane Ann Murray, Edith Ellen Murray, and Sarah F. T. Murray.

The marriage was dissolved by the death of Mr Murray in 1873. He was survived by all his children. He had made no appointment either of the £4000 or of the fund conveyed to the marriage-contract trustees by Mrs Murray. He left a will bequeathing his whole estate to Mrs Murray. The capital of it was about £30,000.

Jane Ann Murray was married to William Gibson Bloxsom in 1876. By antenuptial contract of marriage, she conveyed her whole estate to trustees.

Mrs Bloxsom died in 1878, survived by her husband and by two children, a boy and a girl.

Mrs Murray died in 1884. She left a trust-disposition and settlement by which she conveyed her whole estate to trustees, and directed them to "hold and apply, pay, divide, and convey" the residue of her estate, amounting to about £30,000, "to and for behoof of" her children equally, the lawful issue of any predeceasing child being entitled to the interest which such child would have taken had it survived; "declaring that the provisions, so far as in favour of or descending upon females shall be purely alimentary, and shall be exclusive of the *jus mariti* and right of administration of any husbands they may marry, and shall not be affectable by their debts or deeds or the diligence of their creditors; and I direct and appoint my said trustees and executors to hold and apply the rents, interest, and other produce and income of my means and estate falling to each of my said children, or such part thereof as my said trustees may deem necessary and proper, for the upbringing, education, clothing and maintenance of the said children respectively, and to retain the capital in

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their own hands under the trust hereby constituted until they can pay it over to trustees under a marriage-contract, or otherwise, appointed by my children respectively under trust, which shall prescribe that the said income and produce shall be alimentary for my said children, and the capital provided to their issue: declaring that my said trustees and executors shall only be effectually discharged by the trustees under such last-mentioned trusts."

On the death of Mrs Murray a special case was stated by Mr and Mrs Murray's marriage-contract trustees (first parties), Mrs Murray's testamentary trustees (second parties), Mrs Bloxsom's marriage-contract trustees (third parties), and Mr Bloxsom as his children's tutor and administrator-in-law (fourth party).

The first question of law was,—"Did a right to any portion of the £4000 secured on the policy on Mr Murray's life vest in Mrs Bloxsom? and if so, is that right carried by the conveyance in her marriage-contract?"

On this question the third parties contended that the £4000 settled by Mr Murray in his marriage-contract vested at his death in his children, and therefore that Mrs Bloxsom's share of it had vested then in her, and been carried to them by her conveyance. The fourth party contended that it *did not* vest till Mrs Murray died, and therefore now belonged to his children. The first parties, who were only interested to obtain a proper discharge, contended that it vested at Mrs Murray's death, but that they were entitled to administer it during the minority of the children.

The second question related to the vesting of the funds settled by Mrs Murray in the marriage-contract, but as at the debate the parties were agreed that these funds did not vest till her death no further notice of the question need be taken here.

The third question was,—"If Mrs Bloxsom did not acquire a vested right to a share of either the policy fund or Mrs Murray's marriage-contract fund, are the parties of the first part entitled to administer the shares of these funds, or either of them, falling to Mrs Bloxsom's children during the minority or until the marriage of the said children respectively, or are they bound to pay over these shares, or either of them, to the party of the fourth part as tutor and administrator-in-law for his children?"

The fourth question was whether Mrs Bloxsom had such an interest in Mrs Murray's testamentary funds as entitled her to affect them by her marriage-contract, and the fifth and sixth questions were,—"(5) If not, do the terms of Mrs Murray's settlement, directing the trustees to pay the shares effeiring to her children to their respective marriage-contract trustees, entitle Mrs Bloxsom's marriage-contract trustees, the parties of the third part, to receive from Mrs Murray's testamentary trustees, the parties of the second part, the fee of one-third of the said fund falling to Mrs Bloxsom or her children, and to administer the same in terms of the trust under which they act? or otherwise (6) Are the parties of the second part bound to pay over the fee of said one-third share to the party of the fourth part as tutor and administrator-in-law for his said children, or are they entitled to hold and administer said share during the minority or until the marriage of said children respectively, and apply the income thereof from time to time for their behoof?"

A *curator ad litem* was appointed to Mrs Bloxsom's children and became the fifth party to the case.

Argued for Mrs Bloxsom's marriage-contract trustees (third parties);—(1) As to the £4000 settled by Mr Murray in his marriage-contract: This fund vested at the dissolution of the marriage by Mr Murray's death, and the share of it which fell to Mrs Bloxsom therefore vested in her. In a marriage-contract such a provision was presumed to vest at the dissolution of the marriage.[1] Payment was postponed in so far only as was necessary to secure the widow's annuity, and there was nothing to suspend vesting.

(2) As to Mrs Murray's testamentary funds: The share of Mrs Murray's testamentary funds which fell to Mrs Bloxsom's children fell to be administered by Mrs Bloxsom's marriage-contract trustees. Mrs Bloxsom's daughter ought to have the protection of the clause in the settlement, providing that its provisions, so far as applicable to females, were to be alimentary and protected from any husbands they might marry.

Argued for the *curator ad litem* to Mr and Mrs Bloxsom's children;—(1) The £4000 did not vest at the dissolution of the marriage by Mr Murray's death. There was a destination-over failing the existence of children at the death of the surviving spouse to the "heirs and assignees" of Mr Murray. The fund was thus to go to the heirs and assignees of the settlor at the death of the survivor of the spouses leaving no child of the marriage.[2] The trustees were given special power to apply part of the capital in buying Mrs Murray an annuity, which also was inconsistent with vesting. The case of *Wardlaw* was to be explained by the particular terms of the settlement there construed.

(2) As to Mrs Murray's testamentary funds: Mrs Bloxsom's children were to get a capital sum. Their father was entitled to receive and manage it for them.[3]

The first and second parties maintained that they would not be properly discharged by paying over to Mr Bloxsom any sums which should be found to have vested in his children. They ought to pay to a trust to be formed, or to retain and administer for the children.

LORD JUSTICE-CLERK.—I think that the money falling to Mr Bloxsom's children must be paid to him to be applied for them at his discretion.

As to the question whether the money bequeathed by Mrs Murray is to be an alimentary fund, I think that the testatrix has failed to explain such an intention with sufficient precision for it to receive effect, and that all that could be done would be that the discharge to be granted with reference to Mrs Bloxsom's daughter's provision should bear that it is to be held for her alimentary use. It might be better that it should. But the money must be paid over to the father for his children.

LORD YOUNG.—I am of the same opinion. There are three questions. The first is as to the fund provided by the marriage-contract of Mr and Mrs Murray, which has been called the £4000 question. As to that question I am of opinion that it vested on the death of Mr Murray, not because that was the period of the dissolution of the marriage, for I think it would not have vested on the death of Mrs Murray if the marriage had been dissolved by her death. If it vested on the death of Mr Murray, it therefore vested in Mrs Bloxsom, who survived, and therefore passed to her marriage-contract trustees by her conveyance in that contract.

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[1] Wardlaw's Trustees v. Wardlaw, July 7, 1880, 7 R. 1070.

[2] Young v. Robertson, July 20, 1860, 22 D. 1527, rev. Feb. 14, 1862, 24 D. (H. L.) 1.

[3] Stevenson v. Dumbreck, Feb. 18, 1857, 19 D. 462, aff. Feb. 11, 1861, 4 Macq. 86.

Secondly, as to the provision made by Mrs Murray in the marriage-contract, I am of opinion as to this matter that there was no vesting till the death of the surviving wife. This result is, I suspect, the consequence of an error in conveyancing, for it is difficult to imagine that the parties intended a different period of vesting for these two funds. But the parties are agreed, for reasons I can well understand, that the mother's provision did not vest till her death, and as she survived Mrs Bloxsom the result is Mrs Bloxsom's children take in their own right. It vested in them, and did not pass by her conveyance to her marriage-contract trustees.

Thirdly, my opinion is the same as to the provision in Mrs Murray's settlement. There was no vesting under it in Mrs Bloxsom's lifetime. On the death of Mrs Murray, who survived her, the funds in that settlement vested in the children of Mrs Bloxsom. They are therefore the fiars of a sum of about £10,000 under their grandmother's will. They have a legal guardian, and he is entitled to receive the money due to them and to give an effectual discharge. His duty will be to manage it for them, and he is not obliged by law to find caution. But I do not doubt he will secure them against any misfortune which might happen to him. That, in my opinion, he will best do by a voluntary deed.

LORD CRAIGHILL.—I concur. My only doubt has been as to the interpretation of the clause in Mr and Mrs Murray's marriage-contract on which the question about the £4000 depends. If I were to be guided only by the words of the clause itself, I should have thought there could be no vesting till the death of the surviving spouse, which seems to me to be the natural meaning of the words. But then the deed which was construed in the case of *Wardlaw* contained expressions similar to those in the present deed. On the authority of that case I agree with your Lordship and Lord Young. As to the other points, I have felt no doubt, and I agree in the decision proposed.

LORD RUTHERFURD CLARK.—I concur. I think the £4000 vested on the death of Mr Murray.

As to the £9000 I need say nothing. As to the funds settled by Mrs Murray's will, I am clearly of opinion that the children of Mrs Bloxsom take a right of fee in those funds, and that they must be paid over to the father. According to the authority of the case of *Stevenson* v. *Dumbreck*, he is entitled to receive and discharge these funds for them. I think it ought to be a simple discharge without any qualification. Further, as to the limitation of the right, I think it cannot be extended to grandchildren, as by the form of the words that provision is applicable only to Mrs Murray's immediate issue, and not to her grandchildren.

THE COURT pronounced this interlocutor:—"The Lords are of opinion in regard to the first question, that a right to one-third of the sum of £4000, part of the sum payable under the policy of insurance on the life of Mr Murray, vested on his death in Mrs Bloxsom, his daughter, and was transmitted to the parties of the third part by the conveyance in her contract of marriage . . . . .; in regard to the second question, ... that one-third of the funds settled by Mrs Murray in her antenuptial contract of marriage vested on the death of the survivor of the spouses in the children of Mrs Bloxsom; in regard to the third ques-

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tion, that the parties of the first part are bound to pay the said share of the said sum of £4000 to the parties of the third part, the trustees under Mrs Bloxsom's marriage-contract, and to pay the said one-third share of the fund settled by Mrs Murray as aforesaid to the said William Gibson Bloxsom, as tutor and administrator-in-law for the said children on delivery of a receipt and discharge by him in that capacity; in regard to the fourth question, that it falls to be answered in the negative, and that one-third share of the funds bequeathed by Mrs Murray in her deed of settlement vested at her death in the children of Mrs Bloxsom; in regard to the fifth question, that it falls to be answered in the negative; and in regard to the sixth question, that the parties of the second part are bound to pay the said share of the sums bequeathed by Mrs Murray as aforesaid to the said William Gibson Bloxsom, as tutor and administrator-in-law for the said children as aforesaid, upon a receipt and discharge by him as such: Find and declare accordingly: Find the parties entitled to payment out of the several funds falling to Mrs Bloxsom or her children, in proportions corresponding to the amount thereof respectively of the expenses incurred by them in relation to the special case, as the same shall be taxed by the Auditor of Court, and decern."

BOYD, JAMESON, & KELLY, W.S.—J. & A. F. ADAM, W.S.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

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Earl of Fife v. Duff.

EARL OF FIFE, Pursuer (Reclaimer).—*D.-F. Mackintosh—Lorimer.*
MISS ANNE J. WHARTON DUFF AND HER *Curator Bonis*,
Defender (Respondent).—*Low—Murray.*

Teinds—Over and under-paying heritors—Prescription.—Held that although in general prescription does not begin to run against a claim for repayment by an overpaying heritor in a locality against an underpaying heritor until a final decree of locality has been pronounced, it did operate where the overpayments by the heritor were caused by his own act in failing to produce a decree of valuation.

The teinds of a parish were valued by the subcommissioners in 1629, and decree of approbation of the valuation was pronounced in 1792. Payments in excess of the valuation by the subcommissioners had been made by A, a heritor, and his predecessors, for nearly eighty years prior to the date of the decree of approbation. In a process of augmentation, modification, and locality brought in 1812, and under two interim decrees of locality in 1815 and 1824 respectively, A made further overpayments of stipend. It was not until a second process was brought in 1842—by which date the objections to which the decree of 1792 was exposed, by reason of prior dereliction of the valuation of the subcommissioners, had prescribed—that A produced and founded on that decree, although he and his predecessors were aware of its existence.

Final decrees of locality in these processes, and in a third brought in 1863, were pronounced in 1878, 1881, and 1882 respectively. A in 1886 sued B, another heritor, for repetition of his overpayments, with interest from 1812 onwards. B pleaded that the claim was prescribed except for forty years prior to 1886, to which A answered that he was *non valens agere* during the years of prescription.

Held that as A had abstained from producing the decree of valuation, the overpayments were caused by his own fault, and that prescription applied to them.

Observations upon the decision of the House of Lords in *Campbell's Trustees* v. *Sinclair*, 5 R. (H. L.) 119, as affecting the decision in the case of *Weatherstone* v. *Lord Tweeddale*, 12 S. 1.

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1st Division.
Lord Kinnear.
B.

On 29th June 1629 the subcommissioners of the Presbytery of Elgin valued the teinds upon the lands in the parish of Lhanbryde at 3 chalders 8 bolls, &c., and this subvaluation was approved of on 21st November 1792 in a process of valuation of the lands at the instance of Lord Fife, who had then come to be the sole heritor in the parish.

In 1715 the minister of Lhanbryde had raised a process of modification and locality, under which he obtained, on 16th January 1717, a decree of modification of his stipend, and by a final decree there was localled upon the teinds of the lands in the parish a stipend of 6 chalders 4 bolls, &c., payment of which was made under that final locality until 1815.

In 1781 the two parishes of Lhanbryde and St Andrews were united, and the united parish was thereafter called St Andrews Lhanbryde, and the stipends which had been paid to the separate ministers thereafter formed the stipend of the united parish.

In 1812 the minister of the united parish raised a summons of augmentation, in which the locality of 1717 was founded on by the heritors as a valuation, and the subvaluation and decree of approbation of 1792 were ignored.

In 1815 an interim decree of locality was pronounced in that process, which regulated the payment of stipend until 1824, when a second interim decree was pronounced, regulating the payment down to 1842. The date of the final locality was 15th November 1878.

In 1842 another process of augmentation was brought in which an interim decree of locality was pronounced in 1844, which regulated the payment of stipend down to 1863. In this process the Earl of Fife's trustees founded on the decree of approbation of 1792, and it received effect in the final locality in 1881 (See *Earl of Fife's Trustees* v. *The Commissioners of Woods and Forests*, Feb. 28, 1849, 11 D. 889).

In 1863 a third process of augmentation was brought, and an interim decree of locality was pronounced therein in 1865, which regulated the payment of stipend down to 1881. The locality was made final in 1882.

The first two processes were conjoined on 9th February 1844, and these again were conjoined with the third process on 31st January 1868.

In May 1886 Lord Fife brought an action against Miss Anne J. Wharton Duff of Orton and her *curator bonis*, as representing the proprietors since 1812 of the lands of Barmuckity, in the united parish, and as present proprietrix, for relief of overpayments of stipend alleged to have been made by him under the above four interim localities. He claimed for overpayments (1) from 1812 to 1823, £197, 11s. 11d., being, with interest from the date of each payment to the raising of the action, £872, 0s. 2d.; (2) from 1823 to 1842, £355, 2s. 8d., being, with interest, £1296, 8s. 8d.; (3) from 1842 to 1863, £284, 14s. 4d., being, with interest, £745, 0s. 4d.; (4) from 1863 to 1881, £230, 15s. 6d., being, with interest, £379, 10s. 4d.—in all, £3292, 19s. 6d.

The defender stated that it was for the first time in 1844 in a condescendence lodged in the process of augmentation then pending that Lord Fife founded upon the decree of approbation and valuation of 1792, and took up the position that the whole amount of the valued teind in the parish having been exhausted his lands were not liable for any part of the augmentations, either under the interim schemes of 1815 and 1824, or under that of 1844. She stated further that it was owing apparently to the oversight of the Officers of State and the minister that Lord Fife had in 1792 obtained decree of approbation of the subvaluation of 1629, although he was paying at the time, and he and his successors had continued ever since to pay, stipend in terms of the locality of 1717, which exceeded the valued teind as above stated by 44 bolls, and completely

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derelinquished the subvaluation. She added,—(Stat. 3) "Had this decree of approbation and valuation been founded on or produced in the localities after mentioned within the years of prescription, it could, and probably would, have been reduced and set aside; it was therefore kept out of view and never founded on or produced in said proceedings until prescription had run upon it, and it had become unchallengeable."

The defender admitted liability for a proportion of the principal sums of the overpayments subsequent to 1846 under the localities of 1844 and 1865, and for such rate of interest thereon as the Court might fix.

The pursuer's explanation of the non-production of the decree of approbation of 1792 prior to 1844 was that it had been overlooked.*

The pursuer pleaded;—(1) The pursuer and his predecessors having under successive interim localities made overpayments from the teinds of their lands, in respect of the stipend of the ministers of St Andrews Lhanbryde, from 1812 to 1881, is entitled for himself and as in right of his predecessors to recover from the underpaying heritors, or their representatives, their proportion of the overpayments, with interest as concluded for. (2) The defender, as owner of the lands of Barmuckity, and

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* A correspondence between Mr Innes, the common agent in the locality of 1815, and Messrs Inglis & Robertson, the agents for Lord Fife, was produced, in which in answer to an inquiry by the former as to whether Lord Fife's teinds in the parish of Lhanbryde were valued, the latter, on 5th May 1815, replied,—"Lord Fife's teinds in the parish of Longbride appear to have been valued in 1792. We shall look into the decree on record, and order an extract if necessary."

The common agent answered on 3d June 1815,—"Dear Sirs,—I now enclose to you copy of a scheme of locality of the stipend of St Andrews Lhanbryde, which was given in and allowed to be seen this morning preparatory to its being approved of as an interim rule of payment as the minister is out of all patience. I looked into Lord Fife's valuation in 1792, which I see embraced the lands which his Lordship then had in St Andrews parish as well as those in Lhanbryde; but it will be of little avail to you I suspect in the latter, and was unnecessary and even prejudicial as to the former—the St Andrews lands—from the whole parish having been valued by a decree of the High Commission on the 28th of January 1713, wherein Lord Fife's lands were valued at a lower rate than by the approbation in 1792. So far as respected the Lhanbryde lands, that approbation was, I am afraid, quite unavailing, because the lands had paid nearly double the teind as it would have been by the decreet 1792 from 1722 downward, and have done so to this hour. I have, accordingly, wholly disregarded your valuation of 1792. I have taken your St Andrews lands by the valuation of 1713, which being a decreet of the High Commission could not, according to the late decisions, be derelinquished; and I have laid one full half of the augmentation (which by the by, is no great matter) on your Lhanbryde lands, presuming that the teind by the present rental of them (the valuation of 1792 being laid aside) would fully warrant that. Along with the copy of the scheme, I send you the excerpt which I made from the valuation of 1792 with scrolls of the jottings explanatory of the view of the teind I have mentioned; and if you conceive that any relief can be got as to your lands in Lhanbryde, I am sure I shall be very well pleased, and will give you any assistance in it I can. . . . It will be absolutely necessary to get the present scheme approved of as an interim rule of payment, as the minister threatens all and sundry with letters of horning, but you should look into it as soon as you conveniently can; and if there are grounds for it, let a rectified scheme be made out for final approbation.—I am, &c."

The condescendence for the heritors of the united parish in the augmentation process of 1812 made no reference to the decree of approbation of 1792, and in the condescendence for Lord Fife's trustees in the process of 1842,—although the decree was then for the first time apparently set forth and founded on,—there was no reason given for its having been previously ignored.

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also as representing former owners thereof, having underpaid teind during the period libelled, is bound to pay to the pursuer the proportion of overpayments applicable to the said lands, with interest as concluded for, and with expenses.

The defender pleaded;—(2) The defender is not liable for any alleged overpayments for any period beyond forty years. (3) The decree of approbation and valuation of 1792 having been withheld, notwithstanding the orders of the Court to produce the same, so as to fortify it against reduction by concealing it for the period of the long prescription, the pursuer is barred from claiming any overpayments which were only made on the assumption of the decree being invalid, or *separatim* is barred from insisting on any such payments for the years prior to 1844, or, at all events, prior to 1832 (the end of the prescriptive period).

The Lord Ordinary (Kinnear), on 18th December 1886, sustained the second plea in law for the defender.*

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* "OPINION.—The pursuer has made overpayments under interim schemes of locality from 1812 to 1881; and he brings this action to recover from the *defender*, as an underpaying heritor, her proportion of the overpayments. The *defender* admits her liability to account for underpayments for forty years before the date of the action. But she maintains, on the authority of *Sinclair's Trustees* v. *Campbell*, decided in the House of Lords (5 Rettie, H. of L. 119), that the pursuer's claim to recover for underpayments before that date is cut off by prescription. She also maintains that, apart from prescription, the pursuer is barred by the conduct of his predecessors from insisting on his claims for the period prior to 1844. But whatever weight may be ascribed, in considering the plea of prescription, to the conduct which is said to create a bar, it does not appear to me that, apart from prescription, it affords a sufficient answer to the pursuer's claims. It appears that in 1629 the teinds of the lands in the parish of Lhanbryde were valued by the subcommissioners of Elgin; that in 1792, the Earl of Fife obtained a decree of approbation and valuation in terms of the report, notwithstanding that in the meantime he had been paying stipend in excess of the valued teind. It is argued for the defender that if this decree of approbation and valuation had been founded on in the localities before it had been fortified by prescription, it would have been seen to be a bad decree, by reason of prior dereliction, and must therefore have been reduced. It is alleged, therefore, that it was purposely withheld till 1844, when it was, for the first time, produced and founded on in the locality then pending. But now that it has been brought forward, it is admittedly a good and valid decree; and since all inquiry into the grounds on which it is said that it might once have been challenged is now excluded by prescription, it must be assumed that it was a good decree from the first. Even if it were challengeable, the defender had at no time any title to challenge it; and she cannot assume that it would or could have been disputed by the Officers of State or the minister, who were parties to the proceeding in which it was pronounced. She does not maintain that the pursuer is barred from founding upon his decree as fixing the true measure of his liability; and, indeed, this is already determined in his favour by the approval of the final scheme in which it has received effect. If she is not in a position to plead prescription, therefore, I am unable to see any ground for maintaining that the decree of valuation, and the decree of locality following upon it, are not to receive effect for the purpose of adjusting accounts between the pursuer and the other heritors, as well as for the purpose of fixing their respective liabilities to the minister for the future.

"The question therefore comes to depend upon the validity of the defender's plea, that the dependence of a process of locality does not exclude prescription. This appears to me to be a question of great difficulty in the present state of the decisions; but I am unable to find any solid ground for distinguishing

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The pursuer reclaimed.

After the first hearing in the Inner-House, the Court, on 17th June 1

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between the present case and that of *Sinclair's Trustees* v. *Campbell*, as de
by the House of Lords.

"In that case the House of Lords held that the long prescription barre
right to recoupment which had accrued to an overpaying heritor prior t
period of forty years before he insisted in his claim for repetition. It is
that in so holding the noble Lords who took part in the judgment did n
pressly overrule the decision in the *Marquis of Tweeddale* v. *Weather*
which is clearly undistinguishable from the present case. But I think it
fest from the reasoning upon which their judgment proceeded that, wit
exception perhaps of Lord Gordon, they would have concurred in for
overruling that decision, if they had thought it necessary to do so. I
they disapproved of the doctrine on which the judgment of the Court of Se
was based, and that they intended by their decision to give effect to a con
doctrine.

"It is true that there is a marked distinction, in fact, between the po
of the underpaying heritor in that case, and the position of the defender.
there were two successive proprietors against whom a claim was made for r
tion of overpayments of stipend—General Campbell Fletcher's trustees an
Andrew Fletcher; and the first of these might probably have been reli
without touching the question of prescription, for the House of Lords th
that they had not been duly cited, and had not been parties to the proc
locality. But the second was admittedly well cited, and had taken part i
process, by voting in the election of a common agent. But then he had c
to be a heritor, by the sale and conveyance of his lands in the parish, for
years before the claim for repetition was brought forward; and the Lord
doubtedly attached great importance to the consideration that he had
become a stranger to the process of locality before the establishment o
liability of his lands for stipend, which gave rise to the claim. But I d
think they intended to decide that, independently of prescription, the mer
of his having sold his land during the dependence of a process of locality
relieve an underpaying heritor of his liability, or deprive an overpaying h
of his right to an accounting when the true rights of parties had been ascert
It is clear that it could not be so held consistently with the principle on
the right to an adjustment of accounts is based. And there is nothing i
decision of the House of Lords to throw any doubt upon that principle, exc
regards its operation to exclude prescription. It is true that some doubts we
pressed, and similar doubts have been expressed in this Court, as to the acc
of the hypothesis which traces the right to a judicial contract. But the do
itself does not appear to me to have been questioned. On the contrary, it i
tinctly laid down in the opinion of Lord Selborne, where his Lordship says
(H. L.) 125),—'It is settled by the law of Scotland that if one heritor pays a l
and another a smaller share of a minister's stipend, or of any augment
thereof, than they were respectively by law liable to pay, the underpayi
liable in repetition to the overpaying heritor.' And his Lordship goes
quote what was said in *Haldane* v. *Ogilvy*, where he says it was 'laid down
the claim of an overpaying against an underpaying heritor is "strictly and si
a claim of debt, a claim for money advanced by the creditor for the debto
time when their respective pecuniary liabilities were misunderstood."' It w
probably be more accurate to say 'that their pecuniary liabilities had no
been ascertained' than that they had been 'misunderstood.' For although
may be cases where a heritor has paid too much or too little, because h
misunderstood his rights or liabilities, the general rule is that payments u
an interim scheme are made provisionally, on the assumption that the sha
which the burden of stipend ought to be borne by the various heritors hav
yet been determined. The law may reasonably impute to a heritor a know
of his liability for teind, for that depends upon his own right alone. Bu
proportional liability for stipend within the full amount of his teind de

remitted "to the Teind Clerk to report generally the course of proceedings in the locality or conjoined localities of St Andrews Lhanbryde during

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upon the liability of others, of which he can know nothing until a scheme of locality has been adjusted. The underpaying heritor, therefore, is not in the position of a debtor who has paid too little in the belief that he was paying according to his liability, but of a contributor to a common fund who has paid provisionally in the knowledge that the true amount of his share of the burden remains to be ascertained. If it turns out, when the proportional liabilities of all the heritors are determined, that he has paid too little, it follows that under the provisional arrangements of the interim scheme his debt to the minister has been paid by those of the heritors who have paid too much. And it appears to be implied in the very nature of the process that he must reimburse those who have paid his debt. Lord Selborne observes, in a later part of this opinion, that the claim which thus arises to the overpaying against the underpaying heritor is one 'which arises in contemplation of law, and is constituted as a legal cause of action at the time when each overpayment takes place.' But, if this be so, it seems impossible to hold that the mere fact of his having sold his land before a final locality had been adjusted can relieve him of a debt or deprive him of a claim which had already accrued.

"It would appear to me, therefore, that the importance which was attached in the House of Lords to the fact of the underpaying heritor having sold his land arises less from any aid which it could afford to the plea of prescription, than because it served to meet the argument that was founded upon a supposed contract between the heritors. And accordingly it is with reference to this argument that the Lord Chancellor observes that the heritor who had sold had thenceforth no power over the litigation, and no means of expediting it. But the question still remains whether, assuming a debt to have accrued with each year's underpayment, the overpaying heritor's right to repetition will be barred by the lapse of the period of prescription. And the House of Lords has decided that question in the affirmative. But it could not be so decided without rejecting the only ground on which the opposite doctrine had previously been maintained. The ground, as I understand it, is that notwithstanding that a debt had n fact been incurred with each yearly overpayment, it could not be known that t had been so incurred until the final locality had been approved of. Till then was thought to be impossible for the overpaying heritor to bring his action, because it could not be known that he had in fact overpaid. It was supposed, therefore, that there was a *non valentia agere* during the whole period of the dependence of a locality which necessarily interrupted the running of prescription. This is a difficulty which applies just as clearly and directly to the case f a heritor who has sold during the progress of the locality as to a heritor who still retains his land when the locality is brought to an end. But it is a difficulty which was fully before the House of Lords in *Campbell* v. *Sinclair*, nd it was held to be no sufficient reason for excluding the plea of prescription. It appears to me therefore to have been decided by the House of Lords that the dependence of a process of locality does not operate to bar prescription.

But if prescription is pleadable against such a claim as the present, it appears o me that this is a very favourable case for maintaining the plea. The first process of augmentation was raised in 1812, and the heritors were appointed to produce their rights and valuations on the 25th of June 1814. And yet it was not until July 1844 that the Earl of Fife produced the valuation of 1792, and protested that the whole amount of his valued teind having been exhausted, he was liable for no part of the augmentations, either under the interim schemes of 1814, 1824, or 1842. During the whole time between 1814 and 1844, he had been paying on the footing that his teinds were not valued; and yet he must have known of the existence of his valuation, and no reason can be suggested to account for his withholding it. He allows forty years more to pass before he brings his action, in which he seeks repetition with interest of annual payments extending over a period of seventy years. It is said that the

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the dependence of which the alleged overpayments of stipend were n and specially (*First*) to what cause or causes is to be ascribed the delay which occurred in adjusting a final scheme of locality; and (*Se* whether there were overpayments of stipend by the Earl of Fife, to the decree of approbation, sufficient to infer dereliction of the valuation of his teinds." The conclusions of that report, which dealt fully with the subjects of the remit, are stated below.*

Argued for the reclaimer;—The Lord Ordinary's judgment founded on the case of *Sinclair's Trustees*, as decided in the Hous

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defender cannot complain of the delay, because she and her predec might have pressed on the proceedings in the locality. But the which followed the production of the valuation would appear to have caused by a protracted litigation between Lord Fife and the Crown. defender had no part in that litigation, and no power to expedite the ceedings.

"In these circumstances, I think she is fairly entitled to say that afte lapse of forty years from the production of the valuation, all claim for repe of overpayments made before that date must be presumed to have been aband unless it can be maintained against her that that presumption is excluded l dependence of a process of locality which bars prescription. But that ca in my opinion, be maintained, since the contrary is decided by the Hou Lords in *Campbell* v. *Sinclair*."

* "In regard to the first of the two points remitted, the reporter is of op that the delay must be chiefly ascribed to the heritors in not producing rights to teinds and valuations thereof in the first action. Had these bee duced, all questions between the Crown and the heritors, and also the liab of the individual heritors, might have been settled in the first action withi seven years that action was asleep. When the discussion between the C and the Earl of Fife took place in the second action" (*i.e.*, in the process was raised in 1842), "the chief points in discussion were settled withi years; and the remaining question might have been settled within two It is true the Crown did not press the objections which had been made in but the heritors nevertheless continued to pay their shares of stipend, and case of the Earl of Fife to make a large overpayment in the knowledge th decree of approbation of 1792 was in existence, and fixed the teinds at a smaller quantity than was being paid. None of the creditors were so mu terested in the rectification of the locality as the Earl of Fife, as appears the statement produced, and yet it was not till 1844 that the decree of 179 founded on. With so much knowledge of the valuation shewn in the co agent's account, it is thought the delay in its production may fairly be attri to an unwillingness to found upon the decree during the currency of the years from 1792 to 1832.

"On the second of the points, the reporter finds from the records that t stipend allocated upon the Earl of Fife's lands, situated in the then se parish of Lhanbryde, so early as 16th January 1717, amounted as follo [Here followed a statement shewing that the old stipend allocated in 171 100 bolls, while the teinds as valued by the subcommissioners amounted bolls, there thus being an excess of payment of 44 bolls, which continue 1805, when there were added 19 bolls more, making the excess paid til 1844 about 63 bolls.]

"The original overpayment appears to have continued down to 1792, a of about seventy-five years; and as it was continued down to 1812, an increased by the interim locality of 1815 . . . and farther increased l rectified interim locality of 21st January 1824, there is no reason to doub there was good ground for challenge of the decree of approbation of 1792 had been founded on within forty years of its date.

"With reference to the approbation of 1792, it is only fair to state th proceedings in that action were not unduly hurried."

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Lords.[1] But that case was different from the present, because here the heritor against whom the claim was made had remained in the locality till it became final. In *Sinclair's Trustees'* case he had sold his lands and ceased to be a heritor in the parish more than forty years before the date of the action. Further, unless the case of *Weatherstone* v. *Lord Tweddale*,[2] was overruled by the House of Lords in deciding the case of *inclair's Trustees*, the principle of that decision must apply here. The laims of relief arising in the course of the process or processes of ugmentation could not be determined until there has been a final ecree of locality, and prescription did not run upon these claims ntil the final decree had been pronounced. Accordingly, the equitble plea of *non valens agere* was an answer to the defender's plea of rescription.[3]

It was further argued that the pursuer had suppressed the decree of pprobation of 1792, and had purposely done so, until the lapse of rty years had fortified it against the objections to which it was clearly ubject on the ground of prior dereliction. But it was equally the fault f the other heritors that that decree had not been produced. At anyate, they could have set the titular or the minister in motion. Further, here had been no concealment on the part of the pursuer's representaves. The correspondence which had been produced shewed that. The uth rather was that the common agent had disregarded the decree. e pursuer relied upon effect being given to it in the final scheme, and it could not now be challenged it must be assumed to have been a d decree from the first.[4]

Argued for the respondent;—The case of *Weatherstone*[2] was overruled the House of Lords in deciding *Sinclair's Trustees*.[4] It was impossible explain the principle of that decision, except on grounds which were onsistent with the principle laid down in *Weatherstone*. If the prinle of *Weatherstone* was infringed in one case, and prescription held to ply as in *Sinclair's Trustees*, there was no logical stopping place, and it ust apply in all. The fact that a heritor sold his lands and left the rish during the progress of the process of locality could not be material, cause the principle was that he had entered into an implied contract the outset of the process that when the final decree was pronounced would repay any overpaying heritor what was due to him, and the pse of forty years would not affect that liability.

Further, the pursuer was personally barred by his neglecting to produce d found upon the decree of approbation of 1792 before prescription had n upon it. By this acting he had of set purpose prevented the objecns to which that decree was *ex facie* open from being stated. If he d given this opportunity, the decree must have been reduced on the und of prior dereliction. The defender's title to state such a defence an action like the present was supported by the decision in the case of *nloch* v. *Bell*.[5] The defender's rights had been prejudiced by the urse followed by Lord Fife's predecessors, and the former should not be ade to suffer, because, owing to no fault on her part, or on that of her edecessors, who could not have reduced the decree, the objections to it d not been timeously stated.

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[1] Campbell's Trustees v. Sinclair's Trustees, July 18, 1877, 4 R. 1126, rev. pril 15, 1878, 5 R. (H. L.) 119.

[2] Weatherstone v. Lord Tweeddale, Nov. 12, 1833, 12 S. 1.

[3] Bell's Principles, 627; Erskine's Inst. iii. 7, 36.

[4] 5 R. (H. L.) 119.

[5] Feb. 12, 1867, 5 Macph. 360, 39 Scot. Jur. 185.

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LORD ADAM.—This action is brought to recover payment of a su
£3292, 19s. 6d., alleged to be the amount, with interest, due by the defen
the pursuer, in respect of the stipend of the minister of the parish of St An
Lhanbryde, underpaid by her, and her predecessors, from the lands of Barm
and others, from the year 1812 to the year 1881 inclusive.

The corresponding overpayments by the pursuer and his predecessors
made under interim decrees of locality pronounced in three successive pro
of augmentation, modification, and locality, raised by the ministers of the p
and embrace a period, it will be observed, of sixty-nine years.

The sums concluded for amount to about £1068, 4s. 5d. of principa
to £2224, 15s. 1d. of interest.

By the interlocutor brought under review the Lord Ordinary has sus
the defender's second plea in law, which is, that the defender is not liab
any alleged overpayments for any period beyond forty years from the date
raising of the action. The Lord Ordinary explains in his opinion the gr
of his judgment. He says that he cannot distinguish this case from t
Sinclair's Trustees v. *Campbell* in the House of Lords, the judgment in whi
thinks, necessarily, although not expressly, overrules the case of *Weatherst*
The Marquis of Tweeddale. "In that case" (*Sinclair's Trustees*), he says,—
House of Lords held that the long prescription barred any right of recou
which had accrued to an overpaying heritor prior to the period of forty
before he insisted in his claim for repetition. It is true that, in so holdin
noble Lords who took part in the judgment did not expressly overrul
decision in the *Marquis of Tweeddale* v. *Weatherstone*, which is clearly
tinguishable from the present case. But I think it manifest, from the reas
upon which their judgment proceeded, that with the exception perhaps of
Gordon, they would have concurred in formally overruling that decision, i
had thought it necessary to do so. I think they disapproved of the doctri
which the judgment of the Court of Session was based, and that they int
by their decision to give effect to a contrary doctrine."

I cannot concur in this opinion, and it is entirely rested on the ground
the judgment in *Sinclair's Trustees'* case necessarily overruled *Weatherstone'*
I may be allowed to refer to a few passages of their Lordships' opinions, in
to shew that they did not intend to overrule *Weatherstone's* case, and that
judgment depended on, and was given with reference to a different st
facts. These were, that General Fletcher's trustees never had been parties
locality proceedings, and that Mr Fletcher had sold his lands in the parish
had ceased to be a party to the proceedings for upwards of forty years befo
claim for repetition of overpayments was brought against them,—facts whi
not exist in this case, and did not exist in *Weatherstone's* case, where the p
or their authors had been parties to the proceedings throughout.

Lord Chancellor Cairns, after referring to the principle that when pay
are made under an interim scheme of locality there is an implied contract
when a final scheme has been settled, there shall be an adjustment of ove
underpayments, says—"For that proposition one authority, certainly goi
that extent, has been referred to, and is the foundation of the decision c
Court below, the case namely of *Weatherstone* v. *The Marquis of Twee*
and in the observations which I am about to make I will assume, althou

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is not necessary now to decide it, that the principle of the decision in that case is correct and well founded. My Lords, it does not appear to me to apply to the case before your Lordships . . . But what your Lordships have to deal with here is the case of a person who went out of the parish, and left the parish altogether more than forty years ago. You may assume that at the time when he left the parish he was a person who had underpaid—in this case he had paid nothing at all—and that there might have been a right to make him contribute, in that respect, the payment which he ought to have made, but, as I said, he left the parish, he disappeared, he became from that moment a stranger to the proceedings, and from that time he was no party to the litigation, if there was a litigation; from that time the common agent ceased to represent him. Therefore, I am at a loss to see upon what principle it is that, the period of forty years having elapsed, the period after which there is a presumption of the abandonment of every claim having run, there is to be an exception grafted on that prescription, that a person who as I have said has become a stranger to the litigation is after the period of forty years to be held liable."

It will be observed that the Lord Chancellor assumes that *Weatherstone's* case may have been well decided, and rests upon the fact that the parties had not been parties to the locality proceedings for upwards of forty years.

Lord Hatherley says,—"Whatever may have been said in that case of *Weatherstone* v. *The Marquis of Tweeddale*, in order to apply it to a case like the present, I should have expected to find facts similar to those existing in the case upon which such observations were made, and I find nothing at all comparable in the state of circumstances in the case now before your Lordships for decision to the circumstances in the case of *Weatherstone* v. *The Marquis of Tweeddale*. . . . My Lords, it does not appear to me that the case of *Weatherstone* v. *The Marquis of Tweeddale* can be in any way compared with this."

Lord Selborne says,—"Even if the authority of *Weatherstone* v. *Lord Tweeddale* in this question of prescription stood higher than, under these circumstances, it appears to me to stand, it would still not be an authority applicable to the present case," and after explaining that case he adds,—"The doctrine, so explained, seems to be applicable to those only who have been throughout, or at the very least within forty years before action is brought, parties to the locality proceedings, which in the present case none of the appellants were. I do not think it consistent with the principle of any of the authorities on this subject to hold that the cause of action is, in any case of this kind, originally constituted by the final decree of locality, and it would certainly be inconsistent with all principle to hold that it was or could be so constituted as against persons who (like the appellants in the present case) were at the date of the final decree, and had been for many years previously, strangers to the locality proceedings. When the appellant Andrew Fletcher sold his estate in 1833 and ceased to be a heritor, he became a stranger to those proceedings, and had no longer any power (as I apprehend) to intervene in them for any purpose. If the respondents had desired to enforce such liability as he may have been then under to them, and with that view to bring the locality proceedings to a close, it was for them to do so."

Lord Gordon, after adverting to *Weatherstone's* case, says,—"I think the principles involved in the judgment in that case were right, but I think these principles do not apply to the present case."

Weatherstone's case may or may not have been rightly decided, but looking

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to the expressions of opinion which I have just read, I cannot agree wit
Lord Ordinary in thinking that their Lordships disapproved of the doctri
which the judgment in that case was based, and that they intended to
effect to a contrary doctrine. I think, as I have said, that the judgme
Sinclair's Trustees' case rested upon the fact that the defenders either had
been, or had for forty years ceased to be, parties to the locality proceeding
I think that their Lordships (with the exception of Lord Gordon, who,
have seen, expressed his opinion that the decision was right), guarded them
from expressing any opinion as to what the result might be if the part
their authors had been parties to the proceedings throughout, as in this
Weatherstone's case.

The question, therefore, raised in this case being, as I think, open fo
sideration, I think that it is so far ruled by *Weatherstone's* case, and tha
case was rightly decided.

It appears to me that the principle upon which an overpaying her
entitled to obtain relief of his overpayments from an underpaying her
one well established in the law of Scotland, and does not depend upo
peculiarity of the law or practice in teind cases. It is the principle that
one of several debtors who are jointly and severally liable to a credito
that creditor either the whole or more than his proper share of the co
debt, he is entitled to full relief from his co-debtors. Now, all the heri
a parish are liable to the minister in payment of his stipend, to the ext
their free teinds. When the minister has obtained a decree of augmen
and modification, he is entitled to proceed against any one of the herito
to recover from him the full amount of his free teinds, so far as may be
sary to operate payment of the stipend, leaving such heritor to seek his
against the other heritors, who are equally liable with him in payment
The title of an overpaying heritor to obtain relief of his overpayments fr
underpaying heritor does not depend upon the fact that the overpayment
been made under an interim decree of locality, though that may have
important effects in questions of prescription, but upon the fact that
paid to their creditor the whole or part of the debt for which he and the
paying heritor were both liable *in solidum*, and of which, therefore, as
other case, he is entitled to relief, to the extent to which he has paid mor
his share of the common debt.

I think therefore that the liability to relieve, and the consequent grou
action, arises when each overpayment is made, and that, therefore, th
negative prescription necessarily applies as each payment is made, unl
Lord Cairns says, in *Sinclair's Trustees'* case, there is to be an exception
on that prescription. In *Sinclair's Trustees'* case, the exception was sough
found in the principle affirmed in *Weatherstone's* case, that, where payme
stipends are made under an interim decree of locality, there is an in
judicial contract among all the parties, that when the legal obligations
heritors shall be determined by final decreet, their several interests sh
adjusted from the commencement of the process or processes according
true state of their rights and obligations, and that the claims of relie
arising cannot be affected by the length of time during which the settl
of a final locality may have been delayed.

But it was pointed out in the House of Lords in *Sinclair's Trustees'* case
as *Sinclair's Trustees* had never been parties to the proceedings, they coul

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been no parties to any such implied contract; and that as regards Mr Fletcher, he had sold his lands and ceased to be a heritor for upwards of forty years before the claim was made, that he became a stranger to the proceedings, and had no longer any power to intervene in them to any purpose, and, therefore, could not be affected by them. No doubt the overpaying heritor could not sue during the dependence of the locality proceedings, and was, therefore, *non valens agere*, but, as I understand the case, it was held to be the duty of the overpaying heritor, if he desired to enforce a claim against an underpaying heritor, to bring the locality proceedings to a close within the years of prescription; and that, therefore, it was his own fault if his right of action was cut off.

I think that the effect of payments made under an interim decree of locality, where all the parties have been parties to the proceedings, is more accurately expressed by Lord Selborne in *Sinclair's Trustees'* case than it is in *Weatherstone's* case, though, as his Lordship says, "the question may be one more of words than of substance." His Lordship adds,—"That as between the parties, or actors, who were before the Teind Court in a process of augmentation and locality, a right to a future adjustment of such payments as might be made under an interim decree was implied from the very nature of their *concursus* in that proceeding by which they were all bound, and that the dependence of such a process between them would keep that right alive until a final decree."

I think, as so stated, the principle is perfectly sound, and I can add nothing to what was said on this point by the Judges of the Court of Session in deciding *Sinclair's Trustees'* case. The principle necessarily excludes any right of action until the amount of overpayments has been ascertained after a final decree, and also, unless there be exceptional circumstances, necessarily prevents prescription from running during the progress of the proceedings,—as during that time the overpaying heritor could not sue, and was therefore *non valens agere.*

I think, therefore, that, if the defender's plea of prescription depended for its validity solely on the lapse of time, it would not be well founded, as the Lord Ordinary has held it to be, because I think the answer would be good that the pursuer was *non valens agere* until the locality proceedings came to an end in a final decree of locality.

But this plea of *non valens agere* is an equitable plea. Professor Bell, in section 627 of his Principles, says of it:—"This is an answer in equity to the plea of prescription, and proceeds on the principle, not on the words, of the law"; and certainly the statutes introducing the long prescription do not, in terms, provide that inability to sue shall have the effect of stopping the currency of prescription.

It is perfectly well settled, however, that it has this effect. Nevertheless, it is, as Professor Bell says, an equitable plea, and it may not in every case be admitted. Thus, Lord Selborne held in *Sinclair's Trustees'* case that the overpaying heritor could not plead it, because it was his own fault that he was *non valens agere.*

I think, therefore, that the Court is entitled to consider whether, in the circumstances of this case, it is equitable that the pursuer should be allowed to take off the effect of the long prescription which undoubtedly has run against his claim by pleading *non valens agere.*

Since the case was before the Lord Ordinary we have had a report from the Teind Clerk, which discloses some very material facts bearing on this point. It is clear from that report that any of the parties to the locality might, but for

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their own negligence, have brought the proceedings to a close in ample tim have enabled them to take proceedings for the recovery of overpayments, if t desired so to do, within the years of prescription. If, therefore, the claim been, as in *Sinclair's Trustees'* case, against a person not a party to the proc ings, I should have held, as Lord Selborne did in that case, that the plea of *valens agere* was of no avail, because it was the party's own fault that he allowed his claim to be prescribed. But to apply this principle as between parties to these proceedings would, I think, be contrary to the principle of decision in *Weatherstone's* case. It would imply that the negative prescrip applied in all cases of over and underpayments made under an interim de of locality, for I have no doubt that every locality may be brought to an within the years of prescription, and that it is equally the fault of all par concerned if it is not. I am not prepared to sustain the defender's plea of scription on that ground.

But it also appears, from the Teind Clerk's report, that the interim decre locality, under which the overpayments in question were made, was approve an interim rule of payment on 5th July 1815.

It further appears from that report, and the correspondence produced, t the Earl of Fife, the pursuer's author, through his agents, was at and before t time in the full knowledge of the decree of approbation of 1792.

On the 3d June 1815 the common agent writes to Lord Fife's agents,— now enclose to you copy of a scheme of locality of the stipend of St Andr Lhanbryde, which was given in and allowed to be seen this morning preparat to its being approved of as an interim rule of payment, as the minister is ou all patience.

"I looked into Lord Fife's valuation in 1792, which I see embraced the la which his Lordship then had in St Andrews parish, as well as those in Lh bryde; but it will be of little avail to you I suspect in the latter, and was necessary and even prejudicial as to the former—the St Andrews lands—fr the whole parish having been valued by a decree of the High Commission on t 28th of January 1713, wherein Lord Fife's lands were valued at a lower rate th by the approbation in 1792. So far as respected the Lhanbryde lands, th approbation was, I am afraid, quite unavailing, because the lands had pa nearly double the teind as it would have been by the decreet 1792 from 17 downward, and have done so to this hour."

It further appears from the Teind Clerk's report, that large payments in exce of the subvaluation of 1629, which had been approved of by the decree of 17 had been made from 1717 down to the date of the decree of approbation, period of seventy-five years. The decree of approbation, therefore, although *facie* a valid document, was open to challenge, and would probably, if not ce tainly, have been reduced, if challenged by anyone having a title. The decr of approbation was not produced or founded on, with the result that addition sums were allocated on the Earl's lands by the interim locality of 1815, an still further sums by the rectified interim locality of 1824. It was not unt 1844 that the decree of approbation was produced and founded on.

It is thus apparent that it was not in ignorance of the state of his rights t teinds and valuations that the decree of approbation of 1792 was not produce and founded on by the pursuer's author prior to the interim scheme of 1815.

If the Earl had produced it, one or other of two results would have followe either (the decree being *ex facie* valid) it would have received effect, if no

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nged, and the Earl would not have made the overpayments of which he seeks relief; or, if it had been challenged and reduced, the payments ly made would not have been overpayments. The Earl elected not to ce the decree of approbation, and his reason is obvious; he preferred g the payments in question to running the risk of having the decree nged. He continued to make these payments till, by the lapse of time, jections to which the decree of approbation was exposed were cut off by gative prescription. He has thus taken the benefit of the lapse of time ify his decree, but he says that the defender shall not have the benefit of me lapse of time to support her plea of prescription. It is, no doubt, true he Earl was *non valens agere* during these years, in the sense that he not sue for repayment of these alleged overpayments till a final decree of y had been obtained. But it is equally true that he made the payments edly, and that he need never have been in the position of requiring to sue of his own free will. These payments were the price he was willing to r the purpose of validating his decree of approbation, and having suc- in that purpose he now wishes to have the price repaid. The negative ption undoubtedly strikes, in terms, at his claim, and the question is er, in the circumstances, it would be just and equitable to allow its effect aken off by, as Lord Cairns expresses it, grafting on it this exception. r opinion it would not be just or equitable. It was by the acts of his essors, and for their own purposes, that the pursuer is now in a position uire to sue for these overpayments. I do not think that the principle of *erstone's* case applies to such a case as this, and I think that in the cir- ances we ought to hold that the pursuer's claim beyond forty years from te of raising the action is prescribed.

n therefore of opinion, though not on the same grounds as his Lordship, he Lord Ordinary's interlocutor is right.

D MURE.—Having considered the additional information which has been efore the Court by the reporter, under the remit made to him in June have had no difficulty in coming to the same conclusion as that which Adam has arrived at, and that substantially on the same grounds. For is here, in the view I take of the case, no room for the application of the ne of implied contract on which the decision in the case of *Weatherstone d Tweeddale* proceeded. When the case was formerly before us, even on cord and productions as they then stood, I was disposed to come to this sion. But with the additional information now before us, I am quite d that the doctrine, as laid down in the case of *Weatherstone*, does not, circumstances as now explained, apply, and that the ordinary rules of iption must be allowed to take effect.

vas, I conceive, the duty of Lord Fife's advisers to found on the decree of bation of 1792 in 1814, if they considered it effectual to enable Lord Fife st the proposed augmentation. They, however, did not take that course, h quite well aware of its existence. Why they did not do this, it may not e very easy to ascertain. But I think it is not improbable, as has been ted by the reporter, that it was from apprehension that they would be met e plea of dereliction, which they probably would, as the objection to the bation had not then been worked off by prescription. But, whatever may been the reason for this omission, it appears to me that it is sufficient to

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the dependence of which the alleged overpayments of stipend were and specially (*First*) to what cause or causes is to be ascribed th delay which occurred in adjusting a final scheme of locality; and (whether there were overpayments of stipend by the Earl of Fif to the decree of approbation, sufficient to infer dereliction of t valuation of his teinds." The conclusions of that report, which dea fully with the subjects of the remit, are stated below.*

Argued for the reclaimer;—The Lord Ordinary's judgmen founded on the case of *Sinclair's Trustees*, as decided in the Ho

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defender cannot complain of the delay, because she and her pred might have pressed on the proceedings in the locality. But th which followed the production of the valuation would appear to ha caused by a protracted litigation between Lord Fife and the Crow defender had no part in that litigation, and no power to expedite t ceedings.

"In these circumstances, I think she is fairly entitled to say that a lapse of forty years from the production of the valuation, all claim for re of overpayments made before that date must be presumed to have been aba unless it can be maintained against her that that presumption is exclude dependence of a process of locality which bars prescription. But that in my opinion, be maintained, since the contrary is decided by the H Lords in *Campbell* v. *Sinclair*."

* "In regard to the first of the two points remitted, the reporter is of that the delay must be chiefly ascribed to the heritors in not produci rights to teinds and valuations thereof in the first action. Had these b duced, all questions between the Crown and the heritors, and also the li of the individual heritors, might have been settled in the first action wi seven years that action was asleep. When the discussion between the and the Earl of Fife took place in the second action" (*i.e.*, in the proces was raised in 1842), "the chief points in discussion were settled wit years; and the remaining question might have been settled within tw It is true the Crown did not press the objections which had been made i but the heritors nevertheless continued to pay their shares of stipend, an case of the Earl of Fife to make a large overpayment in the knowledge decree of approbation of 1792 was in existence, and fixed the teinds at smaller quantity than was being paid. None of the creditors were so n terested in the rectification of the locality as the Earl of Fife, as appea the statement produced, and yet it was not till 1844 that the decree of 1 founded on. With so much knowledge of the valuation shewn in the agent's account, it is thought the delay in its production may fairly be at to an unwillingness to found upon the decree during the currency of t years from 1792 to 1832.

"On the second of the points, the reporter finds from the records that stipend allocated upon the Earl of Fife's lands, situated in the then parish of Lhanbryde, so early as 16th January 1717, amounted as fol [Here followed a statement shewing that the old stipend allocated in 1 100 bolls, while the teinds as valued by the subcommissioners amounte bolls, there thus being an excess of payment of 44 bolls, which contin 1805, when there were added 19 bolls more, making the excess paid 1844 about 63 bolls.]

"The original overpayment appears to have continued down to 1792, of about seventy-five years; and as it was continued down to 1812, increased by the interim locality of 1815 . . . and farther increase rectified interim locality of 21st January 1824, there is no reason to do there was good ground for challenge of the decree of approbation of 17 had been founded on within forty years of its date.

"With reference to the approbation of 1792, it is only fair to state proceedings in that action were not unduly hurried."

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But that case was different from the present, because here the against whom the claim was made had remained in the locality became final. In *Sinclair's Trustees'* case he had sold his lands ised to be a heritor in the parish more than forty years before the the action. Further, unless the case of *Weatherstone* v. *Lord ale,*[2] was overruled by the House of Lords in deciding the case of *'s Trustees,* the principle of that decision must apply here. The of relief arising in the course of the process or processes of tation could not be determined until there has been a final of locality, and prescription did not run upon these claims ie final decree had been pronounced. Accordingly, the equit- ea of *non valens agere* was an answer to the defender's plea of tion.[3]

s further argued that the pursuer had suppressed the decree of ation of 1792, and had purposely done so, until the lapse of ars had fortified it against the objections to which it was clearly on the ground of prior dereliction. But it was equally the fault ther heritors that that decree had not been produced. At any- ey could have set the titular or the minister in motion. Further, d been no concealment on the part of the pursuer's representa- The correspondence which had been produced shewed that. The ther was that the common agent had disregarded the decree. suer relied upon effect being given to it in the final scheme, and uld not now be challenged it must be assumed to have been a cree from the first.[4]

ed for the respondent;—The case of *Weatherstone*[2] was overruled House of Lords in deciding *Sinclair's Trustees.*[4] It was impossible in the principle of that decision, except on grounds which were tent with the principle laid down in *Weatherstone.* If the prin- *Weatherstone* was infringed in one case, and prescription held to s in *Sinclair's Trustees,* there was no logical stopping place, and it pply in all. The fact that a heritor sold his lands and left the luring the progress of the process of locality could not be material, the principle was that he had entered into an implied contract utset of the process that when the final decree was pronounced ld repay any overpaying heritor what was due to him, and the forty years would not affect that liability.

ner, the pursuer was personally barred by his neglecting to produce nd upon the decree of approbation of 1792 before prescription had on it. By this acting he had of set purpose prevented the objec- which that decree was *ex facie* open from being stated. If he en this opportunity, the decree must have been reduced on the of prior dereliction. The defender's title to state such a defence ction like the present was supported by the decision in the case of v. *Bell.*[5] The defender's rights had been prejudiced by the followed by Lord Fife's predecessors, and the former should not be o suffer, because, owing to no fault on her part, or on that of her essors, who could not have reduced the decree, the objections to it t been timeously stated.

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mpbell's Trustees v. Sinclair's Trustees, July 18, 1877, 4 R. 1126, rev. .5, 1878, 5 R. (H. L.) 119.
eatherstone v. Lord Tweeddale, Nov. 12, 1833, 12 S. 1.
ll's Principles, 627; Erskine's Inst. iii. 7, 36.
R. (H. L.) 119.
b. 12, 1867, 5 Macph. 360, 39 Scot. Jur. 185.

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At advising,—

Lord Adam.—This action is brought to recover payment of a £3292, 19s. 6d., alleged to be the amount, with interest, due by the def the pursuer, in respect of the stipend of the minister of the parish of St A Lhanbryde, underpaid by her, and her predecessors, from the lands of Bar and others, from the year 1812 to the year 1881 inclusive.

The corresponding overpayments by the pursuer and his predecesso made under interim decrees of locality pronounced in three successive p of augmentation, modification, and locality, raised by the ministers of th and embrace a period, it will be observed, of sixty-nine years.

The sums concluded for amount to about £1068, 4s. 5d. of princi to £2224, 15s. 1d. of interest.

By the interlocutor brought under review the Lord Ordinary has s the defender's second plea in law, which is, that the defender is not li any alleged overpayments for any period beyond forty years from the da raising of the action. The Lord Ordinary explains in his opinion the of his judgment. He says that he cannot distinguish this case from *Sinclair's Trustees* v. *Campbell* in the House of Lords, the judgment in w thinks, necessarily, although not expressly, overrules the case of *Weathe The Marquis of Tweeddale.* "In that case" (*Sinclair's Trustees*), he says House of Lords held that the long prescription barred any right of rec which had accrued to an overpaying heritor prior to the period of for before he insisted in his claim for repetition. It is true that, in so hol noble Lords who took part in the judgment did not expressly over decision in the *Marquis of Tweeddale* v. *Weatherstone*, which is clearl tinguishable from the present case. But I think it manifest, from the r upon which their judgment proceeded, that with the exception perhaps Gordon, they would have concurred in formally overruling that decision had thought it necessary to do so. I think they disapproved of the doc which the judgment of the Court of Session was based, and that they i by their decision to give effect to a contrary doctrine."

I cannot concur in this opinion, and it is entirely rested on the grou the judgment in *Sinclair's Trustees'* case necessarily overruled *Weatherston* I may be allowed to refer to a few passages of their Lordships' opinions, to shew that they did not intend to overrule *Weatherstone's* case, and th judgment depended on, and was given with reference to a different facts. These were, that General Fletcher's trustees never had been partie locality proceedings, and that Mr Fletcher had sold his lands in the par had ceased to be a party to the proceedings for upwards of forty years b claim for repetition of overpayments was brought against them,—facts w not exist in this case, and did not exist in *Weatherstone's* case, where the or their authors had been parties to the proceedings throughout.

Lord Chancellor Cairns, after referring to the principle that when p are made under an interim scheme of locality there is an implied contr when a final scheme has been settled, there shall be an adjustment of o underpayments, says—"For that proposition one authority, certainly g that extent, has been referred to, and is the foundation of the decisio Court below, the case namely of *Weatherstone* v. *The Marquis of Tw* and in the observations which I am about to make I will assume, alth

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ecessary now to decide it, that the principle of the decision in that case
t and well founded. My Lords, it does not appear to me to apply to
e before your Lordships . . . But what your Lordships have to
h here is the case of a person who went out of the parish, and left the
ltogether more than forty years ago. You may assume that at the time
e left the parish he was a person who had underpaid—in this case he
d nothing at all—and that there might have been a right to make him
te, in that respect, the payment which he ought to have made, but, as
e left the parish, he disappeared, he became from that moment a stranger
roceedings, and from that time he was no party to the litigation, if there
tigation; from that time the common agent ceased to represent him.
re, I am at a loss to see upon what principle it is that, the period of forty
aving elapsed, the period after which there is a presumption of the
ment of every claim having run, there is to be an exception grafted on
scription, that a person who as I have said has become a stranger to the
n is after the period of forty years to be held liable."

ll be observed that the Lord Chancellor assumes that *Weatherstone's*
y have been well decided, and rests upon the fact that the parties had
n parties to the locality proceedings for upwards of forty years.

Hatherley says,—"Whatever may have been said in that case of
rstone v. *The Marquis of Tweeddale*, in order to apply it to a case like
sent, I should have expected to find facts similar to those existing in the
on which such observations were made, and I find nothing at all com-
in the state of circumstances in the case now before your Lordships for
n to the circumstances in the case of *Weatherstone* v. *The Marquis of*
dale. . . . My Lords, it does not appear to me that the case of *Weather-*
The Marquis of Tweeddale can be in any way compared with this."

Selborne says,—"Even if the authority of *Weatherstone* v. *Lord Tweed-*
this question of prescription stood higher than, under these circum-
, it appears to me to stand, it would still not be an authority applicable
present case," and after explaining that case he adds,—"The doctrine, so
ed, seems to be applicable to those only who have been throughout, or at
y least within forty years before action is brought, parties to the locality
dings, which in the present case none of the appellants were. I do not
it consistent with the principle of any of the authorities on this subject
l that the cause of action is, in any case of this kind, originally consti-
by the final decree of locality, and it would certainly be inconsistent with
inciple to hold that it was or could be so constituted as against persons
like the appellants in the present case) were at the date of the final
, and had been for many years previously, strangers to the locality pro-
gs. When the appellant Andrew Fletcher sold his estate in 1833 and
l to be a heritor, he became a stranger to those proceedings, and had no
r any power (as I apprehend) to intervene in them for any purpose. If
espondents had desired to enforce such liability as he may have been then
r to them, and with that view to bring the locality proceedings to a close,
s for them to do so."

rd Gordon, after adverting to *Weatherstone's* case, says,—"I think the
ciples involved in the judgment in that case were right, but I think these
ciples do not apply to the present case."

Veatherstone's case may or may not have been rightly decided, but looking

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to the expressions of opinion which I have just read, I cannot agree wi Lord Ordinary in thinking that their Lordships disapproved of the doctr which the judgment in that case was based, and that they intended t effect to a contrary doctrine. I think, as I have said, that the judgm *Sinclair's Trustees'* case rested upon the fact that the defenders either had been, or had for forty years ceased to be, parties to the locality proceedin I think that their Lordships (with the exception of Lord Gordon, who, have seen, expressed his opinion that the decision was right), guarded then from expressing any opinion as to what the result might be if the par their authors had been parties to the proceedings throughout, as in this *Weatherstone's* case.

The question, therefore, raised in this case being, as I think, open fo sideration, I think that it is so far ruled by *Weatherstone's* case, and tha case was rightly decided.

It appears to me that the principle upon which an overpaying her entitled to obtain relief of his overpayments from an underpaying her one well established in the law of Scotland, and does not depend upo peculiarity of the law or practice in teind cases. It is the principle that one of several debtors who are jointly and severally liable to a credito that creditor either the whole or more than his proper share of the co debt, he is entitled to full relief from his co-debtors. Now, all the heri a parish are liable to the minister in payment of his stipend, to the ext their free teinds. When the minister has obtained a decree of augmer and modification, he is entitled to proceed against any one of the herito to recover from him the full amount of his free teinds, so far as may be sary to operate payment of the stipend, leaving such heritor to seek his against the other heritors, who are equally liable with him in payment The title of an overpaying heritor to obtain relief of his overpayments fr underpaying heritor does not depend upon the fact that the overpayments been made under an interim decree of locality, though that may have important effects in questions of prescription, but upon the fact that I paid to their creditor the whole or part of the debt for which he and the paying heritor were both liable *in solidum*, and of which, therefore, as other case, he is entitled to relief, to the extent to which he has paid mor his share of the common debt.

I think therefore that the liability to relieve, and the consequent grou action, arises when each overpayment is made, and that, therefore, th negative prescription necessarily applies as each payment is made, unl Lord Cairns says, in *Sinclair's Trustees'* case, there is to be an exception g on that prescription. In *Sinclair's Trustees'* case, the exception was sough found in the principle affirmed in *Weatherstone's* case, that, where payme stipends are made under an interim decree of locality, there is an ir judicial contract among all the parties, that when the legal obligations heritors shall be determined by final decreet, their several interests sh adjusted from the commencement of the process or processes according true state of their rights and obligations, and that the claims of relie arising cannot be affected by the length of time during which the settl of a final locality may have been delayed.

But it was pointed out in the House of Lords in *Sinclair's Trustees'* case as *Sinclair's Trustees* had never been parties to the proceedings, they coul been no parties to any such implied contract; and that as regards Mr Fletcher, he had sold his lands and ceased to be a heritor for upwards of forty years before the claim was made, that he became a stranger to the proceedings, and had no longer any power to intervene in them to any purpose, and, therefore, could not be affected by them. No doubt the overpaying heritor could not sue during the dependence of the locality proceedings, and was, therefore, *non valens agere*, but, as I understand the case, it was held to be the duty of the overpaying heritor, if he desired to enforce a claim against an underpaying heritor, to bring the locality proceedings to a close within the years of prescription; and that, therefore, it was his own fault if his right of action was cut off.

I think that the effect of payments made under an interim decree of locality, where all the parties have been parties to the proceedings, is more accurately expressed by Lord Selborne in *Sinclair's Trustees'* case than it is in *Weatherstone's* case, though, as his Lordship says, "the question may be one more of words than of substance." His Lordship adds,—"That as between the parties, or actors, who were before the Teind Court in a process of augmentation and locality, a right to a future adjustment of such payments as might be made under an interim decree was implied from the very nature of their *concursus* in that proceeding by which they were all bound, and that the dependence of such a process between them would keep that right alive until a final decree."

I think, as so stated, the principle is perfectly sound, and I can add nothing to what was said on this point by the Judges of the Court of Session in deciding *Sinclair's Trustees'* case. The principle necessarily excludes any right of action until the amount of overpayments has been ascertained after a final decree, and also, unless there be exceptional circumstances, necessarily prevents prescription from running during the progress of the proceedings,—as during that time the overpaying heritor could not sue, and was therefore *non valens agere.*

I think, therefore, that, if the defender's plea of prescription depended for its validity solely on the lapse of time, it would not be well founded, as the Lord Ordinary has held it to be, because I think the answer would be good that the pursuer was *non valens agere* until the locality proceedings came to an end in a final decree of locality.

But this plea of *non valens agere* is an equitable plea. Professor Bell, in section 627 of his Principles, says of it:—"This is an answer in equity to the plea of prescription, and proceeds on the principle, not on the words, of the law"; and certainly the statutes introducing the long prescription do not, in terms, provide that inability to sue shall have the effect of stopping the currency of prescription.

It is perfectly well settled, however, that it has this effect. Nevertheless, it is, as Professor Bell says, an equitable plea, and it may not in every case be admitted. Thus, Lord Selborne held in *Sinclair's Trustees'* case that the overpaying heritor could not plead it, because it was his own fault that he was *non valens agere.*

I think, therefore, that the Court is entitled to consider whether, in the circumstances of this case, it is equitable that the pursuer should be allowed to take off the effect of the long prescription which undoubtedly has run against his claim by pleading *non valens agere.*

Since the case was before the Lord Ordinary we have had a report from the Teind Clerk, which discloses some very material facts bearing on this point. It is clear from that report that any of the parties to the locality might, but for

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their own negligence, have brought the proceedings to a close in ample tin
have enabled them to take proceedings for the recovery of overpayments, if
desired so to do, within the years of prescription. If, therefore, the claim
been, as in *Sinclair's Trustees'* case, against a person not a party to the proc
ings, I should have held, as Lord Selborne did in that case, that the plea o
valens agere was of no avail, because it was the party's own fault that he
allowed his claim to be prescribed. But to apply this principle as betwee
parties to these proceedings would, I think, be contrary to the principle o
decision in *Weatherstone's* case. It would imply that the negative prescri
applied in all cases of over and underpayments made under an interim d
of locality, for I have no doubt that every locality may be brought to an
within the years of prescription, and that it is equally the fault of all pa
concerned if it is not. I am not prepared to sustain the defender's plea of
scription on that ground.

But it also appears, from the Teind Clerk's report, that the interim decr
locality, under which the overpayments in question were made, was approv
an interim rule of payment on 5th July 1815.

It further appears from that report, and the correspondence produced,
the Earl of Fife, the pursuer's author, through his agents, was at and before
time in the full knowledge of the decree of approbation of 1792.

On the 3d June 1815 the common agent writes to Lord Fife's agents,—
now enclose to you copy of a scheme of locality of the stipend of St And
Lhanbryde, which was given in and allowed to be seen this morning prepar
to its being approved of as an interim rule of payment, as the minister is o
all patience.

"I looked into Lord Fife's valuation in 1792, which I see embraced the l
which his Lordship then had in St Andrews parish, as well as those in L
bryde; but it will be of little avail to you I suspect in the latter, and was
necessary and even prejudicial as to the former—the St Andrews lands—
the whole parish having been valued by a decree of the High Commission o
28th of January 1713, wherein Lord Fife's lands were valued at a lower rate
by the approbation in 1792. So far as respected the Lhanbryde lands,
approbation was, I am afraid, quite unavailing, because the lands had
nearly double the teind as it would have been by the decreet 1792 from 1
downward, and have done so to this hour."

It further appears from the Teind Clerk's report, that large payments in ex
of the subvaluation of 1629, which had been approved of by the decree of 1
had been made from 1717 down to the date of the decree of approbatio
period of seventy-five years. The decree of approbation, therefore, althoug
facie a valid document, was open to challenge, and would probably, if not
tainly, have been reduced, if challenged by anyone having a title. The de
of approbation was not produced or founded on, with the result that additi
sums were allocated on the Earl's lands by the interim locality of 1815,
still further sums by the rectified interim locality of 1824. It was not u
1844 that the decree of approbation was produced and founded on.

It is thus apparent that it was not in ignorance of the state of his rights
teinds and valuations that the decree of approbation of 1792 was not produ
and founded on by the pursuer's author prior to the interim scheme of 1815.

If the Earl had produced it, one or other of two results would have follow
either (the decree being *ex facie* valid) it would have received effect, if

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challenged, and the Earl would not have made the overpayments of which he now seeks relief; or, if it had been challenged and reduced, the payments actually made would not have been overpayments. The Earl elected not to produce the decree of approbation, and his reason is obvious; he preferred making the payments in question to running the risk of having the decree challenged. He continued to make these payments till, by the lapse of time, the objections to which the decree of approbation was exposed were cut off by the negative prescription. He has thus taken the benefit of the lapse of time to fortify his decree, but he says that the defender shall not have the benefit of the same lapse of time to support her plea of prescription. It is, no doubt, true that the Earl was *non valens agere* during these years, in the sense that he could not sue for repayment of these alleged overpayments till a final decree of locality had been obtained. But it is equally true that he made the payments designedly, and that he need never have been in the position of requiring to sue except of his own free will. These payments were the price he was willing to pay for the purpose of validating his decree of approbation, and having succeeded in that purpose he now wishes to have the price repaid. The negative prescription undoubtedly strikes, in terms, at his claim, and the question is whether, in the circumstances, it would be just and equitable to allow its effect to be taken off by, as Lord Cairns expresses it, grafting on it this exception. In my opinion it would not be just or equitable. It was by the acts of his predecessors, and for their own purposes, that the pursuer is now in a position to require to sue for these overpayments. I do not think that the principle of *Weatherstone's* case applies to such a case as this, and I think that in the circumstances we ought to hold that the pursuer's claim beyond forty years from the date of raising the action is prescribed.

I am therefore of opinion, though not on the same grounds as his Lordship, that the Lord Ordinary's interlocutor is right.

LORD MURE.—Having considered the additional information which has been laid before the Court by the reporter, under the remit made to him in June last, I have had no difficulty in coming to the same conclusion as that which Lord Adam has arrived at, and that substantially on the same grounds. For there is here, in the view I take of the case, no room for the application of the doctrine of implied contract on which the decision in the case of *Weatherstone v Lord Tweeddale* proceeded. When the case was formerly before us, even on the record and productions as they then stood, I was disposed to come to this conclusion. But with the additional information now before us, I am quite satisfied that the doctrine, as laid down in the case of *Weatherstone*, does not, in the circumstances as now explained, apply, and that the ordinary rules of prescription must be allowed to take effect.

It was, I conceive, the duty of Lord Fife's advisers to found on the decree of approbation of 1792 in 1814, if they considered it effectual to enable Lord Fife to resist the proposed augmentation. They, however, did not take that course, though quite well aware of its existence. Why they did not do this, it may not now be very easy to ascertain. But I think it is not improbable, as has been suggested by the reporter, that it was from apprehension that they would be met by the plea of dereliction, which they probably would, as the objection to the approbation had not then been worked off by prescription. But, whatever may have been the reason for this omission, it appears to me that it is sufficient to

The pursuer reclaimed.

After the first hearing in the Inner-House, the Court, on 17th June 1887,

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between the present case and that of *Sinclair's Trustees* v. *Campbell*, as decided by the House of Lords.

"In that case the House of Lords held that the long prescription barred any right to recoupment which had accrued to an overpaying heritor prior to the period of forty years before he insisted in his claim for repetition. It is true that in so holding the noble Lords who took part in the judgment did not expressly overrule the decision in the *Marquis of Tweeddale* v. *Weatherstone*, which is clearly undistinguishable from the present case. But I think it manifest from the reasoning upon which their judgment proceeded that, with the exception perhaps of Lord Gordon, they would have concurred in formally overruling that decision, if they had thought it necessary to do so. I think they disapproved of the doctrine on which the judgment of the Court of Session was based, and that they intended by their decision to give effect to a contrary doctrine.

"It is true that there is a marked distinction, in fact, between the position of the underpaying heritor in that case, and the position of the defender. There there were two successive proprietors against whom a claim was made for repetition of overpayments of stipend—General Campbell Fletcher's trustees and Mr Andrew Fletcher; and the first of these might probably have been relieved, without touching the question of prescription, for the House of Lords thought that they had not been duly cited, and had not been parties to the process of locality. But the second was admittedly well cited, and had taken part in the process, by voting in the election of a common agent. But then he had ceased to be a heritor, by the sale and conveyance of his lands in the parish, for forty years before the claim for repetition was brought forward; and the Lords undoubtedly attached great importance to the consideration that he had thus become a stranger to the process of locality before the establishment of the liability of his lands for stipend, which gave rise to the claim. But I do not think they intended to decide that, independently of prescription, the mere fact of his having sold his land during the dependence of a process of locality would relieve an underpaying heritor of his liability, or deprive an overpaying heritor of his right to an accounting when the true rights of parties had been ascertained. It is clear that it could not be so held consistently with the principle on which the right to an adjustment of accounts is based. And there is nothing in the decision of the House of Lords to throw any doubt upon that principle, except as regards its operation to exclude prescription. It is true that some doubts were expressed, and similar doubts have been expressed in this Court, as to the accuracy of the hypothesis which traces the right to a judicial contract. But the doctrine itself does not appear to me to have been questioned. On the contrary, it is distinctly laid down in the opinion of Lord Selborne, where his Lordship says (4 R. (H. L.) 125),—'It is settled by the law of Scotland that if one heritor pays a larger and another a smaller share of a minister's stipend, or of any augmentation thereof, than they were respectively by law liable to pay, the underpaying is liable in repetition to the overpaying heritor.' And his Lordship goes on to quote what was said in *Haldane* v. *Ogilvy*, where he says it was 'laid down that the claim of an overpaying against an underpaying heritor is "strictly and simply a claim of debt, a claim for money advanced by the creditor for the debtor at a time when their respective pecuniary liabilities were misunderstood."' It would probably be more accurate to say 'that their pecuniary liabilities had not yet been ascertained' than that they had been 'misunderstood.' For although there may be cases where a heritor has paid too much or too little, because he has misunderstood his rights or liabilities, the general rule is that payments under an interim scheme are made provisionally, on the assumption that the shares in which the burden of stipend ought to be borne by the various heritors have not yet been determined. The law may reasonably impute to a heritor a knowledge of his liability for teind, for that depends upon his own right alone. But his proportional liability for stipend within the full amount of his teind depends remitted "to the Teind Clerk to report generally the course of proceedings in the locality or conjoined localities of St Andrews Lhanbryde during

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upon the liability of others, of which he can know nothing until a scheme of locality has been adjusted. The underpaying heritor, therefore, is not in the position of a debtor who has paid too little in the belief that he was paying according to his liability, but of a contributor to a common fund who has paid provisionally in the knowledge that the true amount of his share of the burden remains to be ascertained. If it turns out, when the proportional liabilities of all the heritors are determined, that he has paid too little, it follows that under the provisional arrangements of the interim scheme his debt to the minister has been paid by those of the heritors who have paid too much. And it appears to be implied in the very nature of the process that he must reimburse those who have paid his debt. Lord Selborne observes, in a later part of this opinion, that the claim which thus arises to the overpaying against the underpaying heritor is one 'which arises in contemplation of law, and is constituted as a legal cause of action at the time when each overpayment takes place.' But, if this be so, it seems impossible to hold that the mere fact of his having sold his land before a final locality had been adjusted can relieve him of a debt or deprive him of a claim which had already accrued.

"It would appear to me, therefore, that the importance which was attached in the House of Lords to the fact of the underpaying heritor having sold his land arises less from any aid which it could afford to the plea of prescription, than because it served to meet the argument that was founded upon a supposed contract between the heritors. And accordingly it is with reference to this argument that the Lord Chancellor observes that the heritor who had sold had thenceforth no power over the litigation, and no means of expediting it. But the question still remains whether, assuming a debt to have accrued with each year's underpayment, the overpaying heritor's right to repetition will be barred by the lapse of the period of prescription. And the House of Lords has decided that question in the affirmative. But it could not be so decided without rejecting the only ground on which the opposite doctrine had previously been maintained. The ground, as I understand it, is that notwithstanding that a debt had in fact been incurred with each yearly overpayment, it could not be known that it had been so incurred until the final locality had been approved of. Till then it was thought to be impossible for the overpaying heritor to bring his action, because it could not be known that he had in fact overpaid. It was supposed, therefore, that there was a *non valentia agere* during the whole period of the dependence of a locality which necessarily interrupted the running of prescription. This is a difficulty which applies just as clearly and directly to the case of a heritor who has sold during the progress of the locality as to a heritor who still retains his land when the locality is brought to an end. But it is a difficulty which was fully before the House of Lords in *Campbell* v. *Sinclair*, and it was held to be no sufficient reason for excluding the plea of prescription. It appears to me therefore to have been decided by the House of Lords that the dependence of a process of locality does not operate to bar prescription.

But if prescription is pleadable against such a claim as the present, it appears to me that this is a very favourable case for maintaining the plea. The first process of augmentation was raised in 1812, and the heritors were appointed to produce their rights and valuations on the 25th of June 1814. And yet it was not until July 1844 that the Earl of Fife produced the valuation of 1792, and protested that the whole amount of his valued teind having been exhausted, he was liable for no part of the augmentations, either under the interim schemes of 1814, 1824, or 1842. During the whole time between 1814 and 1844, he had been paying on the footing that his teinds were not valued; and yet he must have known of the existence of his valuation, and no reason can be suggested to account for his withholding it. He allows forty years more to pass before he brings his action, in which he seeks repetition with interest of annual payments extending over a period of seventy years. It is said that the

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the dependence of which the alleged overpayments of stipend were made, and specially (*First*) to what cause or causes is to be ascribed the long delay which occurred in adjusting a final scheme of locality; and (*Second*) whether there were overpayments of stipend by the Earl of Fife, prior to the decree of approbation, sufficient to infer dereliction of the subvaluation of his teinds." The conclusions of that report, which dealt very fully with the subjects of the remit, are stated below.*

Argued for the reclaimer;—The Lord Ordinary's judgment was founded on the case of *Sinclair's Trustees*, as decided in the House of

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defender cannot complain of the delay, because she and her predecessors might have pressed on the proceedings in the locality. But the delay which followed the production of the valuation would appear to have been caused by a protracted litigation between Lord Fife and the Crown. The defender had no part in that litigation, and no power to expedite the proceedings.

"In these circumstances, I think she is fairly entitled to say that after the lapse of forty years from the production of the valuation, all claim for repetition of overpayments made before that date must be presumed to have been abandoned, unless it can be maintained against her that that presumption is excluded by the dependence of a process of locality which bars prescription. But that cannot, in my opinion, be maintained, since the contrary is decided by the House of Lords in *Campbell* v. *Sinclair.*"

* "In regard to the first of the two points remitted, the reporter is of opinion that the delay must be chiefly ascribed to the heritors in not producing their rights to teinds and valuations thereof in the first action. Had these been produced, all questions between the Crown and the heritors, and also the liabilities of the individual heritors, might have been settled in the first action within the seven years that action was asleep. When the discussion between the Crown and the Earl of Fife took place in the second action" (*i.e.*, in the process which was raised in 1842), "the chief points in discussion were settled within five years; and the remaining question might have been settled within two years. It is true the Crown did not press the objections which had been made in 1824, but the heritors nevertheless continued to pay their shares of stipend, and in the case of the Earl of Fife to make a large overpayment in the knowledge that the decree of approbation of 1792 was in existence, and fixed the teinds at a much smaller quantity than was being paid. None of the creditors were so much interested in the rectification of the locality as the Earl of Fife, as appears from the statement produced, and yet it was not till 1844 that the decree of 1792 was founded on. With so much knowledge of the valuation shewn in the common agent's account, it is thought the delay in its production may fairly be attributed to an unwillingness to found upon the decree during the currency of the forty years from 1792 to 1832.

"On the second of the points, the reporter finds from the records that the old stipend allocated upon the Earl of Fife's lands, situated in the then separate parish of Lhanbryde, so early as 16th January 1717, amounted as follows:—[Here followed a statement shewing that the old stipend allocated in 1717 was 100 bolls, while the teinds as valued by the subcommissioners amounted to 56 bolls, there thus being an excess of payment of 44 bolls, which continued till 1805, when there were added 19 bolls more, making the excess paid till after 1844 about 63 bolls.]

"The original overpayment appears to have continued down to 1792, a period of about seventy-five years; and as it was continued down to 1812, and was increased by the interim locality of 1815 . . . and farther increased by the rectified interim locality of 21st January 1824, there is no reason to doubt that there was good ground for challenge of the decree of approbation of 1792 if it had been founded on within forty years of its date.

"With reference to the approbation of 1792, it is only fair to state that the proceedings in that action were not unduly hurried."

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Lords.[1] But that case was different from the present, because here the heritor against whom the claim was made had remained in the locality till it became final. In *Sinclair's Trustees'* case he had sold his lands and ceased to be a heritor in the parish more than forty years before the date of the action. Further, unless the case of *Weatherstone* v. *Lord Tweeddale*,[2] was overruled by the House of Lords in deciding the case of *Sinclair's Trustees*, the principle of that decision must apply here. The claims of relief arising in the course of the process or processes of augmentation could not be determined until there has been a final decree of locality, and prescription did not run upon these claims until the final decree had been pronounced. Accordingly, the equitable plea of *non valens agere* was an answer to the defender's plea of prescription.[3]

It was further argued that the pursuer had suppressed the decree of approbation of 1792, and had purposely done so, until the lapse of forty years had fortified it against the objections to which it was clearly subject on the ground of prior dereliction. But it was equally the fault of the other heritors that that decree had not been produced. At any-rate, they could have set the titular or the minister in motion. Further, there had been no concealment on the part of the pursuer's representatives. The correspondence which had been produced shewed that. The truth rather was that the common agent had disregarded the decree. The pursuer relied upon effect being given to it in the final scheme, and as it could not now be challenged it must be assumed to have been a good decree from the first.[4]

Argued for the respondent;—The case of *Weatherstone*[2] was overruled by the House of Lords in deciding *Sinclair's Trustees*.[4] It was impossible to explain the principle of that decision, except on grounds which were inconsistent with the principle laid down in *Weatherstone*. If the principle of *Weatherstone* was infringed in one case, and prescription held to apply as in *Sinclair's Trustees*, there was no logical stopping place, and it must apply in all. The fact that a heritor sold his lands and left the parish during the progress of the process of locality could not be material, because the principle was that he had entered into an implied contract at the outset of the process that when the final decree was pronounced he would repay any overpaying heritor what was due to him, and the lapse of forty years would not affect that liability.

Further, the pursuer was personally barred by his neglecting to produce and found upon the decree of approbation of 1792 before prescription had run upon it. By this acting he had of set purpose prevented the objections to which that decree was *ex facie* open from being stated. If he had given this opportunity, the decree must have been reduced on the ground of prior dereliction. The defender's title to state such a defence in an action like the present was supported by the decision in the case of *Kinloch* v. *Bell*.[5] The defender's rights had been prejudiced by the course followed by Lord Fife's predecessors, and the former should not be made to suffer, because, owing to no fault on her part, or on that of her predecessors, who could not have reduced the decree, the objections to it had not been timeously stated.

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[1] Campbell's Trustees v. Sinclair's Trustees, July 18, 1877, 4 R. 1126, rev. April 15, 1878, 5 R. (H. L.) 119.

[2] Weatherstone v. Lord Tweeddale, Nov. 12, 1833, 12 S. 1.

[3] Bell's Principles, 627; Erskine's Inst. iii. 7, 36.

[4] 5 R. (H. L.) 119.

[5] Feb. 12, 1867, 5 Macph. 360, 39 Scot. Jur. 185.

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LORD ADAM.—This action is brought to recover payment of a sum of £3292, 19s. 6d., alleged to be the amount, with interest, due by the defender to the pursuer, in respect of the stipend of the minister of the parish of St Andrews, Lhanbryde, underpaid by her, and her predecessors, from the lands of Barmuckity and others, from the year 1812 to the year 1881 inclusive.

The corresponding overpayments by the pursuer and his predecessors were made under interim decrees of locality pronounced in three successive processes of augmentation, modification, and locality, raised by the ministers of the parish, and embrace a period, it will be observed, of sixty-nine years.

The sums concluded for amount to about £1068, 4s. 5d. of principal, and to £2224, 15s. 1d. of interest.

By the interlocutor brought under review the Lord Ordinary has sustained the defender's second plea in law, which is, that the defender is not liable for any alleged overpayments for any period beyond forty years from the date of the raising of the action. The Lord Ordinary explains in his opinion the grounds of his judgment. He says that he cannot distinguish this case from that of *Sinclair's Trustees* v. *Campbell* in the House of Lords, the judgment in which, he thinks, necessarily, although not expressly, overrules the case of *Weatherstone* v. *The Marquis of Tweeddale.* "In that case" (*Sinclair's Trustees*), he says,—"the House of Lords held that the long prescription barred any right of recoupment which had accrued to an overpaying heritor prior to the period of forty years before he insisted in his claim for repetition. It is true that, in so holding, the noble Lords who took part in the judgment did not expressly overrule the decision in the *Marquis of Tweeddale* v. *Weatherstone*, which is clearly undistinguishable from the present case. But I think it manifest, from the reasoning upon which their judgment proceeded, that with the exception perhaps of Lord Gordon, they would have concurred in formally overruling that decision, if they had thought it necessary to do so. I think they disapproved of the doctrine on which the judgment of the Court of Session was based, and that they intended by their decision to give effect to a contrary doctrine."

I cannot concur in this opinion, and it is entirely rested on the ground that the judgment in *Sinclair's Trustees'* case necessarily overruled *Weatherstone's* case. I may be allowed to refer to a few passages of their Lordships' opinions, in order to shew that they did not intend to overrule *Weatherstone's* case, and that their judgment depended on, and was given with reference to a different state of facts. These were, that General Fletcher's trustees never had been parties to the locality proceedings, and that Mr Fletcher had sold his lands in the parish, and had ceased to be a party to the proceedings for upwards of forty years before the claim for repetition of overpayments was brought against them,—facts which do not exist in this case, and did not exist in *Weatherstone's* case, where the parties or their authors had been parties to the proceedings throughout.

Lord Chancellor Cairns, after referring to the principle that when payments are made under an interim scheme of locality there is an implied contract that, when a final scheme has been settled, there shall be an adjustment of over and underpayments, says—"For that proposition one authority, certainly going to that extent, has been referred to, and is the foundation of the decision of the Court below, the case namely of *Weatherstone* v. *The Marquis of Tweeddale*, and in the observations which I am about to make I will assume, although it

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is not necessary now to decide it, that the principle of the decision in that case is correct and well founded. My Lords, it does not appear to me to apply to the case before your Lordships . . . But what your Lordships have to deal with here is the case of a person who went out of the parish, and left the parish altogether more than forty years ago. You may assume that at the time when he left the parish he was a person who had underpaid—in this case he had paid nothing at all—and that there might have been a right to make him contribute, in that respect, the payment which he ought to have made, but, as I said, he left the parish, he disappeared, he became from that moment a stranger to the proceedings, and from that time he was no party to the litigation, if there was a litigation; from that time the common agent ceased to represent him. Therefore, I am at a loss to see upon what principle it is that, the period of forty years having elapsed, the period after which there is a presumption of the abandonment of every claim having run, there is to be an exception grafted on that prescription, that a person who as I have said has become a stranger to the litigation is after the period of forty years to be held liable."

It will be observed that the Lord Chancellor assumes that *Weatherstone's* case may have been well decided, and rests upon the fact that the parties had *not* been parties to the locality proceedings for upwards of forty years.

Lord Hatherley says,—"Whatever may have been said in that case of *Weatherstone* v. *The Marquis of Tweeddale*, in order to apply it to a case like the present, I should have expected to find facts similar to those existing in the case upon which such observations were made, and I find nothing at all comparable in the state of circumstances in the case now before your Lordships for decision to the circumstances in the case of *Weatherstone* v. *The Marquis of Tweeddale*. . . . My Lords, it does not appear to me that the case of *Weatherstone* v. *The Marquis of Tweeddale* can be in any way compared with this."

Lord Selborne says,—"Even if the authority of *Weatherstone* v. *Lord Tweeddale* in this question of prescription stood higher than, under these circumstances, it appears to me to stand, it would still not be an authority applicable to the present case," and after explaining that case he adds,—"The doctrine, so explained, seems to be applicable to those only who have been throughout, or at the very least within forty years before action is brought, parties to the locality proceedings, which in the present case none of the appellants were. I do not think it consistent with the principle of any of the authorities on this subject to hold that the cause of action is, in any case of this kind, originally constituted by the final decree of locality, and it would certainly be inconsistent with all principle to hold that it was or could be so constituted as against persons who (like the appellants in the present case) were at the date of the final decree, and had been for many years previously, strangers to the locality proceedings. When the appellant Andrew Fletcher sold his estate in 1833 and ceased to be a heritor, he became a stranger to those proceedings, and had no longer any power (as I apprehend) to intervene in them for any purpose. If the respondents had desired to enforce such liability as he may have been then under to them, and with that view to bring the locality proceedings to a close, it was for them to do so."

Lord Gordon, after adverting to *Weatherstone's* case, says,—"I think the principles involved in the judgment in that case were right, but I think these principles do not apply to the present case."

Weatherstone's case may or may not have been rightly decided, but looking

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to the expressions of opinion which I have just read, I cannot agree with the Lord Ordinary in thinking that their Lordships disapproved of the doctrine on which the judgment in that case was based, and that they intended to give effect to a contrary doctrine. I think, as I have said, that the judgment in *Sinclair's Trustees'* case rested upon the fact that the defenders either had never been, or had for forty years ceased to be, parties to the locality proceedings, and I think that their Lordships (with the exception of Lord Gordon, who, as we have seen, expressed his opinion that the decision was right), guarded themselves from expressing any opinion as to what the result might be if the parties or their authors had been parties to the proceedings throughout, as in this and in *Weatherstone's* case.

The question, therefore, raised in this case being, as I think, open for consideration, I think that it is so far ruled by *Weatherstone's* case, and that that case was rightly decided.

It appears to me that the principle upon which an overpaying heritor is entitled to obtain relief of his overpayments from an underpaying heritor is one well established in the law of Scotland, and does not depend upon any peculiarity of the law or practice in teind cases. It is the principle that when one of several debtors who are jointly and severally liable to a creditor pays that creditor either the whole or more than his proper share of the common debt, he is entitled to full relief from his co-debtors. Now, all the heritors in a parish are liable to the minister in payment of his stipend, to the extent of their free teinds. When the minister has obtained a decree of augmentation and modification, he is entitled to proceed against any one of the heritors and to recover from him the full amount of his free teinds, so far as may be necessary to operate payment of the stipend, leaving such heritor to seek his relief against the other heritors, who are equally liable with him in payment of it. The title of an overpaying heritor to obtain relief of his overpayments from an underpaying heritor does not depend upon the fact that the overpayments have been made under an interim decree of locality, though that may have most important effects in questions of prescription, but upon the fact that he has paid to their creditor the whole or part of the debt for which he and the underpaying heritor were both liable *in solidum*, and of which, therefore, as in any other case, he is entitled to relief, to the extent to which he has paid more than his share of the common debt.

I think therefore that the liability to relieve, and the consequent ground of action, arises when each overpayment is made, and that, therefore, the long negative prescription necessarily applies as each payment is made, unless, as Lord Cairns says, in *Sinclair's Trustees'* case, there is to be an exception grafted on that prescription. In *Sinclair's Trustees'* case, the exception was sought to be found in the principle affirmed in *Weatherstone's* case, that, where payments of stipends are made under an interim decree of locality, there is an implied judicial contract among all the parties, that when the legal obligations of the heritors shall be determined by final decreet, their several interests shall be adjusted from the commencement of the process or processes according to the true state of their rights and obligations, and that the claims of relief thus arising cannot be affected by the length of time during which the settlement of a final locality may have been delayed.

But it was pointed out in the House of Lords in *Sinclair's Trustees'* case, that, as *Sinclair's Trustees* had never been parties to the proceedings, they could have been no parties to any such implied contract; and that as regards Mr Fletcher, he had sold his lands and ceased to be a heritor for upwards of forty years before the claim was made, that he became a stranger to the proceedings, and had no longer any power to intervene in them to any purpose, and, therefore, could not be affected by them. No doubt the overpaying heritor could not sue during the dependence of the locality proceedings, and was, therefore, *non valens agere*, but, as I understand the case, it was held to be the duty of the overpaying heritor, if he desired to enforce a claim against an underpaying heritor, to bring the locality proceedings to a close within the years of prescription; and that, therefore, it was his own fault if his right of action was cut off.

I think that the effect of payments made under an interim decree of locality, where all the parties have been parties to the proceedings, is more accurately expressed by Lord Selborne in *Sinclair's Trustees'* case than it is in *Weatherstone's* case, though, as his Lordship says, "the question may be one more of words than of substance." His Lordship adds,—"That as between the parties, or actors, who were before the Teind Court in a process of augmentation and locality, a right to a future adjustment of such payments as might be made under an interim decree was implied from the very nature of their *concursus* in that proceeding by which they were all bound, and that the dependence of such a process between them would keep that right alive until a final decree."

I think, as so stated, the principle is perfectly sound, and I can add nothing to what was said on this point by the Judges of the Court of Session in deciding *Sinclair's Trustees'* case. The principle necessarily excludes any right of action until the amount of overpayments has been ascertained after a final decree, and also, unless there be exceptional circumstances, necessarily prevents prescription from running during the progress of the proceedings,—as during that time the overpaying heritor could not sue, and was therefore *non valens agere*.

I think, therefore, that, if the defender's plea of prescription depended for its validity solely on the lapse of time, it would not be well founded, as the Lord Ordinary has held it to be, because I think the answer would be good that the pursuer was *non valens agere* until the locality proceedings came to an end in a final decree of locality.

But this plea of *non valens agere* is an equitable plea. Professor Bell, in section 627 of his Principles, says of it:—"This is an answer in equity to the plea of prescription, and proceeds on the principle, not on the words, of the law"; and certainly the statutes introducing the long prescription do not, in terms, provide that inability to sue shall have the effect of stopping the currency of prescription.

It is perfectly well settled, however, that it has this effect. Nevertheless, it is, as Professor Bell says, an equitable plea, and it may not in every case be admitted. Thus, Lord Selborne held in *Sinclair's Trustees'* case that the overpaying heritor could not plead it, because it was his own fault that he was *non valens agere*.

I think, therefore, that the Court is entitled to consider whether, in the circumstances of this case, it is equitable that the pursuer should be allowed to take off the effect of the long prescription which undoubtedly has run against his claim by pleading *non valens agere*.

Since the case was before the Lord Ordinary we have had a report from the Teind Clerk, which discloses some very material facts bearing on this point. It is clear from that report that any of the parties to the locality might, but for

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their own negligence, have brought the proceedings to a close in ample time to have enabled them to take proceedings for the recovery of overpayments, if they desired so to do, within the years of prescription. If, therefore, the claim had been, as in *Sinclair's Trustees'* case, against a person not a party to the proceedings, I should have held, as Lord Selborne did in that case, that the plea of *non valens agere* was of no avail, because it was the party's own fault that he had allowed his claim to be prescribed. But to apply this principle as between the parties to these proceedings would, I think, be contrary to the principle of the decision in *Weatherstone's* case. It would imply that the negative prescription applied in all cases of over and underpayments made under an interim decree of locality, for I have no doubt that every locality may be brought to an end within the years of prescription, and that it is equally the fault of all parties concerned if it is not. I am not prepared to sustain the defender's plea of prescription on that ground.

But it also appears, from the Teind Clerk's report, that the interim decree of locality, under which the overpayments in question were made, was approved as an interim rule of payment on 5th July 1815.

It further appears from that report, and the correspondence produced, that the Earl of Fife, the pursuer's author, through his agents, was at and before that time in the full knowledge of the decree of approbation of 1792.

On the 3d June 1815 the common agent writes to Lord Fife's agents,—"I now enclose to you copy of a scheme of locality of the stipend of St Andrews Lhanbryde, which was given in and allowed to be seen this morning preparatory to its being approved of as an interim rule of payment, as the minister is out of all patience.

"I looked into Lord Fife's valuation in 1792, which I see embraced the lands which his Lordship then had in St Andrews parish, as well as those in Lhanbryde; but it will be of little avail to you I suspect in the latter, and was unnecessary and even prejudicial as to the former—the St Andrews lands—from the whole parish having been valued by a decree of the High Commission on the 28th of January 1713, wherein Lord Fife's lands were valued at a lower rate than by the approbation in 1792. So far as respected the Lhanbryde lands, that approbation was, I am afraid, quite unavailing, because the lands had paid nearly double the teind as it would have been by the decreet 1792 from 1722 downward, and have done so to this hour."

It further appears from the Teind Clerk's report, that large payments in excess of the subvaluation of 1629, which had been approved of by the decree of 1792, had been made from 1717 down to the date of the decree of approbation, a period of seventy-five years. The decree of approbation, therefore, although *ex facie* a valid document, was open to challenge, and would probably, if not certainly, have been reduced, if challenged by anyone having a title. The decree of approbation was not produced or founded on, with the result that additional sums were allocated on the Earl's lands by the interim locality of 1815, and still further sums by the rectified interim locality of 1824. It was not until 1844 that the decree of approbation was produced and founded on.

It is thus apparent that it was not in ignorance of the state of his rights to teinds and valuations that the decree of approbation of 1792 was not produced and founded on by the pursuer's author prior to the interim scheme of 1815.

If the Earl had produced it, one or other of two results would have followed, either (the decree being *ex facie* valid) it would have received effect, if not challenged, and the Earl would not have made the overpayments of which he now seeks relief; or, if it had been challenged and reduced, the payments actually made would not have been overpayments. The Earl elected not to produce the decree of approbation, and his reason is obvious; he preferred making the payments in question to running the risk of having the decree challenged. He continued to make these payments till, by the lapse of time, the objections to which the decree of approbation was exposed were cut off by the negative prescription. He has thus taken the benefit of the lapse of time to fortify his decree, but he says that the defender shall not have the benefit of the same lapse of time to support her plea of prescription. It is, no doubt, true that the Earl was *non valens agere* during these years, in the sense that he could not sue for repayment of these alleged overpayments till a final decree of locality had been obtained. But it is equally true that he made the payments designedly, and that he need never have been in the position of requiring to sue except of his own free will. These payments were the price he was willing to pay for the purpose of validating his decree of approbation, and having succeeded in that purpose he now wishes to have the price repaid. The negative prescription undoubtedly strikes, in terms, at his claim, and the question is whether, in the circumstances, it would be just and equitable to allow its effect to be taken off by, as Lord Cairns expresses it, grafting on it this exception. In my opinion it would not be just or equitable. It was by the acts of his predecessors, and for their own purposes, that the pursuer is now in a position to require to sue for these overpayments. I do not think that the principle of *Weatherstone's* case applies to such a case as this, and I think that in the circumstances we ought to hold that the pursuer's claim beyond forty years from the date of raising the action is prescribed.

I am therefore of opinion, though not on the same grounds as his Lordship, that the Lord Ordinary's interlocutor is right.

LORD MURE.—Having considered the additional information which has been laid before the Court by the reporter, under the remit made to him in June last, I have had no difficulty in coming to the same conclusion as that which Lord Adam has arrived at, and that substantially on the same grounds. For there is here, in the view I take of the case, no room for the application of the doctrine of implied contract on which the decision in the case of *Weatherstone* v *Lord Tweeddale* proceeded. When the case was formerly before us, even on the record and productions as they then stood, I was disposed to come to this conclusion. But with the additional information now before us, I am quite satisfied that the doctrine, as laid down in the case of *Weatherstone*, does not, in the circumstances as now explained, apply, and that the ordinary rules of prescription must be allowed to take effect.

It was, I conceive, the duty of Lord Fife's advisers to found on the decree of approbation of 1792 in 1814, if they considered it effectual to enable Lord Fife to resist the proposed augmentation. They, however, did not take that course, though quite well aware of its existence. Why they did not do this, it may not now be very easy to ascertain. But I think it is not improbable, as has been suggested by the reporter, that it was from apprehension that they would be met by the plea of dereliction, which they probably would, as the objection to the approbation had not then been worked off by prescription. But, whatever may have been the reason for this omission, it appears to me that it is sufficient to

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constitute a good defence in this case to the pursuer's demand, and that there is no good answer to the alternative view of the question put by Lord Adam. At the date of the augmentation in 1814, the then Lord Fife either had a good claim to exemption upon the decree of approbation, or he had not. If he had not, he was not localled upon beyond his liability at the time; so that there was then no overpayment, and there could be no implied contract to repay. If on the other hand the claim upon the decree was well founded, and could then have been maintained, the predecessor of the present pursuer was alone to blame for not having made the claim effectual. It is not alleged that he was *non valens agere*, and the pursuer cannot therefore, in my opinion, be now heard to maintain upon that, or any other ground in equity, that the plea of prescription does not apply.

In coming to this conclusion I do not think that we are departing in any respect from the rule laid down in the case of *Weatherstone*, nor do I think that in the case of *Sinclair's Trustees* the House of Lords gave any decided opinion as to the conclusion they might have come to, had any precisely similar question been before them for decision. What that House in substance seems to me to have said was, that they did not consider it necessary to go into that question, because, assuming *Weatherstone's* case to have been well decided, there were specialties in the case of *Sinclair's Trustees* which took it out of the rule applied in the case of *Weatherstone;* and for the reason I have now shortly explained, it appears to me that there are specialties in the present case which entitle us to come to a similar conclusion.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD PRESIDENT.—I have had an opportunity of reading Lord Adam's opinion and of considering it very thoroughly, and as I entirely agree in the views stated by his Lordship I shall only add a very few observations, which I should have thought unnecessary, were it not that in consequence of the recent judgment of the House of Lords in the case of *Sinclair's Trustees* there appears to be some misunderstanding as to the present position of the law regarding cases of this kind.

I do not think there is any difficulty in defining the precise grounds in law on which a claim like the present rests, and I do not think it at all necessary to refer to any doctrine of implied contract as the foundation of such a claim. When the minister of a parish obtains a decree of augmentation and modification he is enabled to recover his stipend from any of the heritors who have free teind in their hands, and it is his right to go against any one of these heritors, for they are all conjunctly and severally liable. Of course he cannot recover from any one more than the amount of free teind in that heritor's hands, but to that extent he is entitled to obtain from the individual heritor either the whole of his stipend or as much of it as the free teind in that heritor's hands will furnish. What, then, is the position of the heritors under such a decree of modification, and what is their relation to the minister? They are simply *correi debendi*, and if one of several *correi debendi* pays more than his proportion of the common debt there arises to him at once a right of relief against those who have paid less than their proportion, and that right of relief is the foundation of such a claim as the present. If a number of persons are bound in one contract, conjunctly and severally, we know very well the liability attaching to

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each, but there is a good deal of difficulty in adjusting the precise proportion that each has to pay and in enforcing it as between *correi debendi*. And that gives rise to what is called, according to the practice of our law, an action of contribution—that is, just a series of actions of relief, and the claim, whether in one case or the other—whether in this or any other case such as I have supposed—is a direct claim of relief at the instance of one of several *correi debendi* against his co-debtors. The circumstance that the obligation arises under an interim locality for the purpose of regulating so far as can be done the proportions in which the heritors are to pay the stipend does not seem to alter the nature of the right; it is an interim arrangement, and it does not seem to matter that the proportions may be altered by circumstances before the final locality, because the heritors are liable for their proportions even before the decree of locality is pronounced. So that this pursuer's claim is really nothing else than a right to claim relief as one of several *correi debendi* against his co-debtors.

That such a claim is liable to be met with the plea of the negative prescription cannot, I think, be doubted. It is liable to be extinguished by the lapse of forty years like any other debt, for it is nothing but a debt, although it is in the nature of a claim of relief. Looking therefore to the Statute of 1617 alone one would say that there is no answer to the plea of negative prescription.

But then we all know that in the administration of the law under that statute equitable considerations have been admitted for the purpose of limiting that plea to a considerable extent. Negative prescription cannot be said to run, according to that equitable rule, until the demand of the creditor has become enforceable, and the ground of that equitable exception to the application of the statute is nowhere, so far as I know, so well stated as in the passage of Mr Erskine's Institute, to which we were referred (iii. 7, 36),—"The negative prescription begins to run only from the time that the debt or right can be demanded in judgment or sued upon, because till then negligence cannot be imputed to the creditor, and prescription is the penalty of negligence. The Act of 1617 does indeed precisely fix the date of the obligation to be the period from which that prescription begins its course; and in the same manner the Act of 1579, c. 82, declares that actions of removings against tenants shall prescribe in three years after warning given to the tenant; but the words of these and other such statutes are in practice equitably explained, or rather corrected, into an agreeableness with this rule, that the course of prescription cannot by its nature commence against an obligation till that obligation be productive of an action."

Now, that qualification of the strict rule of the Statute of 1617 will also undoubtedly apply to the present case, and therefore if the creditor in this obligation of relief has been prevented, not by his own fault, from bringing forward and enforcing his claim, then the equitable rule comes in and the years of prescription will run from the date when the claim arose, and prescription will not begin to operate until he could have sued upon his claim.

The question in the present case therefore comes to be, when could this claim have been sued upon, and through whose fault or negligence is it that the claim has not been capable of being sued upon at an earlier date? and there, I think, lies the point of the present case.

The Earl of Fife in the year 1815, when the first of these overpayments commenced, was in possession of a decree of approbation of a subvaluation of the teinds in question. It was suggested to him that that decree of approbation

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might be liable to challenge. It was thought that there had been such a constant series of overpayments beyond the subvaluation that it was thereby impaired, and that the plea of dereliction would have applied, and if stated, either in a process of locality or in a reduction of the decree of approbation, would have effectually set aside that decree.

Now, what was Lord Fife's position in these circumstances? He was well aware of this decree, and also of the objections which might be stated against it. If the decree had been challenged when produced by him, and that could alone have been done, so far as I can see, either by the titular or the minister, then it would have been set aside effectually as regards all parties, and the overpayments alleged by the Earl of Fife would not have been overpayments at all. On the other hand, if it had not been challenged by the minister or the titular nobody could have challenged it in the locality, and there would have been no call upon Lord Fife in that case to make these overpayments at all. So that the fact of these overpayments having been made, whichever view you take of this decree of approbation, was due entirely to the conduct of the Earl of Fife and his predecessors. It was he that allowed these overpayments to be made by his own conduct.

Now, that surely is not a man placed in the position contemplated by the equitable doctrine stated by Mr Erskine, for he is not only negligent—he is a great deal more than negligent—he has been active against himself, and has been positively heaping up a number of payments against himself, which he never would have done or thought of doing if his decree of approbation was good; while, on the other hand, the overpayments were perfectly right and properly made if the decree was bad.

Now, I cannot say that a party who keeps up a decree of approbation till it becomes fortified by prescription is in a position to plead that his claim cannot be met until forty years after it has become a final decree, because if he had produced it, and it had been given effect to, the interim locality might have been rectified upon his application, and this debt would never have been incurred. It seems to me, therefore, that Lord Fife himself has not been equitable in the proceedings on his own side, and accordingly I think that his plea cannot be given effect to.

LORD SHAND was absent.

THE COURT pronounced this interlocutor:—"Having considered the reclaiming note . . . along with the report by the Teind Clerk, and whole other proceedings, and heard counsel for the parties, adhere to said interlocutor."

J. K. & W. P. LINDSAY, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

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Dec. 23, 1887. Latta v. Muirhead.

JOHN LATTA (Muirhead's Factor), Pursuer and Nominal Raiser.—*Sol.-Gen. Robertson—Blair.*

JAMES MUIRHEAD (Real Raiser), Claimant.—*Asher—Watt.*

CHARLES MUIRHEAD, Claimant.—*Sol.-Gen. Robertson—Blair.*

AGNES MUIRHEAD OR CHRISTIE, Claimant.—*Sol.-Gen. Robertson—Blair.*

JAMES B. CRELLIN, Claimant.—*Gloag—Low.*

Succession—Vesting—Effect of wife's repudiation of testamentary provisions by husband.—A truster directed his trustees to pay to his widow an annuity and

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to accumulate the balance of the income till her death, and "as soon after the death of my said wife as convenient," to distribute the estate among his children in a certain manner, declaring that if any of them should predecease the term of payment without leaving issue his or her share should fall into residue, which was to be divided among children surviving the term of payment and the issue of children predeceasing it. The widow repudiated her testamentary provisions and took her legal rights. *Held*, on a construction of the deed, that the object of the postponement of the distribution was the provision for the widow, and that this object having been defeated by her repudiation, the provisions for the children had vested *a morte testatoris*.

2D DIVISION.
Lord Fraser.
1.

(SEE *Latta*, June 5, 1880, 7 R. 881.)

Charles Muirhead, poulterer in Edinburgh, died on 23d May 1865, leaving a widow and four children—Agnes, Jessie, Charles, and James.

He left a trust-disposition and settlement, dated in 1861, conveying his whole estate to trustees for certain purposes. By the trust-deed Mr Muirhead, who was possessed of heritable property in Edinburgh and also of moveable property, directed that in the event, which happened, of his wife's survivance of him, she should have the liferent of a dwelling-house in Young Street, Edinburgh, and the furniture therein, and also a certain annuity varying in its exact amount according to an event specified, but in no case nearly equal to the revenue of his estate. After directions for a conveyance to Charles and Agnes in equal shares of his business, and of the lease of the business premises, of which he was tenant, he provided,—"(Fourth) My said trustees are hereby directed to draw the revenue of all my estate not above disposed of during the lifetime of my said wife, and to accumulate the revenue after paying my wife's said annuity with the principal: (Fifth) As soon after the death of my said wife as convenient my said trustees are directed to dispone" a certain subject to Agnes. By purposes sixth and seventh the trustees were directed to convey other heritable properties to Jessie and Charles, in each case "as soon after the death of my said wife as convenient." "(Eighth) All the foregoing purposes being satisfied, I direct my said trustees to realise the whole residue and remainder of my means and estate," and "(Ninth) I direct my trustees to divide the residue into four equal parts or shares, and to pay over and invest the same as follows," viz., one to be paid over to each of Agnes, Jessie, and Charles, and the fourth to be invested for James in liferent only, and his children in fee; "and if any of my children predecease the term of payment of their provisions under this deed, the said provisions shall lapse and become part of the residue of my estate, unless in the event of the predeceasing child or children leaving lawful issue, in which case such lawful issue shall succeed equally among them to the provisions their parent would have received had that parent survived the term of payment foresaid; and in the event of the predeceasing child dying without lawful issue, and that child's provisions becoming part of the residue of my estate, my said trustees are directed to divide the residue of my estate into as many shares as I have children surviving the said term of payment, or children who, though dead, have left lawful issue, and to pay over, divide, and invest the same in the proportion of one share to each surviving child, and one share to the children of each deceasing child who has left lawful issue."

Mrs Muirhead rejected her testamentary provisions before the end of 1865, and claimed her terce and *jus relictæ*. Shortly after her husband's death she discharged her *jus relictæ* for a sum paid to her. She

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accepted an annual sum in lieu of terce, and this was paid to her down to 31st August 1886, when, under an agreement with the beneficiaries, she discharged it along with all her claims whatsoever as Mr Muirhead's widow.

In September 1886 an action of multiplepoinding was raised with a view to the distribution of the estate, in name of Mr Latta, S.S.C., who had been appointed judicial factor on the trust-estate in consequence of the declinature of the trustees.

In this action the truster's children (1) Charles, (2) Agnes (Mrs Christie), together with her marriage-contract trustees, and (3) the judicial factor, all lodged separate claims maintaining that the period of vesting and of distribution under the trust would not arrive till the death of Mrs Muirhead, the widow.

The truster's daughter Jessie died on 10th September 1866, without issue, but leaving a will, by which she left her estate to her husband, James Crellin, whose representative, James B. Crellin, also claimed on the footing that the provisions to the truster's children had in consequence of the widow's repudiation of her rights under the trust vested at the death of the truster.

James Muirhead, the real raiser, maintained points not necessary to be here reported.

Charles Muirhead, Mrs Christie, and her children and marriage-contract trustees, pleaded;—(1) Upon a sound construction of the trust-settlement of the late Mr Muirhead, no right to the heritable subjects therein specified, or to the residue of the trust-estate, vests in the beneficiaries during the lifetime of the truster's widow, and the claims of Mr James Muirhead and Mr Crellin, proceeding upon the assumption that the said right is now vested, ought to be repelled.

Crellin pleaded, *inter alia*;—(2) The repudiation by Mrs Muirhead of her liferent provisions under her husband's trust-deed accelerated the period of vesting and distribution of the trust-estate, and in that respect was equivalent to her death.

The Lord Ordinary (Fraser), on 10th June 1887, pronounced an interlocutor finding that the time for distributing the estate had arrived, and repelling the claim for Crellin.*

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* "OPINION.—The Lord Ordinary is of opinion that the time for distribution of this estate, and for putting an end to the trust, has arrived. No doubt this would not have been the case if the provisions of the trust-deed had been allowed to take their natural course. The period of division was appointed to be at the death of the truster's widow, and that widow is still alive. Until that event happened, the trustees were appointed to hold the property, and pay the widow her annuity, and to accumulate the balance of the income; but the scheme, as framed by the truster, was not allowed to take effect. The widow refused to accept the provisions in her favour under the will, and claimed her legal rights of terce and *jus relictæ*, which were accorded to her. The *jus relictæ* was at once paid up, and *quoad* the terce, she continued to draw it down to 31st August 1886, when by an arrangement with the beneficiaries she discharged it. Consequently, there is no reason for keeping up this trust any longer so as to protect the provision in her favour. Nor is there any other good ground for doing so arising out of any of the provisions of the deed. It is true that the truster has directed that the income of his estate shall be accumulated by a clause in the following terms: 'My said trustees are hereby directed to draw the revenue of all my estate not above disposed of during the life of my said wife, and to accumulate the revenue, after paying my wife's said annuity, with the principal.' This direction has now become inoperative in consequence of its falling within

Crellin reclaimed, and argued;—The vesting was *a morte testatoris.* There was to be a postponement of it, indeed, by contemplation of the truster, but for one object only, the benefit of the widow. But the widow rejected the provisions of the will and chose her legal rights. She thus wrote herself out of the will and brought to an end the one object of the postponement of distribution. It was said that the truster had another object—the accumulation of income for the benefit of his children on the widow's death, but that was an unnatural view of the settlement, for the children were, in point of fact, grown up and in business before he died. It was thus not like the case of accumulating for behoof of minor children. If, then, the widow's provisions were the one object of the postponement of distribution, her repudiation was equivalent to her death, and as the time of it was the time of her husband's death, the result was vesting at the time of his death.[1] It was impossible to maintain the view of the Lord Ordinary that the time of vesting and distribution was a time subsequent to the widow's repudiation of her testamentary provisions, but yet anterior to her death. There was no sound ground for the argument that the date of a transaction as to terce could be taken as the date of vesting.

Argued for the other claimants;—Mrs Crellin's will could carry nothing if nothing had vested in her. Now nothing vested under the trust till Mrs Muirhead should die, because the testator had postponed the vesting, not merely to secure the widow's provision, but also to build up large benefits for his children. He wished accumulation with capital of all the rents and profits not needed for the widow's annuity, and till the Thellusson Act barred accumulations, in 1886, twenty-one years after he died, he could accomplish that. The expression prefixed to the gift,

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the prohibition enacted by the Thellusson Act, for on the 23d of May 1886 a period of twenty-one years from the death of the truster expired, and the provisions of the Thellusson Act (39 and 40 Geo. III., cap. 98) came at once into operation. Now, although the truster has said that the estate is not to be divided until the death of his wife, this must, in the circumstances, be held to mean that it is not to be divided until her interest in it has ceased, which it has now done by the discharge. There is no object now in keeping up the trust, and no interest to protect, and consequently the trust is at an end (*Annandale and Others* (*Macniven's Trustees*) v. *Macniven and Others*, 9th June 1847, 9 D. 1201; *Pretty and Others* v. *Newbigging and Another* (*Hunter's Trustees*), 1st March 1854, 16 D. 667).

"In regard to the daughter of the truster, Mrs Jessie Crellin, nothing vested in her, and therefore nothing was transmitted by her to her husband, or through him to his executor. She died before the widow had discharged her claim of terce, and she has died before the widow of the truster. It is immaterial therefore to consider which of these periods shall be adopted as the period of vesting. But it is contended on behalf of James Crellin, who claims through her, that the period of distribution must be held to be the date of the widow's repudiation of the conventional provisions in her favour, which was shortly after her husband's death on 23d May 1865, while Mrs Crellin survived till 10th September 1866. The Lord Ordinary is unable to accept this view, which would certainly defeat the provision for accumulation, which was quite lawful for the period of twenty-one years, and would give to the immediate children of the truster a right which he did not intend them to possess,—at least during that period. He provided that in the event of their not surviving the period of distribution their share should go to their children, a provision that would be defeated by holding that the money could be distributed immediately upon the widow's repudiation of the conventional provision in 1865. . . ."

[1] Annandale v. M'Niven, June 9, 1847, 9 D. 1201, 19 Scot. Jur. 529.

[2] Alexander's Trustees v. Waters, Jan. 15, 1870, 8 Macph. 414, 42 Scot. Jur. 193.

[3] Lucas's Trustees v. Patrons of Lucas Trust, Feb. 18, 1881, 8 R. 502.

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"as soon as convenient after the death of my said wife," more than once repeated, prevented vesting. The gift to the children was to be after that event, nothing being expressed in favour of the beneficiaries except a direction to convey to them on the occurrence of a certain event, and not sooner, and failing any of them without issue, the provisions conceived in their favour were intended to lapse, and there was no vesting.[1] None of the cases (except perhaps that of *Lucas*) on which the other side founded were decided on testamentary provisions similar to those here in question, and even that case was distinguished by the terms of the direction to accumulate. In any view there was no vesting till the accumulations became illegal by the operation of the Thellusson Act.[2] That would put out of the deed the direction to accumulate. *Annandale's* case was doubted in *Pretty* v. *Newbigging*.[3] This very settlement had already been before the Court, and it had been held that there was no vesting while the widow survived.[4]

At advising,—

Lord Justice-Clerk.—In this case some important questions are raised, on which we are now to give our opinion. The main question is one which has occurred in many cases. It is the question how far the repudiation by a widow of the provisions made for her by her husband's settlement, and her betaking herself to her legal rights, will operate as an acceleration of the period of the payment of the provisions made for the beneficiaries under the settlement. In this case the widow's repudiation took place many years ago. She claimed her legal rights and obtained them. After she had for many years enjoyed her terce she entered into an arrangement with her husband's trustees by which she commuted it.

I need not go over the various clauses of the will. It is sufficient to say that ample provision is made for the widow by way of an annuity, and also provision that the money is to be accumulated so far as not required for payment of the annuity. Now, as she took her legal rights the object of the provision for an annuity terminated, or rather never arose, and the question now is, whether the date of her death is still to continue the period of vesting and payment of the provisions under the will, or whether the effect upon it of the events which have occurred is tantamount to her death? The Lord Ordinary has given effect to the latter principle of construction to a certain extent, but he has decided that the date from which the effect of the repudiation is to take effect is not the date of the repudiation, but a date subsequent to it. I have come to be of opinion that that is not the true operation of the principle, but that if the repudiation is to be equivalent to the death of the widow in the sense of the will, that principle must have its full effect, and that the provisions must be held to have vested *a morte testatoris*, and not from the date merely when she transacted with her husband's trustees to give up her right of terce. I need not go at length into the decisions on the matter. The principle is simply this (and it has often received effect), viz., that where provisions are made for a wife, and the term of payment of the children's provisions is postponed till her death, her repudiation of these provisions and betaking herself to her legal rights will operate as her death, if the postponement is substantially intended solely for the benefit of the wife. If a testator arbitrarily fixes a period, or if he shews a clear intention of postponing the distribution, irrespective altogether of the wife's interest, the wife's betaking herself to her legal rights may not operate as her death would do. But, on the other hand, it has been distinctly decided in the case of *Annandale*, to which I need not refer at length, that where the object of the postponement is the benefit of the wife, and she betakes herself to her legal rights, the effect will be to accelerate the distribution, as if she had died. The case of *Annandale*, which has been always upheld as authoritative, referred only to personal property, for the deed was, as far as it related to heritage, reduced *ex capite lecti*. But there are two other cases which I have before me which deal also with heritage. In one of them, the case of *Alexander*, 8 Macph. 414, the truster directed his trustees to make certain provisions for his widow during her life, and upon her death, and the youngest of his children having attained majority, and the whole of them being married, to divide the residue of the estate among them. The widow renounced her provisions, and claimed terce and *jus relictæ*, and the Court held that "as it appeared from the deed that the truster had postponed the period of division to the date of the widow's death for no other purpose than to give effect to the provisions in her favour, which had now lapsed, the period had arrived for dividing the residue."

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[1] Bryson's Trustees v. Clark, Nov. 26, 1880, 8 R. 142.

[2] 39 and 40 Geo. III. c. 98.

[3] March 1, 1854, 16 D. 667, 26 Scot. Jur. 338.

[4] Latta (Muirhead's Factor), June 5, 1880, 7 R. 881.

The same result was arrived at in the late case of *Lucas' Trustees*, 8 R. 502, where the trustees were directed to pay the testator's widow an annuity, and to give her the liferent of a house, "and whatever further interest and annual income my said estates shall yield . . . shall be accumulated during the lifetime of my said wife by my trustees, and form part of my estate." The estate yielded a revenue after paying the annuity. The residue on her death, after paying certain bequests, was to be vested in certain trustees for the establishment of a charitable foundation, to be called the Lucas Trust. It was held, as the rubric bears, "on the widow's repudiation of the settlement that the trustees and patrons of the Lucas Trust were entitled to an immediate conveyance of the residue, subject to existing and contingent interests." That is the principle to which the Lord Ordinary has given some effect, but as long as the widow was receiving her terce he thinks a bar existed to its receiving full effect. But I think it is now settled that such a settlement must be construed on the principle that the widow's repudiation of the provisions of the will must have the same effect as her death, and I therefore think that these provisions vest *a morte testatoris*.

There are one or two expressions in the settlement which appear at first sight to create a further difficulty. In particular, there is the provision that if any of the testator's children predecease the term of payment of their provisions under the deed—that is the widow's death—their provisions should lapse unless they leave issue. But I have come to the conclusion that that clause cannot operate to the contrary of the result to which I have otherwise come, and I am of opinion on the whole matter that we should recall the interlocutor of the Lord Ordinary, and find that the provisions vested *a morte testatoris*.

LORD YOUNG.—I have thought this case one of difficulty, but on the whole have come to the same conclusion. I do not know how the case ought to have been decided but for previous decisions. But the judgment now proposed is in accordance with these decisions. Had it not been for them there would have

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been much that was worthy of consideration in the doubt which was felt by Lord Fullerton in one case.[1]

Lord Craighill.—I agree in the opinions which have just been expressed, and have little to add. The question in dispute between the parties is the interpretation of the will of the late Mr Muirhead, who died so long ago as 1865. His widow repudiated the provisions of his settlement immediately after his death, but parties proceeded with the administration of the estate on the assumption that the death of the widow was the time when the beneficiaries under the will acquired a vested interest in their provisions, and when the estate behoved to be realised for distribution. Shortly, however, before the raising of this action some of those interested took up a different view, and the point now to be decided is, what is the true import of the will. Had the widow accepted the provisions which were left to her, no controversy could have arisen. The words used by the testator are plain enough. She was to have her annuity, and until her death the rights of other beneficiaries could not vest, because in every case the death of the widow was specified as the time at which the rights conferred by the settlement were to take effect. The interest of those who predeceased either fell into residue or transmitted to those who had been conditionally instituted. But the widow repudiated her testamentary provisions, betaking herself to her legal rights, and the consequence was that her annuity ceased, and the only impediment to vesting which was apparently in view of the testator was then removed. What is now to be decided is, whether the death of the widow, which was in the view of the testator, or the lapse of her annuity by the repudiation by the widow of her conventional provisions, was to be the period of vesting. The question is one of difficulty, and but for the decisions of the Court in the cases of *Annandale* and *Alexander's Trustees*, to which reference has been made, I should have found it difficult to adopt the latter period as the date of vesting. It is always more or less unsafe to depart from the words of a will where these are plain. The risk which is encountered is the making of a new will in place of merely interpreting the words of the testator as we find them in the deed. Whatever conclusion we adopt we must be sure that it is the will of the testator in the one case as well as in the other. Reading the will as a whole, I think the inference is that the death of the widow was specified only because that was the period at which, according to the anticipation of the testator, her annuity would cease. This, I think, is shewn by the fourth purpose of the trust-deed, whereby his trustees are "hereby directed to draw the revenue of all my estate not above disposed of during the life of my said wife, and to accumulate the revenue, after paying my wife's said annuity, with the principal." Thus the payment of the annuity was assumed to be coincident in point of duration with the life of the widow, and but for this consideration her death, so far as we can see, would not have been chosen as the period at which the rights of the other beneficiaries were to become effectual. An earlier period—the lapsing of the annuity—would have been chosen, and accordingly it is only reasonable, I think, to conclude that the termination of the annuity was the end of the time during which the vesting was to be in suspense. This is certainly a reasonable interpretation, and as the presumption is for vesting at the earliest period compatible with the purposes of the trust, and as there are decisions, the authority of which has never

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[1] Annandale v. M'Niven, 9 D. at p. 1202.

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been questioned, to the effect that the repudiation is the same in its consequences upon the other trust arrangements as the death of the beneficiary would have been, my opinion has come to be that the date of the repudiation is here the date of vesting.

On the other points which have been noticed it is unnecessary for me to say anything. I concur in what your Lordship and Lord Young have said. The interlocutor of the Lord Ordinary ought to be altered, so that effect may be given to the views of the Court, and the cause remitted to the Lord Ordinary that such order as may be necessary for carrying out the testamentary arrangements of the trust consistently with what has now been decided may be pronounced.

LORD RUTHERFURD CLARK.—I think that we must follow the decisions. I therefore concur with your Lordship.

THIS interlocutor was pronounced:—"Find that the right to the provisions made by the truster Charles Muirhead in his trust-disposition and settlement vested in the beneficiaries on his death; and with this finding remit to the Lord Ordinary with instructions to proceed as accords."

ROBERT DENHOLM, S.S.C.—G. M. WOOD, S.S.C.—MACANDREW, WRIGHT, & MURRAY, W.S.—Agents.

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Dec. 24, 1887.
Dick v. Russell.

JOHN DICK, Petitioner.—*C. J. Guthrie.*
MRS MARGARET RUSSELL AND ANOTHER, Respondents.—*Deas.*

Arrestments—Recall—Labourer with precarious income—Aliment.—A colliery labourer was entitled to a payment of 12s. per week from his father's estate for his alimentary use allenarly. Owing to an accident he was unable to earn a full wage, but was in receipt of about 12s. per week for his work in the pits. His employment was, however, precarious in respect of his state of health. In an action brought by him in the Court of Session he was unsuccessful, and the defenders obtained decree for expenses. Following thereon they arrested money due to him from his father's estate in the hands of the trustees. The Court in the circumstances *recalled* the arrestments.

1ST DIVISION.
M.

JOHN DICK, colliery labourer, Hamilton, was the eldest son of Robert Dick, who died on 8th June 1885 leaving a trust-disposition and settlement by which he appointed his trustees to pay the liferent of his whole property to his wife, and on her death to hold his whole estate for the liferent use of his surviving children, for their alimentary use allenarly. The provision was declared to be not affectable by their debts or deeds, or liable to the diligence of creditors.

On 10th December 1885 John Dick raised an action in the Court of Session against his father's trustees for reduction of this deed. Mrs Margaret Dick or Russell, and Miss Annie Dick, executrices-dative to Mrs Robert Dick, the truster's widow and one of his trustees, who died in 1886, were sisted as defenders in the action.

John Dick was unsuccessful in the action, and was found liable in expenses.

On 1st December 1887 Mrs Robert Dick's executrices, in virtue of the decree for expenses, arrested the share of the income due to John Dick from his father's estate from Whitsunday to Martinmas 1887 (amounting to £16, 12s. 10d.) in the hands of the trustees.

On 6th December 1887 John Dick presented a petition to the First Division praying the Court, *inter alia*, to recall these arrestments.

Mrs Russell and Miss A. Dick lodged answers.

No. 51.

Dec. 24, 1887.
Dick v. Russell.

The petitioner averred that in December 1879 he fell into a vat of boiling liquid and was so seriously injured that he was confined to bed for six months, and that he had not recovered and never would recover altogether from the results of the accident. "He is besides suffering from a dropsical affection in his feet and legs which prevents him from working save at light labour. His employment is accordingly precarious, and when working he only earns about 12s. a-week or thereby." He further averred that though anxious to meet his obligations under the decree he was unable to set aside towards that object any part of the alimentary income from his father's estate (about 12s. a-week), upon which he "at present depends for his support." He therefore maintained that the arrestments were oppressive.

The respondents averred that the petitioner was unmarried and able-bodied, and suffered from no incapacity, mental or physical, and that he was in receipt of a wage sufficient to aliment and maintain him suitably in his position in life.

Lord President.—There is no doubt that this fund is alimentary, the only doubt is whether this man's income is excessive, his aggregate income being about 24s. per week. I cannot say that I think that that is more than is necessary for the support of a man in his position. If he were able to earn larger wages the case would be different, but it is evident that he is not in the proper sense of the term able-bodied, and that he cannot earn more than 12s. a-week, and that is somewhat precarious. He is a labourer in the pits, and his work is apt to be interrupted owing to the state of his health. His wages, therefore, depend on his being constantly in employment. In these circumstances, I am for recalling the arrestments of 1st December.

Lord Mure and Lord Adam concurred.

Lord Shand was absent.

The Court recalled the arrestments.

Fodd, Simpson, & Marwick, W.S.—Robert D. Ker, W.S.—Agents.

No. 52.

Dec. 24, 1887.
Minty v. Ellis' Trustees.

George Cumming Minty and Others, Petitioners.—*H. Johnston.*
Alexander Scott and Another (Ellis' Trustees), Respondents.—*Law.*

Presumption of Life Limitation Act, 1881 (44 *and* 45 *Vict. cap.* 47), *sec.* 4—*Moveable Estate—Where no vested right in absentee.*—Trustees under a trust-settlement were directed, on the death of the testator's widow, to pay the income of the estate to his son and daughter, and were authorised to pay to them such part of the capital as they should see fit, but they were also empowered to withhold payment thereof altogether. In the event of the son's death without issue before receiving payment of any part of the capital, they were directed to pay his share to the issue of the daughter. The widow died in 1865, and the daughter in 1874. The son, who was not married, disappeared in Australia in 1853 before receiving payment of any part of the estate. In a petition presented under sec. 4 of the Presumption of Life Limitation Act, 1881, by the issue of the daughter, for authority to make up a title to and receive the share of residue destined to the son in the same manner as if he had died in 1860, *held* that, as no part of the testator's estate had vested in the absent person, the petitioners could not complete a title through him under sec. 4 of the said Act, and petition *refused.*

1st Division.
B.

Gordon Ellis, Aberdeen, died on 5th February 1853, possessed of estate to the value of about £650. He left a trust-disposition and settlement, dated 18th May 1850, and duly recorded, in which he directed his trustees to pay the whole revenue of the estate to his wife during her life, with power to encroach on capital, if necessary for her comfort.

The third purpose was,—"Upon the death of my said spouse, I appoint my said trustees and their foresaids to pay the whole annual rents, interest, and revenue which they may receive from my said whole estate, or the remainder thereof, to Gordon Ellis, my son, and Margaret Ellis, my daughter, and that yearly or half-yearly, as they receive the same, and they shall have full power to pay such part of the principal sums or stock of my estate to my said son and daughter, at any time my said trustees and their foresaids may think proper, my said trustees having full power either to withhold payment to my said son and daughter of any part of the principal or stock of my said estate, or they may pay the same to them equally by one payment or by various payments, as to them may seem proper; but my said son and daughter shall have no right to demand payment from my said trustees and their foresaids of the said principal sum or stock of my estate, or any part thereof, it being my wish and intention that my said trustees and their foresaids shall have full and discretionary power either to pay the whole or part of my said estate to my said son and daughter, or to withhold the same from them altogether: Declaring farther, that in case of the death of my said son and daughter, or either of them, before receiving payment of the whole or any part of the principal sums or stock of my estate, and leaving lawful issue, my said trustees and their foresaids shall in that event pay the whole principal sums or stock of my estate remaining unapplied as aforesaid, if any, one half thereof to the lawful issue of my said son, and the other half to the lawful issue of my said daughter, equally among them, or in the event of only one of my said son and daughter leaving lawful issue, then to pay the whole to such issue equally among them."

The testator's widow received the income of the estate till her death in 1865.

His daughter Margaret Ellis or Minty died in November 1874, survived by George Cumming Minty and two other children.

Gordon Ellis junior, son of the testator, left Scotland for Melbourne, Australia, in 1850, being then 21 years of age. He disappeared there, being last heard of late in 1853.

Under these circumstances, George Cumming Minty, and the other children of Margaret, the testator's daughter, presented a petition in terms of sec. 4 of the Presumption of Life Limitation Act, 1881,* for "authority to make up a title to, enter into possession of, receive, and discharge the

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* Sec. 4 provides that "in the case of any person who has been absent from Scotland, or who has disappeared for a period of fourteen years or upwards, and who has not been heard of for fourteen years, and who, at the time of his leaving or disappearance, was possessed of or entitled to moveable estate in Scotland, or who has since become entitled to moveable estate there, it shall be competent to any person entitled to succeed to the said absent person in such moveable estate to present a petition to the Court setting forth the said facts, and after proof of the said facts and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to make up a title to, receive and discharge, possess and enjoy, sell or dispose of the said moveable estate in the same manner as if the said absent person were dead." It is provided by section 8, that "for the purposes of this Act, in all cases where a person has left Scotland or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of at or after such leaving or disappearance."

No. 52. — Dec. 24, 1887. Minty v. Ellis' Trustees.

share of the residue of the estate of the said Gordon Ellis destined to the said Gordon Ellis junior, with the dividends and interest thereof, in the same manner as if the said Gordon Ellis junior had died on 31st December 1860, or on such other date as your Lordships shall fix as the date at which the said Gordon Ellis junior must be presumed to have died."

The testator's trustees lodged answers, in which they submitted that Gordon Ellis junior, if he was to be presumed to have died not later than 31st December 1860, never became entitled to any part of the trust-estate, and that therefore the petition was incompetent. They did not, however, oppose the granting of the prayer of the petition.

The petitioners argued that the Act ought to apply. Were it held not to apply, the petitioners could not get the estate at common law, as Gordon Ellis only disappeared in 1853, when he was quite a young man.[1]

Lord President.—It may be regretted that the Presumption of Life Limitation Act is not so framed as to cover such a case as this, but the only question for us to decide is, whether it does so or not. I do not think that there is any room for doubt about the matter. The testator's directions to his trustees were to pay such portions as they thought proper to the son and daughter, but everything was left to the trustees' discretion, and till they paid a portion to one or the other no right was vested in Gordon or Margaret Ellis. Everything depended on the will of the trustees, for the alternative power of withholding any share of the estate from the son or daughter is clearly expressed. What has happened is this. The son has disappeared for a sufficient time to let in the presumption of the statute, and he must be presumed to have died, under the provisions of the 8th section, in 1860. The effect of his death is not to open to the petitioners a right of succession to him, for he had nothing for them to succeed to, but a right of succession under the will of the testator. They take therefore in their own right, and not as coming in place of the deceased man or taking through him. Now, the section of the statute on which this petition proceeds (sec. 4) contemplates that it shall be competent "to any person entitled to succeed to the said absent person," to petition the Court under the statute. I have therefore come to the conclusion that the petition is incompetent. The position of these beneficiaries is not so desperate as it has been represented to be, for I think ways and means may be found to extricate them from it, and to enable them to get the estate they claim.

Lord Mure and Lord Adam concurred.

Lord Shand was absent.

The Court refused the petition.

Hagart & Burn Murdoch, W.S.—Wallace & Guthrie, W.S.—Agents.

No. 53. — Jan. 11, 1888. Glasgow Royal Infirmary v. Magistrates of Glasgow.

Miss Beatrice Clugston and Others, Petitioners.—*Ure.*
Glasgow Royal Infirmary and Others, Respondents.—*R. V. Campbell.*
Magistrates of Glasgow and Others, Respondents.—*Jameson.*

Trust—Nobile officium—Cy près.—In 1866 the funds realised by a charitable bazaar were appropriated in part to the establishment of a convalescent fever home in connection with the Royal Infirmary, Glasgow, which was at that time the only institution in the city for treating fever patients. Thereafter the

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[1] The following cases were mentioned:—Craig, &c., Jan. 20, 1882, 9 R. 434; Peterhead School Board v. Yule's Trustees, March 11, 1883, 10 R. 763.

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Magistrates and Council of Glasgow, as Local Authority for the city, established a fever hospital for the city, and the Royal Infirmary ceased to treat fever patients. The trustees of the fund presented a petition to the Court for leave to divide the fund equally between the Glasgow Royal Infirmary, to be applied by them towards the erection of a home for nurses connected with the infirmary, and the "Dorcas Society in connection with the Belvidere, Knightswood, and Govan Fever and Smallpox Hospitals." The Court being of opinion that the purposes of that society were more nearly akin to the wishes and intentions of the raisers of the fund than the establishment of a home for the nurses of the Royal Infirmary *directed* the trustees to pay over the funds to the magistrates and council as Local Authority, to be held by them in trust for the Society in order that the annual proceeds might be applied by that society exclusively for the benefit of convalescent fever patients treated in hospitals, the property of the Local Authority of the city, for fever patients belonging to the city of Glasgow, and that by supplying patients who were in need of the same with clothing upon leaving the hospitals, or by enabling them to sojourn for a time in the country or otherwise.

1st Division.
B.

On 15th October 1887 Miss Beatrice Clugston and Others, trustees of the Fever Home Fund, Glasgow, presented a petition to the Court of Session in which they prayed the Court "to authorise the petitioners to make payment to the directors for the time being of the Glasgow Royal Infirmary, and to the office-bearers for the time of the Dorcas Society in connection with the Belvidere, Knightswood, and Govan Fever and Smallpox Hospitals, of one-half share each of the sum of £3476, 9s. 6d., together with any farther interest that may accrue thereon, the sum to be paid to the directors of the said Infirmary to be applied by them towards the erection of a home for nurses in connection with said Infirmary; and the sum to be paid to the said Dorcas Society to be applied by it to the purposes of that society: or otherwise, to settle a scheme for the administration of the said fund, with the interest that has accrued and may yet accrue thereon, and that by applying the capital and interest of the said fund, or interest that has accrued or may yet accrue thereon, in the manner above suggested in this petition, or in such other manner as your Lordships may be pleased to appoint; and to grant warrant to the petitioners to apply the said fund, according to the scheme to be settled by your Lordships."

They stated that in December 1866, "a bazaar was held in Glasgow under the auspices of the Royal Infirmary Dorcas Society, Glasgow, for the purpose of raising funds for the establishment of a home for the reception of patients recovering from fever, and a children's hospital, both in or near Glasgow,—both of which charities were promoted by the petitioners, Miss Beatrice Clugston," &c.

"The funds realised at the said bazaar were lodged with the head office of the City of Glasgow Bank, in an account-current in name of 'The Bazaar Fund, per Alex. Stronach,' who acted as honorary treasurer of the bazaar. After payment of various incidental expenses, the net proceeds, which amounted to £4893, 0s. 3d., were appropriated in certain proportions, in pursuance of an arrangement among the parties interested—(1) Towards the establishment of a Convalescent Fever Home, the bazaar having, as already mentioned, been held under the auspices of the Glasgow Royal Infirmary Dorcas Society (the Royal Infirmary being then the only institution for treating fever patients); and (2) In aid of a Sick Children's Hospital. The former sum amounted to £1976, 4s. 6d., and the latter to £2916, 15s. 9d."

They further stated that the sum appropriated to the Sick Children's Hospital was applied in the manner proposed, but that the sum set aside for the Convalescent Fever Hospital, being insufficient to erect such a

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home as was contemplated, was lodged in bank, and in 1887 amounted to £3476, 9s. 6d.

They further stated,—"The conditions with regard to fever and other infectious diseases existing in 1866 differed from those which the petitioners found to exist on entering upon their duties (1871), in respect (1) that the treatment of these complaints was not then fully assumed by the Local Authority, (2) their hospital accommodation was limited, and (3) it was situated in the centre of the town. The necessity for a Fever Home which existed at the date of the bazaar now, however, no longer exists, for since that date the Local Authority of Glasgow, under the powers and obligations conferred by the Public Health (Scotland) Act, 1867, have wholly taken in hand the hospital treatment of infectious diseases. Their accommodation is ample, the hospital being situated in the country, with several acres of pleasure ground attached. The convalescents are kept apart from acute cases, and are retained until fit for work. It is thus obvious that the functions which it was intended should be discharged by the Fever Home are now fully and efficiently discharged, as statutory duties with which private benefactions like the fever fund cannot be mixed up.

"The petitioners therefore believe that in these circumstances it is not only inexpedient, but that it has become impracticable, for them to carry out the objects for which the fund was created, and it cannot be anticipated that anything will occur to alter the position of matters."

Answers were lodged to the petition by (1) the Glasgow Royal Infirmary, and the "Dorcas Society in connection with the Royal Infirmary."

They averred;—"The primary object of this society [the Dorcas Society above named] is to provide warm clothing and other necessaries for the convalescent poor who are about to leave the infirmary; but, as explained in the report for 1886, herewith produced, there are 'besides this, the society's main work, a variety of ways in which it endeavours to follow up and supplement the good work done in that noble institution.' It was this society which, in 1866, organised and held the bazaar mentioned in the petition, conform to copy advertisement from the *Glasgow Herald* of 17th December 1866, herewith produced. The different stalls or tables were so arranged that while the monies drawn at some were for the Sick Children's Hospital and some for the Fever Convalescent Home then intended to be instituted in connection with the infirmary exclusively, the others were for both objects equally. The funds raised at the different stalls, and apportioned, according to this arrangement, to the Children's Hospital, have been duly paid or applied to that institution, which is now in operation. The remaining funds now in question were intended, as the respondents aver, for the benefit and increased efficiency of the Glasgow Royal Infirmary, the particular means then in view being the establishment of a Fever Convalescent Home in connection with that infirmary, which then treated infectious fevers and other infectious diseases. The Lord Provost, who opened the bazaar, was *ex officio* chairman of the infirmary, and other gentlemen, who had been managers of the infirmary, took part in the proceedings. Three ladies, active members of the Infirmary Dorcas Society, and who, or whose representatives, concur in these answers, were stall-holders in the bazaar.

"At the time of this bazaar, and for some years afterwards, the managers of the Glasgow Royal Infirmary had in view a scheme for erecting a Fever Convalescent Home, but the funds collected at this bazaar were by themselves insufficient. In 1872, while that scheme was still contemplated, they received notice from the trustees of the late Alexander Mitchell of a bequest of £1000, specifically given 'for a Fever Convalescent Home

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when erected.' Then, or soon thereafter, the managers bought a building at Saltcoats, on the Ayrshire coast, for the purpose of using the same as a Fever Convalescent Home; but they met with so much opposition from the inhabitants of Saltcoats that they gave up their purchase. It was shortly after this that the treatment of fevers and other infectious cases was wholly undertaken by the Local Authority of Glasgow, under the Public Health (Scotland) Act, 1867. That Local Authority has since assessed the city, and erected at Belvidere, near Glasgow, accommodation for fever patients at the public expense, and maintained it at an expense out of the rates of some £35,000 per annum, with ample grounds for convalescents. The infirmary being thus relieved of infectious diseases, has since, and of late years, in addition to its general work, as at the time of the bazaar, laid out large sums of money in providing accommodation, appliances, and staff for treating specialties not previously treated, such as diseases of women, the eye, the ear, and the throat, thereby making the infirmary, as it is recognised to be, one of the largest, if not the largest and best equipped general hospital in the Kingdom. At the present time, and in the present state of the infirmary funds, the particular means of maintaining its usefulness and efficiency most urgently required appears to its managers to be the provision of a suitable Nurses' Home in close proximity to the wards. Such a home has long been contemplated, and would have been built before now, but for the want of funds. It was explained and pressed in the medical superintendent's report for 1885 in the following terms:—'Additional accommodation for the nurses is urgently required, and this can only be met by the erection of a Nurses' Home. Such a home would increase their comfort and preserve their health; it would give additional beds for the reception of patients; and it would also keep the infirmary abreast of the improvements that had been adopted in other similar institutions.' The managers of the infirmary, considering that whatever could contribute to the efficiency of the nursing staff would be of benefit to the patients, and that it was in the interest of the infirmary, as a curative institution, that a separate Nurses' Home should be provided, have, though hampered by the state of their funds, already proceeded with the erection of the necessary buildings, which will cost, when completed, more than £6000. The fund now in question, raised to help their institution with a Fever Convalescent Home no longer required by them, would, especially if undivided, be a substantial assistance towards the present much needed improvement of a Nurses' Home. The Mitchell bequest above mentioned has already been applied to the like purpose by the Court, on the petition of the present respondents, the Glasgow Royal Infirmary, as reported in 14 Rettie, p. 680."

"The respondents plead that the money having been raised in connection with and for the benefit and further efficiency of the Glasgow Royal Infirmary, by adding to its charitable arrangements a Fever Convalescent Home, and that particular purpose having through public legislation become no longer necessary, the money should now be applied to the next best means for promoting the further efficiency of the same infirmary, viz., a Nurses' Home."

Answers were also lodged (2) for the Lord Provost and Magistrates of Glasgow, as Local Authority for the city, and the "Dorcas Society in connection with the Belvidere, Knightswood, and Govan Fever and Smallpox Hospitals."

They averred;—"Under the Glasgow Police Act of 1862 the police board in 1865 had provided a temporary fever hospital, situated near Parliamentary Road. By the Glasgow Police Act, 1866, this hospital, which is called 'The City of Glasgow Fever Hospital, Parliamentary Road,' was made a permanent institution, and is now retained as a reserve hospital. The compearers the Magistrates of Glasgow having, under the powers and obligations conferred and imposed upon them by the Public Health (Scotland) Act, 1867, undertaken the treatment of infectious fever cases, they, in 1870, purchased the estate of Belvidere for the purpose of erecting thereon a fever hospital. This estate, which is situated on the eastern outskirts of the city, extends to upwards of 31½ acres. Temporary pavilions were put up to meet the immediate requirements, and from time to time permanent structures were substituted. In this year, 1887, 'The City of Glasgow Fever Hospital, Belvidere,' was finally finished, with 390 beds, having cost altogether the sum of £76,176. In 1876 the Glasgow Royal Infirmary shut up their fever house. The parochial boards had already given up providing accommodation for paupers affected with infectious disease, so that since 1876 the whole hospital treatment of fever has been assumed by the compearers, the Corporation of Glasgow, as the Local Authority. The said Fever Hospital includes accommodation for convalescents, 130 out of the total 390 beds being set aside for that purpose; and the grounds also contain ample accommodation, and are used for the convalescent patients. A difficulty arose almost at once in the hospital management with reference to the clothing of convalescents on dismissal. The great majority of the patients treated in the said hospital belong to the poorer class. Some of them are removed to the hospital with only night-clothes, and others with clothes so dirty and worn-out that the washing to which they are necessarily subjected entirely puts an end to their existence as garments, and almost all the patients, when the time of leaving the hospital comes, are insufficiently clad. The average residence of patients is about six weeks. Prior to 1871 the Dorcas Society in connection with the Royal Infirmary of Glasgow was in the habit of supplying fever convalescent patients with warm clothing, but that Society having intimated that they would be unable to render any more assistance to convalescent fever patients after the expiry of the month of December in that year, a meeting of parties interested was held in the Corporation Galleries, Glasgow, at which, in order to meet the want thus indicated, 'the Dorcas Society in connection with the Glasgow Fever Hospital,' whereof the office-bearers are compearers, was established. The chief object of the members of the society is to provide warm clothing for the fever convalescents on leaving the hospitals. They also occasionally assist convalescents to go to the country for a short time to effectuate complete recovery. During last year they collected money and distributed 5540 articles of clothing among 1307 convalescent fever patients. In 1877 the burghs of Partick, Hillhead, and Maryhill erected on the estate of Scotstoun 'The Joint Burghs Hospital, Knightswood,' and in 1883 'The Govan Combination Fever Hospital' was erected by the burghs of Govan, Govanhill, and Kinning Park, and Govan (Landward) Parish. As these institutions came into existence the Dorcas Society extended their operations so as to include the convalescent fever patients of these hospitals, and the name of the Society was, in 1886, changed to 'The Dorcas Society in connection with the Belvidere, Knightswood, and Govan Fever and Smallpox Hospitals.' A large store for the clothing, and a sitting-room for the lady in charge, have been provided by the Local Authority at the Fever Hospital, Belvidere, which is the centre from which articles are sent to the suburban institutions at Knightswood and Govan.

"Under these circumstances the compearers submit that inasmuch as the funds were undoubtedly originally raised for the purpose of the Convalescent Fever Home, and inasmuch as the institutions above mentioned are now the only institutions which answer that description, the fund should be made over for the benefit of the patients treated therein. The Magistrates of Glasgow, while they have no desire that the said funds should be applied in diminution of the rates, are of opinion that the same should be preserved and applied for the benefit of convalescent fever patients, and the compearers are willing that the fund should be either paid to the Corporation of Glasgow, to be held by them in trust for the compearers, the Dorcas Society, so long as the said Society shall continue to further the objects which it at present sets before it; or otherwise, if the Court should so think fit, that the fund should be paid directly to the office-bearers of the said Society. But they submit that in any view the whole fund should be paid to one or other of them, and not diverted, as is proposed by the petitioners and by the compearers the directors of the Royal Infirmary, to objects which have no connection with the particular purpose for which the fund was originally raised."

The cases cited *infra* were referred to on the questions (1) whether the Court had power to interfere,[1] and (2) which of the proposed charities was nearest to the wishes and intention of the raisers of the fund.[2]

At advising,—

LORD PRESIDENT.—The funds in question here were raised by a society called the Royal Infirmary Dorcas Society of Glasgow, the purpose for which they were raised being to establish a house for the reception of patients recovering from fever, and also a children's hospital. The latter object is provided for, and the only question is what is to be done with the remainder of the funds. At the time the money was raised the Royal Infirmary received all the fever patients who fell to be treated in the hospitals of Glasgow. Since that time it has ceased to receive any fever patients in consequence of the Local Authority having established a fever hospital for fever patients. That is no doubt a great improvement as regards the interests of public health, but it has created a difficulty as regards these funds, for it is idle to suppose that we can authorise the establishment of a home for patients recovering from fever in the Royal Infirmary when there are no patients of that class in the infirmary at all.

The question we have now to dispose of is how in these circumstances we can fulfil most nearly the wishes and intentions of those who raised the fund. The case resolves into a competition between two claimants. The Royal Infirmary, on the one hand, maintain that as they were the original objects of the charity (or rather that as the Dorcas Society, which was in connection with them, was) and were intended to be its recipients, and to employ it in a certain way, they have the best claim to it now, and what they propose to do is to expend it in providing a home for nurses employed in the infirmary. That certainly is not very near the object of the original charity. It has nothing to do with fever patients or convalescent patients.

On the other hand answers have been lodged for the Magistrates of Glasgow

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[1] Clephane v. Magistrates of Edinburgh, Feb. 25, 1869, 7 Macph. (H. L.) 7, Lord Westbury's opinion, p. 15, 41 Scot. Jur. 306; M'Andrew, May 19, 1868, 5 S. L. R. 504; Caird, Feb. 25, 1874, 1 R. 529.

[2] Glasgow Royal Infirmary, March 19, 1887, 14 R. 680; Mitchell v. Burness, June 19, 1878, 5 R. 954; Bain v. Black, Feb. 22, 1849, 6 Bell's App. 317; Grant v. M'Queen, May 23, 1877, 4 R. 734, and June 29, 1878, 5 R. 1014; Burnet's Trustees, Nov. 17, 1876, 4 R. 127.

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and the Dorcas Society in connection with the Belvidere and other hospitals. They say that in consequence of the new arrangement by which fever patients are now treated in a separate hospital, a meeting was held of parties interested, in Glasgow, and they now state that their principal object is to provide warm clothing for the fever convalescents on leaving the hospital. They further state that since December 1871 they have been in use to employ their funds for that purpose. There is now one fever hospital in Glasgow, the other hospitals in which the respondents are interested not being within the city, and that one hospital in Glasgow no doubt has taken the place of the Royal Infirmary, which was also in Glasgow, in treating fever patients. The contention of these respondents is that the fund will be disposed of in the way most nearly approaching to the wishes of the original donors if it is given to them to assist the convalescent fever patients in the Glasgow Fever Hospital.

My opinion is that the claim of these latter respondents ought to be sustained. Their charity comes very naturally in the place of the charity originally contemplated. The same class of persons will be benefited in the same way as was intended, but I do not see my way to saying that this Dorcas Society should be allowed to use these funds for the relief of patients out of Glasgow. That would be an extension of the charity which I do not think is justified in view of the original purpose of the donors. Subject to that restriction, I think their proposal is just and proper.

Perhaps it is necessary, to avoid misunderstanding, to refer to a case which was some time ago before us (see 14 R. 680), as to a bequest left by Mr Mitchell, with instructions to his trustees to divide his estate among such benevolent and charitable institutions as they thought most proper. Among others the trustees allotted a part of the fund to the Glasgow Fever Hospital when erected. There is some resemblance in the cases, and as the way in which the fund here is to be given is different, I desire to shew the points in which the two cases differ. In the case of the Mitchell fund the money had been paid over to the Infirmary, it was in their possession, and subject to their use. All the Court had there to consider was what was the most profitable purpose to which the fund which was in the hands of the Infirmary could be turned. The words of bequest were very wide, and that came to be the only question. We thought at the time, and I see no reason now to doubt that we were right, that the fund might best be devoted to the Royal Infirmary Nurses' Home when it was erected. There was no competition in that case, the application being *ex parte* to take the advice of the Court as to how the fund should be disposed of. Here, however, there are competing claims, and we have to determine in which way the fund shall be used so as to answer most nearly to the original purpose and intention of the persons who raised it. I have already said that the party which has applied along with the magistrates is the one best entitled, in my opinion, to succeed; but as to the manner in which the money is to be used, that is a matter for further consideration, and we shall be glad to receive the suggestions of parties on that point.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

THE COURT pronounced this interlocutor:—"Refuse the claim for the respondents, the Glasgow Royal Infirmary, and the Dorcas Society in connection therewith, as set forth in their answers, No. of

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process: Grant warrant to and authorise the petitioners to transfer and make over to and in favour of the Magistrates and Council of the city and royal burgh of Glasgow, as Local Authority for said city under the Public Health (Scotland) Act, 1867, the sum of £3476, 9s. 6d. mentioned in the petition, with the interest which has accrued," &c.: "Direct the said fund, after deduction as aforesaid, to be held by the said Magistrates and Council, as Local Authority foresaid, in trust for the Dorcas Society in connection with the Belvidere, Knightswood, and Govan Fever and Smallpox Hospitals, in order that the annual interest or proceeds of the same may be applied by the said Society exclusively for the benefit of convalescent fever patients treated in 'The City of Glasgow Fever Hospital, Parliamentary Road,' and 'The City of Glasgow Fever Hospital, Belvidere,' or in any other hospital or hospitals which may be erected or acquired by or become the property of the Magistrates and Council of Glasgow, as Local Authority foresaid, for the treatment of fever patients belonging to the city of Glasgow, and that by supplying patients who are in need of the same with clothing upon leaving the said hospitals, or by enabling them to sojourn for a time in the country, or by in other ways rendering such assistance to said convalescent fever patients as may be considered suitable for promoting their restoration to health; and in the event of the said last-mentioned Dorcas Society ceasing to exist, or ceasing to carry on work of the description above directed, appoint the said Magistrates and Council, as Local Authority foresaid, to apply to the Court for further directions," &c.

H. B. & F. J. DEWAR, W.S.—J. W. & J. MACKENZIE, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

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CHARLES JOPP AND OTHERS (Jopp's Trustees), Pursuers (Reclaimers).—*Sol.-Gen. Robertson—Salvesen.*
FRANCIS EDMOND, Defender (Respondent).—*Asher—Low.*
Et e contra.

CHARLES JOPP AND OTHERS (Jopp's Trustees), Pursuers (Respondents).—*Sol.-Gen. Robertson—Salvesen.*
FRANCIS EDMOND, Defender (Reclaimer).—*Asher—Low.*

Public Burdens—Clause of Relief—Lease—Expositio Contemporanea.—In a tack of lands granted in 1788, for sixty years and a lifetime, the lessee bound himself to free and relieve the lessor "of and from payment of feu-duty, land-tax, minister's stipend, and augmentations thereof, if established, and all other public burdens affecting the foresaid lands." In 1854 the lessee sublet the lands by a subtack to a person who had acquired the property, and who, by the subtack, bound himself to pay "the following yearly rents, including the sub-tenant's share of public burdens." The subtack also provided that the lessor in it, being the lessee in the principal tack, should "continue to pay the principal rent . . . . with the poor-rates for the lands as formerly, and shall also pay and free and relieve the proprietor of the feu-duty and other burdens specified in the principal tack."

From the date of the original lease the lessee paid the taxes and burdens exigible from the proprietor, including those imposed by supervenient legislation, and from the date of the subtack in 1854 till 1884 the sublessee paid besides the rent the public burdens payable by occupiers, and did not deduct them from the rent paid by him. In 1887 the latter raised an action

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for declarator that under the sublease these were included in the rent, and that he was entitled to deduct them therefrom. At the same time the lessee in the principal lease raised an action against the proprietor of the lands for declarator that the pursuer was not by its terms bound to relieve the defender of any proprietor's taxes except those existing at its date, and was entitled to repayment from the defender of all such taxes as he had paid in error since 1854, when the defender became proprietor.

Held that the parties having for a long period of years acted on a particular construction of the obligations of relief, such construction must be regarded as their true meaning, and receive effect accordingly.

Valuation.—Opinions as to the effect of the 6th section of the Valuation (Scotland) Act, 1854 (17 and 18 Vict. cap. 91).

2d Division.
Lord Trayner.
M.

By a tack dated in 1788, Alexander Jaffray, proprietor of the estate of Kingswells, in the county of Aberdeen, let that estate to William Black and his heirs, assignees, and subtenants for sixty years, from Whitsunday 1788, and after the expiry of the said sixty years for the lifetime of any person to be nominated within three months before or after the expiry of the sixty years. A rent increasing to £130 after the first forty years was stipulated for, "as also beside the aforesaid rents the said William Black obliges him and his foresaids to free and relieve the said Alexander Jaffray and his above written of and from payment of the feu-duty, land-tax, teind-duties, minister's stipends, and augmentations thereof, if established; and all other public burdens affecting the foresaid lands, and to pay the same annually and regularly as they become due, and report discharges therefor to the said Alexander Jaffray and his above written." Then followed a certain exception as to repairs on the manse, &c., of Newhills.

In 1807 Black assigned his right under the tack to Alexander Jopp, advocate in Aberdeen, and his heirs or assignee. Jopp then entered into possession.

In 1848 the original sixty years of the lease ran out, but the lease continued during the life of a person nominated by Jopp's testamentary trustees who was still alive in 1887.

In 1854 Mr Francis Edmond, advocate in Aberdeen, purchased Kingswells from the representatives of Jaffray. Being desirous of obtaining possession of the estate, in 1855 he entered into a subtack with Jopp's trustees as the tenants under the principal tack, whereby they let to him the estate for all the remaining years of the principal tack, from Martimas 1854. Mr Edmond bound himself to pay to them during the currency of the subtack or the principal tack "the following yearly rents, including the subtenant's share of public burdens," viz., certain rents gradually rising to £665, 11s. 7d., which was to be the rent after the nineteenth year. It was also agreed by the subtack that Jopp's trustees should "also continue to pay the principal rent of £130, with the poor's-rates for the lands as formerly; and shall also pay and free and relieve the proprietor of the feu-duty and other burdens specified in the principal tack."

Mr Edmond thereafter obtained possession of the estate, and continued to possess it by himself and his tenants. During all the years from 1854, the date of the subtack, till 1884, Mr Edmond paid to Jopp's trustees the rents stated in the sublease, and he and his tenants also paid the public burdens payable by occupiers. In 1884 he, for the first time, maintained that he was not bound to pay these burdens, and was entitled to repayment of the amount thereof as payments which he had in error omitted to deduct from the rent. He founded on the words of the subtack, rents, including the subtenant's share of public burdens." In 1884, 1885, and 1886, Mr Edmond withheld payment of the rents.

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Jopp's trustees, on 18th April 1887, raised an action against Mr Edmond for these rents.

Mr Edmond lodged defences. He did not dispute that the rents were due, but maintained that the pursuers were due to him a larger sum for public burdens than was sued for.

Mr Edmond then, on 26th May 1887, raised a counter action for declarator that the rents payable by him to Jopp's trustees under the subtack "include the whole public burdens affecting the said lands, or that may affect the said lands at any time during the currency of the said subtack, so far as the said public burdens are payable by the subtenants or occupiers of the said lands and estate; and in particular, that the rents so payable by the pursuer to the defenders include the subtenant's or occupier's share of the following public burdens, viz., poor-rate, school-rate, registration assessment, sanitary assessment, the assessment for road maintenance, and the assessment for cattle disease, and any other assessments which are to any extent payable by tenants or occupiers of lands." He also concluded (2) for declarator that in paying the rent in the subtack he was entitled to deduct the amount of the subtenant's or occupier's share of public burdens, and that the defender was bound to repay him the amount of such share of public burdens, which, since 1855, he had omitted to deduct, and that the defenders were "bound to free and relieve him in all time coming of the subtenant's share of all public burdens affecting the said lands." He also concluded for decree for the sums alleged to have been paid by him in error.

Jopp's trustees lodged defences, pleading, *inter alia*;—(1) On a sound construction of the principal tack and subtack in question, the defenders are not bound to relieve the pursuer of the burdens and assessments of which repayment is now claimed, and they are therefore entitled to be assoilzied from the whole conclusions of the summons, with expenses. (2) *Separatim*, The sums sued for having been in whole or in part paid not by the pursuer but by his tenants, the pursuer is not *in titulo* to sue for repetition thereof. (3) In any event, the defenders are not bound to relieve the pursuer of any burdens imposed subsequent to the date of said subtack, or to pay interest on any sum for which they may be liable prior to the date of citation. (5) The pursuer having for a period of thirty years voluntarily paid the public burdens in question without error of fact, and being fully advised with reference to his legal rights, is barred from insisting in this action, and *separatim*, is not now entitled to repayment of the sums sued for. (7) In any view, the defenders are not bound to relieve the pursuer of subtenant's taxes imposed on rent in excess of the rent payable by the pursuer to them.

This latter action was subsequently conjoined with that which Jopp's trustees had raised for rents.

Jopp's trustees had since 1854 paid the whole public burdens payable by owners in respect of the lands. They on 4th May 1887 raised a second action against Mr Edmond, as proprietor of Kingswells, for declarator that they as in right of the principal tack (1) were "not bound to relieve the defender of any burdens, taxes, or assessments affecting the same, other than those specified in said tack—*videlicet*, the feu-duty, land-tax, teind-duties, ministers' stipends, and augmentations thereof, if established, and any other burdens affecting the said lands as at the date of the said tack, and such only of said burdens as still affect the same," and that in regard to the parish kirk, &c., the pursuers were only bound to relieve the defender of the expense of repairs; (2) that the defender was bound to

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relieve them from "all burdens, taxes, and assessments other than those above specified, now affecting or that may affect the said lands and others during the subsistence of the said tack, and in particular of the burdens, taxes, and assessments which are imposed on or exigible from the proprietor of said lands and others under and in virtue of the following statutes"; then followed an enumeration of various statutes passed between 1854 and 1883, commencing with the Valuation Act, 1854, and consisting of statutes whereby burdens were laid on proprietors of lands and heritages for purposes of police, militia, registration, education, and similar burdens, and including a local Road Act passed in 1865. They further concluded for declarator that the defender was bound to make repetition to them of all such payments, and for decree against him for the amount of such payments. They maintained that the burdens imposed by the statutes in question were burdens imposed by supervening legislation subsequent to the date of Edmond's acquiring the lands, and that they were therefore not bound to relieve the proprietor of them.

In defence Edmond maintained (1) that on a sound construction of the principal tack he ought to be assoilzied, because the statutes in question were not supervenient legislation, but were statutes "passed by way of extending and developing the system of local government which had been provided for in statutes prior to 1854, and their purposes and the incidence of the relative assessments were substantially the same as those of the previous statutes"; (2) that in respect of the Valuation Act, 1854, the pursuers themselves were to be deemed "proprietors," and therefore liable for the burdens of which they claimed relief, subject only to the relief thereby afforded.*

He pleaded, *inter alia*;—(2) On a sound construction of the principal tack, the pursuers are bound to relieve the defender of all the public burdens mentioned in the detailed account. (4) In respect of the provisions of section 6 of the "Valuation of Lands (Scotland) Act, 1854," the pursuers are liable for all the public burdens mentioned in the detailed account, subject only to the relief afforded by said section. (7) The pursuers having for a period of thirty years voluntarily paid the public burdens in question, without error of fact, and being fully advised with reference to their legal rights, are barred from insisting in this action, and *separatim*, are not now entitled to repayment.

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* The Valuation Act, 1854 (17 and 18 Vict. c. 91), sec. 6, provides that "in estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year . . . and where such lands and heritages are *bona fide* let for a yearly rent conditioned as the fair annual value thereof, without grassum or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value of such lands and heritages in terms of this Act: Provided always, that if such lands and heritages be let upon a lease, the stipulated duration of which is more than twenty-one years from the date of entry under the same . . . the rent payable under such lease shall not necessarily be assessed as the yearly rent or value of such lands and heritages, but such yearly rent or value shall be ascertained in terms of this Act, irrespective of the amount of rent payable under such lease, and the lessee under such lease shall be deemed and taken to be the proprietor of such lands and heritages in the sense of this Act, but shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor, of such proportion of all assessments laid on upon the valuations of such lands and heritages made under this Act and payable by such lessee as proprietor in the sense of this Act, as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation."

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On 20th July 1887, the Lord Ordinary (Trayner), in the conjoined actions relating to the subtack, pronounced this interlocutor:—"Having heard parties in the conjoined actions, repels the 1st, 2d, and 5th pleas, and also the 3d plea (except in so far as it refers to the interest claim), and sustains the 7th plea for Jopp's trustees in the action in which they are defenders; and in the same action finds and declares in terms of the first and second declaratory conclusions of the summons, subject to this declaration, that the defenders, Jopp's trustees, are not liable, and shall not be bound to relieve the pursuer, Mr Edmond, of any share of subtenant's taxes beyond the share of such taxes which effeirs to the amount of the rent as specified in said subtack: *Quoad ultra* continues the cause, and grants leave to reclaim."[*]

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[*] "OPINION.—The parties to these actions (which I have conjoined) are at variance as to the extent of their respective rights and obligations, under a subtack of the lands of Kingswells granted by Jopp's trustees in favour of Mr Edmond. The primary question arises on the construction of the clause in the subtack, which provides for the rent which Mr Edmond is bound to pay. By that clause it is provided that Mr Edmond shall pay, during the currency of the subtack, 'the following rents, including the subtenant's share of public burdens, viz., £540, 13s. 2d. for the first crop and year of 1855, £577, 12s. for each of the second and third years, being for crops 1856 and 1857,' and so on for each year during which the tack may endure, the rent increasing in amount as the years advance. The different views maintained by the parties may be thus stated: Mr Edmond contends that, under the clause in question, he is only bound to pay the rent specified, under deduction of the share of public burdens falling upon the subtenant, the share being included in the rent so specified. Jopp's trustees, on the other hand, contend (as I understand their argument) that no such deduction is admissible; that Mr Edmond is bound to pay the specified rent, including,—*i.e.* as well as,—the subtenant's share of taxes; that in any view the public burdens included in the specified rent can only be those burdens which existed at the date of the tack, and not those imposed by subsequent legislation. On this part of the case I am of opinion that Mr Edmond is right. I entertain no doubt that the specified rent was to include the tenant's share of public burdens. If these were paid by the tenant they formed a deduction from the rent; if the specified rent was paid in full the landlord was bound to pay the tenant's share of public burdens, because a part of the rent he had received was paid to meet these burdens. I can give no other meaning or interpretation to the clause I have above quoted. It is probably not so clear whether the public burdens referred to include all public burdens, at whatever date imposed, or only public burdens existing at the date of the subtack. I am of opinion, however, that on this matter also Mr Edmond is right. If the clause had been an ordinary clause of relief, binding Jopp's trustees to relieve the subtenant of public burdens, I should have decided that such an obligation covered only existing burdens, and did not extend to those subsequently imposed. But the clause I am dealing with is not of that nature. The parties stipulate in advance for a certain rent to be paid in future years, that rent so stipulated including the tenant's share of public burdens. That in effect was a stipulation that the amount of each year's rent,—that is, the nett rent payable to the landlord,—should be ascertained when the burdens for that year had been ascertained. In short the tenant was never to be bound to pay more than the amount of the specified rent, whether he paid it as rents or public burdens. At the same time I think the share of the subtenant's burdens which Jopp's trustees are bound to bear is only such a share as effeirs to the rent specified in the subtack, and not to any greater rent which Mr Edmond may be getting from his subtenant. If it were otherwise, then Mr Edmond by increasing the assessable rent might seriously reduce his own obligations to Jopp's trustees, and reduce also the benefit conferred on them in name of rent under the subtack. I cannot suppose that Jopp's trustees ever intended to leave the amount of their liability

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Of the same date his Lordship pronounced this interlocutor in the declarator by Jopp's trustees, relating to the principal tack:—"Repels the 7th plea in law for the defender: Finds and declares in terms of the first and second conclusions of the summons, the defender being bound to make repetition, as concluded for, from the term of Martinmas 1854."*

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practically in Mr Edmond's hands, nor do I think they have done so. Accordingly I sustain the 7th plea for Jopp's trustees in the action against them. A separate question was raised by Jopp's trustees as to the poor's-rates, to understand which it is necessary to have in view a relation of the parties to each other not yet adverted to. While Mr Edmond is the subtenant of Jopp's trustees in the lands of Kingswells, he is also the proprietor of these lands. Jopp's trustees were or are the tenants of the lands in virtue of a long lease granted by Mr Edmond's author, under which Jopp's trustees are bound to relieve the proprietor of certain public burdens, of which poor's-rates is no doubt one. And in the subtack in favour of Mr Edmond, Jopp's trustees bound themselves to pay 'the poor's-rates for the lands as formerly.' On this clause it is maintained for Jopp's trustees that they are only bound under the subtack to pay that proportion of the poor's-rates which they formerly paid, and that consequently poor-rates are not within the public burdens of which the tenant's share is to be deducted from the specified rent. They say that the words 'poor's-rates as formerly' were inserted in the subtack with the intention of so limiting their obligation, and offer to prove that this is so. If there had been any dubiety caused by these words, I would have allowed a proof to clear it up. But I do not find the words attended with any dubiety, and cannot allow a proof to contradict or modify what I think to be the plain meaning of the writ. When Jopp's trustees undertook to pay the poor's-rates 'as formerly,' I think they undertook (superfluously I admit) to pay the poor-rates so far as a burden on the landlord, which they had undertaken to do by the lease under which they hold. But this undertaking is not given in modification or limitation of their other obligations to let the tenant's share of public burdens be so deducted from the rent. The two things are distinct in themselves, and are kept quite distinct and locally separate in the subtack. As regards the poor's-rates therefore, I am of opinion that Jopp's trustees must pay—(1) the landlord's proportion in respect of their obligation under the original lease; and (2) the tenant's proportion as included in the rent under the terms of the subtack.

"I repel the second plea for Jopp's trustees in the action at Mr Edmond's instance. What may have been done between Mr Edmond and his subtenant does not concern Jopp's trustees. Their obligation to Mr Edmond is not thereby affected.—*Montgomerie*, 3 D. 942 (Lord Jeffrey's note, p. 947); *Hunter*, 20 D. 1311.

"There are some other questions raised by these actions, into which I do not enter here, as they have been disposed of by me in another action (the 'Assessments Case') between the same parties."

* "OPINION.—. . . . The pursuers aver that since 1854 they have paid a number of taxes or public burdens affecting the lands which do not fall within the clause of relief in the principal tack, and which therefore should have been paid by the defender. The present action is brought (1) to have it declared that the pursuers are not bound under the clause of relief to make payment of said public burdens; and (2) for repetition of the sums already paid by them in error.

"The several statutes under which the burdens now in question were imposed are set forth in the conclusions of the summons, and they are all enactments passed since 1854. *Prima facie*, therefore, the burdens in question having all been imposed by Acts of Parliament passed since the date of the principal tack, would not fall within the clause of relief, which, binding the pursuers only to relieve the landlord of public burdens then affecting the lands, could not be extended so as to cover burdens imposed by supervenient legislation.

"With regard to three of the statutes set forth by the pursuers, the defender

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In the conjoined actions Jopp's trustees reclaimed, and in the other action Edmond reclaimed.

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maintains that they are truly continuations of enactments existing at the date of the principal tack, and do not, therefore, fall within the rule applicable in cases like the present as to supervenient legislation. These three are (1) the County Police Act, 1857; (2) the Aberdeenshire Road Act, 1865; and (3) the Education (Scotland) Act, 1872.

"1. The County Police Act, 1857, is said to be a continuation of the Acts 11 Geo. I. cap. 26; 2 and 3 Will. IV. cap. 65; and 2 and 3 Vict. cap. 65. These three Acts only dealt with, and authorised the levying of, rogue money, a tax directed to meet the expenses of apprehending criminals, maintaining them until their prosecution, and the expense of their prosecution. The County Police Act authorised assessment for different and more extensive purposes, in which, no doubt, what was formerly levied as rogue money was practically included. But its main purpose was to provide for the establishment of a police force in each county in Scotland, and to provide, by way of assessment, for its maintenance and payment. At same time (by sec. 34) the power to levy rogue money was repealed. I am of opinion, therefore, that the assessments authorised by the County Police Act are not in continuance of the assessment for rogue money, but were new assessments not authorised or levied in 1854.

"2. The question raised upon the Aberdeenshire Roads Act appears to me to be already decided adversely to the defender, by the case of *Dunbar's Trustees*, 5 R. 350, aff. H. L., 5 R. 221.

"3. The third question relates to the burdens imposed on land by the Education Act of 1872. If the clause of relief in the principal tack in question had bound the tenants to relieve the landlord of 'schoolmaster's salary,' there can be no doubt that that would not have extended to the education rates now imposed—(*Stewart*, 3 R. 518). The clause of relief is not, however, so expressed, and the defender maintains that the clause of relief as expressed really takes over the whole burden of the landlord as heritor, and that the Education Act has imposed on the land no greater burden than the heritor formerly had to bear. I am not prepared to assent to the view that the Education Act imposes no new burden beyond that for which heritors were by law liable before 1872. But even if I were, I think it clear that the clause of relief was not intended, and in point of fact did not amount to an obligation on the tenant to take over the whole obligations or liabilities of the heritor. The heritor was undoubtedly bound to rebuild the kirk, schoolhouse, or manse where this was necessary, and the clause of relief exempts the tenant in terms from any such obligation. In my opinion the principles of the decision in *Stewart's* case are applicable here, and I hold accordingly that the burdens imposed by the Education Act of 1872 do not fall upon the pursuers under the clause of relief.

"The defender farther maintains, that in respect of the 6th section of the Valuation Act, 1854, the pursuers are liable in the public burdens in question, subject only to the relief which that section affords. I think this argument is based upon a mistaken view of the section referred to, even if that section has any application in the present case. The Valuation Act is not in any sense a taxing statute; it neither imposes nor exempts from taxation. When by section 6 it declares that in long leases the tenant shall be deemed to be the 'proprietor' for the purposes of that Act, it appears to me to do nothing more than provide means for the convenient imposition and recovery of the burdens which are authorised to be imposed and levied on the basis of the Valuation-roll. It does not certainly, in my opinion, lay taxation on one who is deemed to be the proprietor apart from the terms of any agreement which may exist between the person deemed proprietor and the actual owner. But has the 6th section of the Valuation Act any application here at all? It applies to leases, 'the stipulated duration of which is more than twenty-one years from the date of entry under the same.' The lands in question are held by the defender, not under the tack of 1788, but the subtack of 1854, and the latter is not of the 'stipulated duration' of twenty-one years. It has, as matter of fact, endured

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In the Inner-House neither party was prepared to argue in support of the pleas founded on the practice since the date of the subtack, that practice being hostile to the view which each maintained in their respective declarators. Each party maintained their respective contentions as to the clause of relief in the tack and subtack, which have been above explained.

At advising,—

LORD JUSTICE-CLERK.—The parties to these actions are Mr Francis Edmond, and the trustees of Andrew Jopp. The circumstances under which the questions involved in these actions arose are somewhat peculiar. It seems that in 1788 the proprietor of the estate of Kingswells let the estate to the authors of Jopp's trustees on a long lease, which was to run for sixty years, and for and after the sixty years "during the lifetime of any person to be condescended upon and nominated within three calendar months before or after the expiry of the said sixty years," by the tenant. The sixty years ran out in 1848, but there was the nomination of a life then made, as contemplated, and the lady nominated, Miss Beattie, is still alive, and therefore the lease has not yet expired.

Jopp acquired the tenant's part of the lease in 1807, and Mr Edmond acquired the property of the lands in 1854. At the same time Edmond took a subtack of the lands from the tenant in the long lease, and has continued in possession since that time. Thus it appears that on the one hand Edmond is proprietor of the lands, subject always to the principal tack, and on the other is tenant under a sublease from the lessee in the principal tack.

In these circumstances the question arises between Edmond and Jopp's trustees as to their mutual rights, which is the subject of these actions.

The first process is an action by Jopp's trustees against Edmond for rent. That is met by Edmond by a counter claim under the subtack, and he has raised the second action to give effect to it, maintaining that under the subtack he is entitled to deduct the public burdens payable by the subtenants or occupiers of the lands from the sum of rent he is to pay to Jopp's trustees. Then Jopp's trustees raise the third action for relief of a variety of public burdens, by reason of a clause of relief in the principal tack.

These, in substance, are the claims of the parties, but one fact of importance remains to be mentioned—that in regard to both these tacks the course of possession and dealing has been the reverse of what both parties maintained in their pleadings to be the true state of their rights, in other words, the respective contentions made by them in these actions were never raised till 1883. Possession has been had under the principal tack for nearly 100 years, and under the subtack for nearly thirty years, without such claims being put forward, and

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for more than twenty-one years, but that is not to the purpose. Its stipulated duration was the 'remaining years and crops still to run of the principal tack,' and as that depended on the life of a certain person the defender's lease might have expired at any time. It was not, and could not be, certain that the lease would last for twenty-one years, and it was not so stipulated. The defender urges the provisions of the Valuation Act in the view that the lands are held under the tack of 1788. But it appears to me that the lease referred to in the Valuation Act is the lease under which the lands taxed are naturally or beneficially held when the tax is imposed, and if that is so, the lease to be considered is the subtack of 1854 in the defender's favour. It follows that the lease of 1854 not being of the 'stipulated duration' of twenty-one years, the Valuation Act does not apply.

"I repel the defender's seventh plea on the authority of *Hope* v. *Lumsdaine*, 9 Macph. 865."

to pay the whole revenue of the estate to his wife during her life, with power to encroach on capital, if necessary for her comfort.

The third purpose was,—"Upon the death of my said spouse, I appoint my said trustees and their foresaids to pay the whole annual rents, interest, and revenue which they may receive from my said whole estate, or the remainder thereof, to Gordon Ellis, my son, and Margaret Ellis, my daughter, and that yearly or half-yearly, as they receive the same, and they shall have full power to pay such part of the principal sums or stock of my estate to my said son and daughter, at any time my said trustees and their foresaids may think proper, my said trustees having full power either to withhold payment to my said son and daughter of any part of the principal or stock of my said estate, or they may pay the same to them equally by one payment or by various payments, as to them may seem proper; but my said son and daughter shall have no right to demand payment from my said trustees and their foresaids of the said principal sum or stock of my estate, or any part thereof, it being my wish and intention that my said trustees and their foresaids shall have full and discretionary power either to pay the whole or part of my said estate to my said son and daughter, or to withhold the same from them altogether: Declaring farther, that in case of the death of my said son and daughter, or either of them, before receiving payment of the whole or any part of the principal sums or stock of my estate, and leaving lawful issue, my said trustees and their foresaids shall in that event pay the whole principal sums or stock of my estate remaining unapplied as aforesaid, if any, one half thereof to the lawful issue of my said son, and the other half to the lawful issue of my said daughter, equally among them, or in the event of only one of my said son and daughter leaving lawful issue, then to pay the whole to such issue equally among them."

The testator's widow received the income of the estate till her death in 1865.

His daughter Margaret Ellis or Minty died in November 1874, survived by George Cumming Minty and two other children.

Gordon Ellis junior, son of the testator, left Scotland for Melbourne, Australia, in 1850, being then 21 years of age. He disappeared there, being last heard of late in 1853.

Under these circumstances, George Cumming Minty, and the other children of Margaret, the testator's daughter, presented a petition in terms of sec. 4 of the Presumption of Life Limitation Act, 1881,* for "authority to make up a title to, enter into possession of, receive, and discharge the

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* Sec. 4 provides that "in the case of any person who has been absent from Scotland, or who has disappeared for a period of fourteen years or upwards, and who has not been heard of for fourteen years, and who, at the time of his leaving or disappearance, was possessed of or entitled to moveable estate in Scotland, or who has since become entitled to moveable estate there, it shall be competent to any person entitled to succeed to the said absent person in such moveable estate to present a petition to the Court setting forth the said facts, and after proof of the said facts and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to make up a title to, receive and discharge, possess and enjoy, sell or dispose of the said moveable estate in the same manner as if the said absent person were dead." It is provided by section 8, that "for the purposes of this Act, in all cases where a person has left Scotland or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of at or after such leaving or disappearance."

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say the words meant over and above the public burdens. But in this instance also it is not necessary to come to a conclusion, for from 1855 to 1883 the settlement of accounts proceeded on the opposite principle from that which Edmond now contends for.

I therefore think that neither of these new contentions can receive effect, and that neither party can complain if they are left on the footing they themselves selected. Something was said in the argument in Jopp's trustees' action—the assessments case—as to the effect of the Valuation Act, as if a right had been acquired under that statute to be free of the public burdens in question. I think that proceeded on a complete misapprehension of the matter. The Valuation Act is for ascertaining the annual value, and nothing else, and the machinery pointed out is that where lands are let to a tenant for not more than twenty-one years—thirty-one if minerals—the rent, if a fair rent without grassum or the like, is to be held to be that value for the purposes of the Valuation-roll. If the lease is for more than twenty-one years the rent payable is not necessarily to be entered on the roll as the yearly value, but is to be otherwise ascertained, and the lessee is to be deemed proprietor. But the Valuation Act does not apply here. Edmond is the proprietor in the sense of it, for he is the person who receives the rents and consequently comes under the statutory definition of proprietor. On the other hand his tenants do not hold for terms over twenty-one years. The leases are ordinary agricultural leases, not exceeding twenty-one years.

I have thought it right to make these last observations though they are not really necessary to my decision. I think the rule regulating both cases is that afforded by the construction which both parties have put upon their respective rights.

Lord Young.—The relation between the parties is singular but quite comprehensible. Edmond is proprietor of Kingswells, having bought it in 1854. But it was the subject of a long lease which might be of long duration, and which indeed still exists. It had run sixty years and was to run during the life of Miss Beattie, who is still alive. Its duration is uncertain. Edmond desired when he became proprietor to get the possession, which he could not do without arranging with the tenant who held the long lease, viz., Jopp's trustees. Here the complication begins. The simple course—I presume, however, some difficulty arose as to it—was to have bought up the right of the tenant. But the course adopted was that Edmond became tenant under a subtack from these lessees of the principal tack—his sublease being entered into in 1855. The principal tack had then subsisted for nearly seventy years, and that the contract between Jopp's trustees and Edmond related to a principal tack which had subsisted for that time I regard as a material fact in the case. Now, it occurred to Edmond—for we were told it first occurred to him—to raise these questions in 1884 or so,—that is thirty years after he became proprietor, and twenty-nine after the date of the subtack,—to do so. He had up till then been paying the tenant's burdens he now disputes. From 1855 to 1884 he paid them without question. In that year it occurred, I say, to him that there was a clause in his subtack, "including the subtenant's share of public burdens," which was in his favour, and might put the obligation of paying these burdens on Jopp's trustees as granters of the subtack, and he began to withhold payment of the rent payable under the subtack in order to recoup himself for the burdens which he had theretofore paid, but which according to this new view were really due by Jopp's trustees. That put

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Abd: Extn & Imprvt Act 1883

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them on their inquiry, on their own side. The result was that they thought they had misunderstood the principal lease, and the result is that we have three actions,—1st, by Jopp's trustees against Edmond for rent which he is withholding as I have described, and the summons in which action was signeted on 18th April 1887; 2d, a declarator by Jopp's trustees with respect to the meaning of the clause in the principal tack which in 1884 they had come to think they had misconstrued; and 3d, a declarator by Edmond against them that the clause of the sublease "including the subtenant's share of public burdens" imports an obligation on them as lessors to pay the public burdens payable by subtenants or occupiers. As this idea of Edmond was the beginning of the strife, I shall state my views as to this last action first.

The conclusion of it is for declarator that Jopp's trustees are bound to free and relieve him, Edmond, in all time coming of the subtenant's share of all public burdens affecting the lands; and that conclusion is founded on the clause "including the subtenant's share of public burdens." The words occur in the clause of obligation to pay rent. The meaning of these words is not obvious. But we are desired by the summons to declare what the parties meant by them, if they meant anything. At first sight it seems simply inaccurate language, and to have no meaning, and one therefore looks for some indication of what the parties understood, or to see if they understood nothing. We have the usage for twenty-nine years, and find that the parties who made the contract annually—for their attention was annually called to the matter—for twenty-nine years acted on the footing that the words meant nothing. That is just what they mean to my view on reading them—nothing. The parties having thus for twenty-nine years acted on that view of them, one of them now asks us to declare that the other undertook by them to pay all the public burdens of the tenants or occupiers. I cannot declare that. Such an obligation was never so expressed before. The words do not express it, and if we are asked to declare that they imply it the conduct of parties shews that they do not. The tenants paid their own burdens, and relief was never applied for. But Edmond's view is this, "You are to ascertain what the agricultural tenants pay as tenants or occupiers, and then you are to permit me to deduct from my rent to you a sum corresponding to that." That I think is extravagant, and if that construction had been suggested at once, and without the clear light of the usage of many years, my decision would have been the same as it now is, but in the face of the light of these many years' usage it seems to me as clear a case as I ever saw for refusing decree. I am therefore for sustaining the defences in Edmond's action, and assoilzieing Jopp's trustees from its conclusions, with expenses.

Now, I shall next refer to the action at the instance of Jopp's trustees for rent. They are, of course, entitled to the rent withheld by Edmond on the view of his rights which we are now about to negative. In that action I am for giving decree.

There only remains the action by Jopp's trustees for declarator of the soundness of the counter idea which they took up when reflecting on Edmond's new idea to which I have alluded. It is that whereas they have been paying under the principal tack all the landlord's burdens, they were really only bound to pay those subsisting at 1788, and not bound to pay those imposed by subsequent legislation. Well, there are many decisions to the effect that a clause of this kind in a feu-charter under which a superior undertakes to relieve of burdens is limited to those subsisting at its date, and which alone, therefore, are

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the date of the feu. But the rule is to ascertain, as satis- , what the parties intended. Here we have the means of for we have the usage of nearly 100 years under the principal ct made between the present disputants when that tack was old, on the footing of the usage subsisting then, which was ed, that the lessee should pay all the landlord's burdens of the rted by the clause, whether imposed in 1788 or by subsequent ince 1788 we have, I say, the contract of 1855, and alike before and since t date the lessees under the principal tack have paid all the landlord's burdens. This ascertains what the parties understood, and with reference to what they contracted in 1855, and they have acted on the contract then made. I am therefore for dealing with this contention as we are to do with Edmond's new contention. I think we should assoilzie the defender Edmond in this action, so that with respect to the supposed newly discovered rights, *hinc inde*, the defending party will be assoilzied from the claim made by the other.

Lord Craighill concurred.

Lord Rutherfurd Clark.—I am of the same opinion. I think we must hold that the contracts should be construed as the parties themselves construed them for a long course of years.

In the conjoined actions the Court pronounced this interlocutor:—"Recall the said interlocutor, except in so far as it conjoins the actions, and in the actions at the instance of the said trustees against Francis Edmond ordain the defender to make payment to the pursuers of the sum of £668, 16s. 1d. sterling, with interest at the rate of £5 per centum per annum, as concluded for: Find the pursuers entitled to expenses . . . and decern: And in the action at the instance of Francis Edmond against the said trustees, in respect parties have arranged *inter se* for the settlement of the claims for assessments in connection with the repairs of parish buildings . . . find it unnecessary to dispose of the conclusions relating thereto, and *quoad ultra* assoilzie the defenders from the conclusions of said action: Find them entitled to expenses . . ."

In the action of declarator by Jopp's trustees against Edmond, the Court assoilzied the defender.

H. B. & F. J. Dewar, W.S.—Morton, Neilson, & Smart, W.S.—Agents.

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Ross v.
Martin.

James Ross, Pursuer (Reclaimer).—*Moncreiff—G. R. Gillespie.*
William Martin, Defender (Respondent).—*Shaw—Gunn.*

Property—Sale—Title—Possession.—In 1875 two adjoining feus, one feued to Caldwell in 1795 the other to Kelly in 1803, came to belong to one proprietor.

In 1880 he exposed them for sale by public roup in two lots. The articles of roup described the first lot as "that portion of land feued out to William Kelly . . . bounded on the east by the house and garden now or formerly belonging to William Caldwell, . . . extending per measurement to 22 falls and 9 ells of land." Caldwell's lot was next described by boundaries only, but the description of the western boundary was not intelligible. On the margin of the articles opposite the description of Kelly's feu were the words,—"Three houses near Millgate, occupied by M. Finn and others," and opposite the description of Caldwell's feu the words,—"House and large garden, occupied by William Hannah."

Balderston became the purchaser of Caldwell's lot, and recorded his disposition in February 1880; and Martin became the purchaser of Kelly's lot, and recorded his disposition in March 1880. Martin took possession of the two houses built on Kelly's feu, and of one house and a joiner's shop which had been built on Caldwell's feu, with a strip of ground—also part of Caldwell's feu—behind them. Both dispositions as recorded contained descriptions identical with those in the articles of roup, but without the marginal notes.

In May 1885 Balderston sold his (Caldwell's) feu to Ross, and in November 1886 the latter raised an action against Martin for declarator that the portion of Caldwell's feu possessed by Martin belonged to him (Ross).

It was admitted or proved that Martin understood that he was purchasing the whole subjects of which he had taken possession, and that if he lost the ground in dispute his feu would be reduced to one-half of the extent specified in his disposition. The extent specified was identical with that specified in the original grant to Kelly, but it was proved that prior to 1850 a large portion of Kelly's feu had been used as a public road.

Ross, in his evidence, admitted that he never intended to buy the house on the disputed ground, and in the end abandoned his claim to that, but stated that he understood he was buying the other disputed subjects.

Held (*rev.* judgment of Lord Kinnear) that the subjects in dispute were within the pursuer's and not within the defender's title, that the pursuer as a singular successor could not be affected by such personal exceptions as might have been pleaded against his author Balderston, and therefore that he was entitled to decree as concluded for, except as regarded the house.

2D DIVISION.
Lord Kinnear.
M.

IN 1795 William Honyman, of Græmsay, feued out to William Caldwell, a piece of ground in the village of Blackburn, in Linlithgowshire, and in 1803 he feued out an adjacent piece of ground on the west to William Kelly. The feus continued to be separately owned and occupied for over forty years, but by 1875 they had both come to be the property of Thomas Robinson Johnstone.

In February 1880 Johnstone exposed both feus for sale by public roup.

The eastmost (Caldwell's) feu was sold to Lawrence Balderston. The articles of roup contained this description of it,—"All and Haill that part or portion of land, with the houses thereon, in the village of Blackburn, bounded on the south by the Edinburgh and Glasgow Road; on the west by the feu sometime ago granted to David Mitchell; on the north by the lands sometime belonging to the said William Honyman; and on the east by the feu now or formerly belonging to David Brownlee, lying in the parish of Livingston, and sheriffdom of Linlithgow." On the margin of the articles of roup there was this note,—"House and large garden, occupied by William Hannah."

The disposition in favour of Balderston was dated 4th, and recorded 11th February 1880, and contained a description of the subjects identical with that in the articles of roup, but without the marginal note, and the boundaries given were the same as those in the original feu to Caldwell except that the western boundary in the original feu was stated to be "the feu recently granted to David Mitchell."

The westmost (Kelly's) feu was sold at the roup to William Martin, whose title was not recorded till 2d March 1880. The articles of roup gave this description of the subjects:—"In the third place, All and Haill that part or portion of land feued out to William Kelly, merchant in Glasgow, by William Honyman, Esquire, of Græmsay, bounded on the east by the house and garden now or formerly belonging to William Caldwell, on the south by the Edinburgh and Glasgow Road, and on the west and north by the lands sometime occupied by David Prentice, extending per measurement to 22 falls and 9 ells of land, all lying within the barony of Blackburn, parish of Livingstone, and sheriffdom of Linlithgow." There was also this marginal note,—"Three houses near Millgate, occupied by

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M. Finn and others." The description in the recorded disposition in favour of Martin was the same as in the articles, with this addition, and without the marginal note,—"Together with the buildings and erections on the said part or portion of land, and all my right, title, and interest therein." The boundaries and measurement in the original grant to Kelly were identical with those in the foregoing description.

With reference to the discrepancy between the western boundary of Caldwell's feu and the eastern boundary of Kelly's, it was not disputed by the defender in the action after mentioned that there was no trace of any grant in favour of David Mitchell ever having been feudalised.

In 1885 Balderston sold his (Caldwell's) feu to James Ross. The disposition in favour of Ross, which was dated 27th and 30th May, and recorded 5th June 1885, contained the same description of the subjects as in the disposition by Johnstone to Balderston.

In November 1886, Ross brought an action against Martin for declarator "that a piece of ground in the village of Blackburn, parish of Livingstone, and sheriffdom of Linlithgow, extending to 11 poles 20 yards or thereby, imperial measure, bounded on the south by the old Edinburgh and Glasgow Road; on the east by the gable-wall of the cottage belonging to the pursuer, and presently occupied by Hugh M'Conkie, and by a line drawn northwards in continuation of the line of the said gable-wall; on the north by the lands belonging to Sir William Macdonald Honyman, Baronet, of Torbanehill; and on the west partly by the eastern gable of a house belonging to the defender, and partly by a stone wall and thorn hedge, said last-mentioned gable-wall terminating at a point 31 feet to the westwards of the gable-wall of the said cottage belonging to the pursuer, and occupied as aforesaid, being the portion of ground coloured pink on the plan herewith produced and referred to," was part of the ground conveyed to the pursuer under his disposition from Balderston; and for removing.

The pursuer, after setting forth his own and the defender's titles as recorded, averred;—(Cond. 4) "The piece of ground, with reference to which decree of declarator is now sought . . . was in the occupation of William Caldwell, the original feuar of the pursuer's property, from the date of the feu-disposition till his death in or about 1838, and continued to be possessed as part of the feu granted to the said William Caldwell by his successors therein. The said William Caldwell built a joiner's shop on the said piece of ground against the gable of his own dwelling-house (that now occupied by Hugh M'Conkie); he drew the rents of a cottage which stands on the said piece of ground at the western extremity of it, and otherwise exercised all the rights of ownership . . . If the said strip of ground is deducted from the pursuer's feu there will be left an extent of 1 rood 12 falls, being considerably less than the extent to which he is entitled under the original feu-right granted to William Caldwell."

The pursuer also denied the defender's averments of want of *bona fides*.

The defender founded on the conditions in the articles of roup and on the recorded titles, and in his statement of facts averred, *inter alia*;—(Stat. 4) "The properties as now possessed by the pursuer and defender respectively exactly answer the descriptions and measurements contained in said articles and dispositions. Were the pursuer's claim in the present action to succeed, the defender's subjects would be reduced from three houses (as bought by him) to two, and from 22 falls and 9 ells of land (as specified in the disposition in his favour) to about half of that extent. On the other hand, the pursuer's property would be increased by the addition of a house other than that formerly occupied by Hannah, which alone he bought, and would be very greatly increased in extent and nearly doubled in value. The pursuer was aware of this when he purchased from Mr Balderston, and he knew that what he now alleges to be his ground was being possessed by the defender as owner thereof. The pursuer was not a *bona fide* purchaser of the subjects described in the summons."

The pursuer pleaded;—(1) The pursuer being by virtue of his titles heritable proprietor of the subjects in question, is entitled to decree of declarator and removing as asked. (2) The defender having no right or title to the property or possession of the subjects in question, should be ordained to remove therefrom.

The defender pleaded;—(3) Under the titles, including the articles referred to, the claim of the pursuer is unfounded, and the defender should be accordingly assoilzied. (4) The pursuer not having been a *bona fide* purchaser of the subjects described in the summons, he is not entitled to decree as concluded for, and the defender is entitled to absolvitor. (5) The defender being the owner of the strip of ground in question, is entitled to absolvitor.

A proof was allowed. The evidence was to the following effect: Between the ground marked pink on the plan and the pursuer's undisputed property the only boundary line was an ill-defined footpath. On the other hand, between the ground marked pink and what was undoubtedly the defender's property, there was a well-marked boundary hedge, except between the points occupied by the eastern gable of the house referred to in the summons. That house was marked C on the plan, and was one of the houses "occupied by M. Finn and others," mentioned in the marginal note on the articles of roup of the defender's property. The house described in the summons as occupied by Hugh M'Conkie was that described in the articles of roup of the pursuer's property as occupied by William Hannah. There was also a joiner's shop on the disputed ground, the rest of which was a garden. There was no doubt that the whole subjects in dispute were in the possession of Caldwell as proprietor from the original grant in 1795 down to about 1842, and there was no other title to which that possession could be ascribed except the grant of 1795. The defender when he made the purchase intended to buy, and thought he was buying, the whole subjects in dispute, and he was in the occupation of them at the date of the action. The pursuer, who was a native of Blackburn, but had left it in early life, deponed that he never intended to buy the house marked C, but that he did intend to buy the joiner's shop and the garden. He further deponed that he had bought the subjects from recollection and without visiting them, and that according to his recollection his boundary line was the hedge, the line of which he was surprised to find on visiting the place included the house C on its eastern side. He stated that he had included the house C in the summons only because his agent advised him that his proper course was to claim all his titles gave him. Kelly's feu without the ground coloured pink was nearly one-half less than the extent specified in the conveyance to the defender, but it appeared that some time before 1850 a large strip of ground on the west was taken off Kelly's feu to form the Riddochhill Road.

On 18th April 1887 the Lord Ordinary (Kinnear) assoilzied the defender.*

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* "OPINION.—There can be no doubt, upon the evidence, that the subjects in question form part of a property which was purchased by the defender in 1880 from Mr Robinson Johnstone, the common author of the parties, and which he has possessed ever since under the title given to him by Mr John-

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The pursuer reclaimed.[1]

At the hearing he stated that he did not desire to press his claim to the house marked C.

stone, in implement of the contract of purchase and sale. If the question had arisen between him and the seller there could have been no difficulty in sustaining the defender's right. But the subject in which the defender is infeft is described in the disposition in his favour as the portion of land 'feued out to William Kelly, merchant in Glasgow, by William Honyman of Græmsay, bounded on the east by the house and garden now or formerly belonging to William Caldwell, on the south by the Edinburgh and Glasgow Road, and on the west and north by the lands sometime occupied by David Prentice, extending per measurement to 22 falls and 9 ells of land.' The pursuer alleges that he has acquired the property originally feued out by the common superior, Honyman of Græmsay, to William Caldwell in 1795, and that that feu has been shewn to have included the piece of ground described in the conclusions of the summons. He therefore maintains that whatever may have been the defender's bargain with Mr Johnstone, and whatever possession may have followed upon it, the defender can have no right in the disputed ground available against him, because the description of the subject as 'the ground feued out' to Kelly, and the boundary by 'the house and garden belonging to William Caldwell,' effectually exclude the disponee from any part of the ground originally included in Caldwell's feu.

"If the feus granted to Caldwell and William Kelly respectively had been separately possessed from the date of the original feu-right, and the question between the parties had depended exclusively upon the identification of the original feus, the pursuer must probably have prevailed. But for many years before the defender's purchase both feus had belonged in property to one proprietor, and the question is, what part of the property then belonging to him the common author, Mr Johnstone, sold and conveyed to the defender, and what part to the pursuer's immediate predecessor, Mr Balderston?

"The piece of ground in dispute is occupied by a house and garden, with a shed or building, which is spoken of in the proof as a joiner's shop, attached to the house. There can be no question that this house, with the joiner's shop, was part of the subject purchased by the defender, or that it was intended to be included in his title. He bought three houses, and if the pursuer's construction of his title is right he will only have two. But a few days before the sale to the defender, the common author, Mr Johnstone, sold to the pursuer's predecessor, Balderston, the subjects which the pursuer acquired in 1885. Upon his purchase being completed, the defender entered upon possession of the property which he understood that he had acquired, including the house and joiner's shop in dispute, and he has continued in the undisturbed possession of the whole until the present claim was advanced by the pursuer. Mr Balderston entered on possession of the adjoining property, and asserted no right to the eastmost of the defender's three houses, or to the joiner's shop. The pursuer frankly admits that when he made his purchase from Mr Balderston he was perfectly well aware that the defender was in possession, and was reputed proprietor of the house and garden now in dispute. His case, therefore, is based exclusively on a strict construction of the titles.

"The description in the defender's title requires to be explained by evidence, because what is meant by the feu granted to Kelly, or by the house formerly belonging to Caldwell, cannot be known without evidence as to the history of the possession. The result of the evidence appears to me to be that the ground, of which he is now in possession, coincides in part, but in part only, with the feu granted to Kelly. There appears to have been a small piece of ground included in the original feu, to the west of the defender's property, and to which

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[1] Petrie v. Forsyth, Dec. 16, 1874, 2 R. 214; Stoddart v. Dalziel, Dec. 16, 1876, 4 R. 236; Reid v. M'Coll, Oct. 25, 1879, 7 R. 84; Lee v. Alexander, Aug. 3, 1883, 10 R. (H. L.) 91.

At advising,—

Lord Rutherfurd Clark.—This case, which is concerned with a property of trifling value, is attended with considerable difficulty.

In the village of Blackburn there were two feus, the one given out in 1795 to William Caldwell, and the other in 1803 to William Kelly. These were adjacent feus. It is true that in the feu-disposition of 1795 Caldwell's feu is described as bounded on the west by the feu recently granted to David Mitchell. But there is no trace of a feu-right in favour of Mitchell having ever been feudalised. For the feu granted to Kelly is described as bounded on the east by the house and garden belonging to William Caldwell.

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he asserts no right; and I think it probable that the disputed ground on the east was not originally in Kelly's but in Caldwell's feu. But then the extent of the ground conveyed to the defender is specified in the conveyance as 22 falls and 9 ells of land per measurement, and that is within 2 ells of the extent of the ground of which he is now in possession. The defender, therefore, will lose about half of the extent of ground specified in his title if he is deprived of the ground now claimed by the pursuer. In these circumstances, I think the reference to Kelly's feu must be regarded as demonstrative, and not as taxative. There is no question about any of the boundaries except the boundary on the east. But it is to be observed that the eastern boundary is not 'Caldwell's feu,' but the 'house and garden formerly belonging to Caldwell,' and that is a description which will be satisfied by the boundary claimed by the defender, because the pursuer's house and garden, which lie immediately to the east of the disputed ground, did at one time belong to Caldwell. There is thus a description of a piece of ground by specific measurement, within boundaries of which one alone is ambiguous. If the ambiguous boundary be construed in one way, it will satisfy the measurement; if it be construed in the other way, it will diminish the property to a very material extent. The larger measurement is in accordance with the possession which has followed upon the title, and it is in accordance also with the evidence as to the extent of the ground embraced in the contract of sale to which the title was intended to give effect. I think it would be inconsistent with sound principles of construction to allow the description by measurement to be overruled by the reference to the original feu. Nor does it appear to me that the description by measurement will be satisfied by including portions of the old feu, to which the defender has admittedly no right, in order to restore the quantity of ground which will be cut off by the pursuer's claim. The measurement given in the defender's title must be taken to mean the measurement of the ground actually conveyed.

"There might have been greater difficulty if the pursuer could have alleged that the ground in dispute was clearly within his title, and that he had bought on the faith of the record. But neither of these points can be maintained. His boundary on the west is described as the feu granted to David Mitchell; and it is admitted that no trace of a feu-right to David Mitchell has been recovered. But he did not purchase in reliance upon any description in the titles, but upon his general knowledge of the ground, and he admits that he never supposed he was buying the defender's eastmost house, which forms the most important part of the subject he now claims, but only the joiner's shop. The witness Young, who acted as the pursuer's agent in making the purchase, knew that the defender was in possession of the joiner's shop. But, whatever doubt the pursuer may have had as to the joiner's shop, he had none as to the defender's property in the house. He claims the house, to which he admits that he has no just right, because he has been advised that the construction of the titles, upon which alone he can make good his claim to the joiner's shop, must either be pressed so far as to include the house also, or must be admitted to be untenable. It follows that the construction to which he asks that effect should be given is inconsistent with the admitted rights of parties. . . . ."

It appears, then, on the face of the later title that Kelly's feu was adjacent to Caldwell's feu, and the possession which followed on the feu-rights puts this point beyond a doubt. For Caldwell and his successors possessed up to Kelly's feu, and Kelly and his successors possessed up to Caldwell's feu. There is no trace of the existence of any intermediate right, except the mention of Mitchell's feu, which must be laid aside as having been nothing more than a personal fee.

The next question is, what did Caldwell's feu comprise, and here again the possession is decisive. It is clear that Caldwell and his successors possessed up to the western margin of the ground coloured pink on the plan which is before us, which is the disputed ground. It is not necessary to examine the evidence, for it is all one way. The house marked C was all along in the possession of the Caldwells, as well as the ground behind it. The feus were divided from each other by a well-marked boundary hedge running along the west side of the pink ground, and, as I have said, each feuar possessed up to that boundary.

The defender suggested that Caldwell's possession of the ground coloured pink must be attributed to a title other than the feu-right of 1795, because on the theory that that ground formed part of Caldwell's feu, Kelly's feu was materially less than the dimensions given in his title. There are two answers to this suggestion. Caldwell's possession must be attributed to the only title which he is shewn to have had, and it is proved that Kelly's feus were diminished by alterations which were made on the Riddochhill Road. Mrs Lind, whose grandmother occupied a house on Kelly's feu, remembers that there was a garden on the west side of the house, which no longer exists. It may be safely inferred that the garden was taken in order to make the alterations on the road.

So far, all, I think, is clear. The two feus were contiguous, and the ground in dispute was comprised in Caldwell's feu. The titles and possession continued to be the same down to 1841 or 1842.

At a later date the feus came to be held by one person, and of course from that time onward it is immaterial to consider the state of possession. We may advance to the year 1875, when they both belonged to Thomas Robinson Johnstone.

In February 1880, Johnstone disponed a piece of ground to Lawrence Balderston. The description and boundaries of the subject so conveyed are the same as occur in the original feu-right granted to Caldwell. This subject was conveyed by Balderston to the pursuer in 1885, and by consequence the pursuer is *ex facie* of his title the proprietor of the ground originally feued to Caldwell.

The subjects of which the defender is in right were acquired by him from Johnstone, conform to disposition dated March 1880, so that his title is later than the pursuer's. They were conveyed to him according to the boundaries contained in Kelly's feu, and therefore on the face of his title he is proprietor of Kelly's feu, and of nothing more. If, therefore, the case were to be decided by the titles alone, it seems to be clear that the pursuer's must prevail. His title contains the ground in dispute. The defender's title does not contain it.

But the defender maintains that Johnstone did not intend to sell, and that Balderston did not intend to buy, any part of the ground coloured pink. He points out that the entire subject as it stood in the person of Johnstone was exposed for sale in two lots, conform to articles of roup under which Balderston made his purchase. Each of these lots was described in precisely the same terms as Kelly and Caldwell's feus are described in the feu-contracts. Indeed, the description in the articles of roup is nothing more than an excerpt from the original titles. But on the margin of the articles the lot which the defender acquired is described as consisting of "three houses," while the lot which the pursuer acquired is described as consisting of a "house and large garden occupied by William Hannah." The defender contends that the description contained in the titles must be construed in conformity with what is shewn to have been the true bargain, that Balderston could not claim more than what he intended to buy, and that the pursuer is in no better position. I confess that I have much sympathy with the defender, for it is clear enough that he intended to buy, and thought that he was buying, the whole subjects which he now possesses, and it is equally certain that after he obtained his disposition Balderston did not take possession of any part of the ground which is now in dispute. But the case cannot be disposed of on these considerations alone, because the defender has no title to the ground which he claims, and because the title is clearly in the pursuer, who is a singular successor.

If the question had arisen with Balderston, it is by no means clear that he could not have vindicated all the subjects which were conveyed by the disposition in his favour. But if it were pleaded against him that such a claim was contrary to the good faith of the bargain, to what extent would his claim be limited if such a plea received effect? It is founded on the marginal note in the articles of roup, and I do not see that it could be pressed further against him than that his claim must be consistent with that note,—in other words, that he could claim nothing which the articles under which he purchased assigned to the other lot which he did not buy. But that lot was described as consisting of "three houses near Millgate, occupied by M. Finn and others." If he did not claim any of these houses, there is no evidence that his claim would be contrary to his bargain.

It is true that when the defender took possession of what he thought he had purchased, and erected some buildings on a part of the disputed ground, a question was raised by Balderston as to the defender's right, but he did not persevere with it or bring it to decision. But there is no evidence to shew that he surrendered any right, or that he would now be barred from putting forward his claims if he had continued to be the owner of the feu which he had bought. It is certain that he conveyed nothing to the defender, and nothing more is proved than that he did not at that time take any legal steps to vindicate what he asserted to be his rights.

Thereafter he sold to the pursuer, who bought according to the titles. The pursuer acquired all that was in Balderston's person, and I, as I have already said, do not think that it can be doubted that he acquired the disputed ground. If the titles were ambiguous, much might be urged in favour of the defender. But when they are clear, how can the pursuer be prevented from vindicating what is in his title? It is not affected by any personal exception which could be stated against Balderston, for the pursuer is a singular successor. The defender cannot claim the ground in question, for he has no title to it. It is true that he is in possession, but he is without a title, and his possession has not been of such duration as to give him any aid. The case therefore comes to this point, that the pursuer has a title to the disputed ground, while the defender has none, and inasmuch as he has no title to it, he has no title, and never had any title, on which he can resist the pursuer's claim.

But I am disposed so far to modify the conclusion which I have reached as afterwards made up, in which the complainers averred that the respondents had received from them as commission on the price of the mines the sum of 37,632 dollars—being upwards of £7500—being 28,857 dollars, corresponding to the call of £8, 10s. on 700 shares, and 8775 dollars, which was at their credit in the company's books as above stated. Mr Walker, a partner of the respondents' firm, having been a promoter, and subsequently having become a director of the complainers' company, the complainers contended that the respondents were bound to refund the sums above mentioned, and that upon an accounting it would be found that the respondents were indebted to them. They therefore averred that the bill in question had been granted without value, and ought not to be enforced.

Their case, shortly put, was that "the respondents, and in particular their partner James D. Walker, took an active part in the promotion of the said company, and in the preparation and issue of the said prospectus; and they also took an active part in the negotiations with the vendor of the said mines. . . . The said James D. Walker was, and acted from the first as, a director of the company. The firm of Falkner, Bell, & Company (the respondents) throughout acted as the agents, managers, and factors of the company at San Francisco. Following on the formation of the company, the provisional agreement with the vendor was confirmed, and the stipulated price of 400,000 dollars was, by or with the authority of the directors, paid to or on account of the vendor." They stated further that the arrangement regarding the payment out of the price of the mines to the respondents "was known to Mr Walker, but was not disclosed nor known to the board of directors, nor to the company or its shareholders."

The complainers pleaded;—(1) Power to accept bills not being conferred by the memorandum and articles of association on the company or its directors, and not being necessary in the ordinary course of its business, the granting thereof was *ultra vires*, and the bill in question is null. (2) There being no balance due by the complainers in account with the respondents, no value was received by the complainers in respect of the bill libelled, and they are entitled to suspension and interdict as against the respondents, Falkner, Bell, & Company. (3) The sum of 35,000 dollars, equal to £7000 or thereby, being a payment obtained by the respondents—the firm of a promoter and director of the complainers' company—out of the price of subjects sold to the company, falls to be credited to the complainers in account with the respondents. (4) In any event, the complainers are entitled to retain the amount of the said bill in extinction *pro tanto* of the said debt due to them.

The respondents stated in answer;—"The respondents believe that the £7500 referred to was a sum which they were credited with by Mr Charles Sutherland of San Francisco, in respect of an agreement between them and him, with which the complainers have no concern. The said £7500 was arranged to be paid by Mr Charles Sutherland to the respondents from the proceeds of a sale to the complainers' company of certain mining properties in America, but, at the request of Mr Sutherland and the complainers, the respondents took payment of the said sum of £7500 in shares of the complainers' company, with the exception of a certain sum which is due to them by the complainers, and stands at their credit in the complainers' books. No cash has ever been received by the respondents from the complainers in respect of said arrangement." "The prospectus is referred to. Explained that Mr Walker, although named therein as a provisional director, never possessed the necessary qualification of 50 shares, in terms of article 76 of the articles of associa-

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succeeded in selling them one-half of the nett profits was to be paid to Falkner, Bell, & Company, and a quarter to Mr Sutherland himself.

On 13th January 1881 a meeting was held in Edinburgh to consider a proposed purchase of the mines, and as the result of it a provisional agreement was drawn up, under which Mr Sutherland, as first party, agreed with certain persons as second parties, including Mr Walker, to sell the mines in question for the sum of 400,000 dollars to a company, to be thereafter incorporated under the Companies Acts, and to be named the Scottish Pacific Coast Mining Company, with a capital of £100,000 (£10 shares), provided the result of certain inquiries which were to be made by an engineer, who was to report upon the nature and value of the properties, and by a lawyer, who was to investigate the title, was favourable. Five gentlemen were named, of whom Mr Walker was not one, who were to have the sole right of determining whether the company ought to be incorporated. This agreement was signed by Mr Sutherland and by the gentlemen present at the meeting, including Mr Walker.

A prospectus of the company was issued on 21st January following, which gave the names of the provisional directors, among which was that of Mr Walker. The prospectus also bore,—"It is proposed that, if the company be incorporated, Mr James D. Walker, of the well-known firm of Falkner, Bell, & Company, San Francisco, should be managing director in California. His firm, and other parties in San Francisco, will subscribe £10,000." It was further stated that the company was not to be incorporated until Mr Price, the engineer who had been employed, had reported, and that no agreement other than the provisional agreement with Mr Sutherland had been entered into on behalf of the company. Copies of the prospectus were sent to Falkner, Bell, & Company for circulation.

The inquiries made by the committee having proved satisfactory, the company was incorporated on 8th March 1881, the provisional directors, including Mr Walker, being appointed in the articles of association the first directors of the company.

The memorandum of association bore that the company was formed for the purpose of acquiring various mining properties, and recovering precious metals from them, &c., and it embodied the provisional agreement of the 13th January. It was signed, *inter alios*, by Mr Walker.

Of the purchase price of the mines, amounting to 400,000 dollars, 350,000 dollars were remitted in cash to Falkner, Bell, & Company, and of that sum 330,000 dollars were paid to the original owners, and 20,000 to Mr Sutherland. The balance of 50,000 dollars was put to Falkner, Bell, & Company's credit in the books of the new company; they were at the same time debited in the books of the company with 41,225 dollars, being £8, 10s. per share on 1000 shares, which were to be taken up by them and their friends, on which £8, 10s. was called up, leaving 8775 dollars at their credit. These shares were afterwards registered by request of Falkner, Bell, & Company, 700 in name of one of their partners, Mr Harrison, and 300 in the name of Mr Sutherland.

In 1884 Falkner, Bell, & Company, who acted as the company's agents and managers in San Francisco, drew three bills upon the company for £1000, £2000, and £3000 respectively. These were at first accepted, but subsequently the company refused payment of them, and brought a note of suspension and interdict against Falkner, Bell, & Company, and James D. Walker, as an individual member of the firm, in which they craved interdict against the defenders doing diligence upon the first of these bills, amounting to £1000.

Interim interdict having been granted, and consignation of the bill, and £20 to cover interest and expenses having been made, a record was

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afterwards made up, in which the complainers averred that the respondents had received from them as commission on the price of the mines the sum of 37,632 dollars—being upwards of £7500—being 28,857 dollars, corresponding to the call of £8, 10s. on 700 shares, and 8775 dollars, which was at their credit in the company's books as above stated. Mr Walker, a partner of the respondents' firm, having been a promoter, and subsequently having become a director of the complainers' company, the complainers contended that the respondents were bound to refund the sums above mentioned, and that upon an accounting it would be found that the respondents were indebted to them. They therefore averred that the bill in question had been granted without value, and ought not to be enforced.

Their case, shortly put, was that "the respondents, and in particular their partner James D. Walker, took an active part in the promotion of the said company, and in the preparation and issue of the said prospectus; and they also took an active part in the negotiations with the vendor of the said mines. . . . The said James D. Walker was, and acted from the first as, a director of the company. The firm of Falkner, Bell, & Company (the respondents) throughout acted as the agents, managers, and factors of the company at San Francisco. Following on the formation of the company, the provisional agreement with the vendor was confirmed, and the stipulated price of 400,000 dollars was, by or with the authority of the directors, paid to or on account of the vendor." They stated further that the arrangement regarding the payment out of the price of the mines to the respondents "was known to Mr Walker, but was not disclosed nor known to the board of directors, nor to the company or its shareholders."

The complainers pleaded;—(1) Power to accept bills not being conferred by the memorandum and articles of association on the company or its directors, and not being necessary in the ordinary course of its business, the granting thereof was *ultra vires*, and the bill in question is null. (2) There being no balance due by the complainers in account with the respondents, no value was received by the complainers in respect of the bill libelled, and they are entitled to suspension and interdict as against the respondents, Falkner, Bell, & Company. (3) The sum of 35,000 dollars, equal to £7000 or thereby, being a payment obtained by the respondents—the firm of a promoter and director of the complainers' company—out of the price of subjects sold to the company, falls to be credited to the complainers in account with the respondents. (4) In any event, the complainers are entitled to retain the amount of the said bill in extinction *pro tanto* of the said debt due to them.

The respondents stated in answer;—"The respondents believe that the £7500 referred to was a sum which they were credited with by Mr Charles Sutherland of San Francisco, in respect of an agreement between them and him, with which the complainers have no concern. The said £7500 was arranged to be paid by Mr Charles Sutherland to the respondents from the proceeds of a sale to the complainers' company of certain mining properties in America, but, at the request of Mr Sutherland and the complainers, the respondents took payment of the said sum of £7500 in shares of the complainers' company, with the exception of a certain sum which is due to them by the complainers, and stands at their credit in the complainers' books. No cash has ever been received by the respondents from the complainers in respect of said arrangement." "The prospectus is referred to. Explained that Mr Walker, although named therein as a provisional director, never possessed the necessary qualification of 50 shares, in terms of article 76 of the articles of associa-

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tion, and by the provisional agreement between the vendor and the provisional directors Mr Walker was excluded from taking any part in considering whether the American property should be purchased or not, and as to what reports and evidence of value should be obtained. In point of fact it was intended that Mr Walker should be merely managing director or manager, and it was not necessary that to hold that office he should be a member of the company. He never was, and as above explained was not qualified to be, a director in the ordinary sense of that term." They further averred that Walker's name had appeared erroneously, and without his consent, in the articles of association as one of the first directors.

In regard to the averment as to Walker's knowledge of the arrangement between Sutherland and the respondents, they stated;—(Ans. 10) "Denied that Mr Walker was a party to the agreement here mentioned, or knew that it was to be made. Explained that it was made in America between Mr Sutherland and Mr Thomas Menzies, a member of the respondents' firm, before Mr Sutherland came to this country to try and dispose of the mining properties he had for sale. Mr Walker knew nothing of said agreement till after Mr Sutherland came to London. It is denied that the arrangement as to the respondents receiving a share of Mr Sutherland's profit on the sale of the mines was not disclosed or known to the company. The provisional directors and other gentlemen were made aware of the arrangement at a meeting or meetings held preliminary to the purchase of the properties."

The respondents pleaded;—(2) The complainers are bound to make payment to the respondents of the sum contained in the said bill, the same being a liquid debt, and they are not entitled to refuse to make payment of the same in respect of the illiquid and unconstituted claim for £7500 against the respondents, now put forward for the first time. (3) The ordinary course of the company's business requiring that they should accept the bills to their foreign managers against expenditure necessarily made by them abroad on the company's behalf, the bill in question is valid; and *separatim*, the complainers are barred by their own actings and course of dealing with the respondents from pleading that it is null. (5) No part of the sum of £7500 mentioned in the complainers' third plea having been paid to or being in the hands of the respondents, the complainers' pleas of compensation and retention are excluded.

Falkner, Bell, & Company raised a counter action concluding against the complainers for payment of the bill for £3000. The averments and pleas in this action were similar to those already set forth, and the two actions were conjoined.

Falkner, Bell, & Company afterwards raised another action against the company for payment of £2000, the sum contained in the second bill above mentioned, with costs, interest, charges, and damages, and of a sum of £1540 as remuneration for work done by them as agents for the company since its formation in 1881. This action was subsequently not insisted on by Falkner, Bell, & Company, as it appeared that they had no title to sue upon the bill. It need not therefore be further adverted to.

In February 1885 the company having resolved on voluntary liquidation, Francis More, C.A., was appointed liquidator, and he was afterwards sisted as a party to the actions.

Parole proof was led in the conjoined actions at great length, and documentary evidence was also produced. It is unnecessary to refer in detail to the proof, the result of which sufficiently appears from the Lord Ordinary's note, and from the opinions of the Judges.

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It dealt chiefly with the question whether the directors were or were not cognisant of the agreement between Mr Sutherland and Falkner, Bell, & Company, and with the negotiations about the formation of the company. It was proved that the agreement had never been communicated to the shareholders.

Mr Walker's name was shewn to have appeared in the lists of directors and in the annual reports of the company for each year except 1882, and its omission in that year was explained to be due to an oversight.* The minutes of meetings of the committee, dated 25th February and 5th March 1881, were produced, at the former of which Mr Walker was present. At the general meeting of the shareholders of the company, held on 22d May 1883, he fell to retire from the directorate, but was re-elected. It was proved that he had signed the memorandum of association for fifty shares.

With regard to the 1000 shares set aside for Falkner, Bell, & Company, although it appeared that no formal letter of allotment and no call letters ever reached them, letters were produced from them,—the first dated 6th July 1881, bearing:—"*Register of stock.*—Please place Mr C. Sutherland's in his own name, and our shares in the name of H. D. Harrison. Please keep Mr Sutherland's with you, and send our certificate to Messrs Bell, Harrison, & Company"; and the second, dated 16th August 1881, bearing:—"*Shares.*—Of the 1000 shares referred to, 700 are for our account, to be registered in name of Mr H. D. Harrison; and 300 for Mr Sutherland, to be registered in his name." That left 8775 dollars or £1809 still at the credit of Falkner, Bell, & Company, and it appeared that in May 1882 Walker was asked to join a private syndicate to take up those shares of the company which had not been taken up by the general public, and he agreed to make a contribution of the 8775 dollars for that purpose. These shares were registered in the company's books in name of Mr W. J. Menzies on behalf of the syndicate.

The Lord Ordinary (Kinnear) on 24th June 1887 pronounced this interlocutor in the conjoined actions:—"Repels the first plea in law for the complainers and defenders, the Scottish Pacific Coast Mining Company, Limited, and liquidator; sustains the third and fourth pleas in law for the said complainers and defenders: Sustains the respondents' and pursuers' claims upon the bills libelled; but in respect the complainers' and defenders' counter claim exceeds the amount thereof, in the suspension and interdict, interdicts and suspends as craved, and in the action for payment assoilzies the defenders from the whole conclusions of the action: Grants warrant to the liquidator of the said Scottish Pacific Coast Mining Company, Limited, to uplift the sum of £1020 consigned in the process of suspension and interdict, with the interest accrued thereon, and

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* Mr Walker, in cross-examination for the liquidator, deponed,—"I was not surprised to find in the prospectus that I was to be managing director in California, because that had been arranged. I was surprised to find my name appear as a director, because I did not see what use I could be to the company here, and I had never been asked to be a director. I got copies of the prospectus sent to me immediately on its issue, and I sent copies to various of my friends. I did not take any objection when I saw my name included as a director. I did not mention to the friends to whom I sent copies of the prospectus that that was a mistake, because when I got the prospectus and saw my name in it I took no objection to it, and I thereby gave consent. I afterwards signed the articles of association, in which I was named as one of the first directors of the company. I cannot say whether I attended any of the meetings of directors in Edinburgh after the company was formed, but if the minutes shew that I did I will accept that."

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authorises and ordains the Clerk of the Bills to pay over the same to the said liquidator, and that on production of a certified copy of this interlocutor and decree: Finds the Scottish Pacific Coast Mining Company, Limited, entitled to expenses in both actions, and in the conjoined actions." *

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* "OPINION.—The first question for consideration in these actions is, whether the defenders are liable to the pursuers for the sums contained in three bills for £1000, £2000, and £3000 respectively, drawn by the pursuers and accepted by the defenders in June 1884. [His Lordship then dealt with the £2000 bill, which he explained was now out of the case.]

"As to the other two bills, the objection that the directors had no power to accept was not seriously pressed at the debate, although the defenders' pleas upon that point were not withdrawn. I see no reason, however, to doubt the defenders' liability. Falkner, Bell, & Company were their agents in California, and were required to make disbursements on their account. But the moneys of the company were in Scotland, and the acceptance of bills was the ordinary and convenient method for making remittances to America. . . .

"Assuming the sums contained in the bills to be due, the next question is, whether the liquidator of the defenders' company is entitled to retain; and the ground on which he claims to do so is, that the pursuers' firm has taken benefit to a greater extent than the amount sued for from an unlawful agreement between one of its partners and the directors of the defenders' company, or some of them. The facts upon which this claim arises do not appear to me to be doubtful.

"The company was formed for the purpose of acquiring and working certain mining properties in California, described in a provisional agreement mentioned in the published prospectus. The nominal vendor of these properties was a Mr Charles Sutherland of San Francisco, and the provisional agreement was made between him and certain gentlemen, who afterwards became directors of the company, and one of whom was the pursuers' partner Mr Walker. But before any negotiation had taken place between Mr Sutherland and the promoters, other than Mr Walker, a prior agreement had been made between him and the partners of the pursuers' firm in San Francisco by which it was agreed that if the pursuers should by their introduction enable Mr Sutherland to find a purchaser for the mines in this country, one-half of the profit which Mr Sutherland might make upon the transaction was to be paid to their firm. In pursuance of this arrangement, Mr Sutherland was introduced by the pursuers' partner Mr Walker to the gentlemen who promoted the company; and an agreement was made by which the mines were purchased from the company for 400,000 dollars, of which 330,000 dollars went to certain prior owners or bondholders on the property, and the remaining 70,000, which represented the vendor's profit upon the sale, was to be divided, according to their previous arrangement, between Mr Sutherland and Falkner, Bell, & Company. It was subsequently arranged that Falkner, Bell, & Company, should take their share of the profit in shares, paid up to the extent of £8, 10s. on £10 shares. The agreement was carried out after the formation of the company by payment of 350,000 dollars in cash, of which 330,000 was paid to the original owners, and 20,000 dollars to Mr Sutherland. This left 50,000 dollars of the price; and in June 1881 that sum was put to the credit of Falkner, Bell, & Company in the company's books and in their current account with the company; and on the same day they were debited with 41,000 dollars odds, which represented £8, 10s. per share on one thousand shares. Seven hundred of these shares were registered, at the pursuers' request, in name of one of their partners, Mr Harrison, and three hundred in name of Mr Sutherland. This left 8775 dollars at the credit of Falkner, Bell, & Company. But in May 1882 certain of the gentlemen interested in the company formed what is called a syndicate for the purpose of taking up the shares which had not been taken up by the public. Mr Walker agreed that he should contribute to the purposes of the syndicate the sum with which his firm was credited, and accordingly that sum was paid over, or put

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Falkner, Bell, & Company reclaimed, and argued;—I. The principle of liability in cases involving the question of the repayment of promotion-

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to the credit of Mr Menzies as representing the syndicate. The result is that, apart from this last transaction, Falkner, Bell, & Company have received seven hundred partly paid-up shares as their portion of the price of the mines. There is no question that this arrangement was made for them by their partner Mr Walker; and it is equally certain that at the time it was made and carried out Mr Walker stood in a fiduciary relation towards the company, both as a promoter and a director. His name appears, with a statement of his position as a partner of Falkner, Bell, & Company of San Francisco, in the published prospectus as one of the provisional directors; his name is in the list of original directors in the articles of association; and although it appears to have been dropped out from the list published in 1882, it reappears in the following year; and he continued in fact to be a director in 1884. He put himself, therefore, in a fiduciary position towards the company. As a provisional director he held himself out to intending shareholders as one of the persons who had undertaken the duty of considering the expediency of the purchase on behalf of the company; and as an acting director when the company was formed he undertook the duty of carrying out the contract of purchase and sale in their interest, while at the same time he was truly in the position of a vendor, because he was receiving a considerable portion of the purchase-money, and contributing nothing to the purchase-money as a buyer. There can be no doubt whatever, if that were all, that a transaction made by him in these circumstances for the benefit of his firm could not be sustained as against the company. But that is not all, because the intending shareholders were not only entitled to rely upon his services as a director bound to consider their interest alone in making the purchase, but they were specially invited to rely on his special knowledge and experience, and on the material interest which he and his firm were to have in the company as considerable contributors, because it is set forth in the published prospectus that 'it is proposed that if the company be incorporated Mr James D. Walker, of the well-known firm of Falkner, Bell, & Company of San Francisco, should be the managing director, and that his firm and other parties in San Francisco will subscribe £10,000.' And therefore the public are invited to have confidence in the adventure, because Mr Walker is to be a director, and his firm, with others, is to subscribe £10,000, although at the time when this prospectus is published there is a concealed agreement between him and certain promoters that he and his firm are to subscribe nothing but the company's money, which is to be paid to them as a commission on the sale. He represents himself to be acting for the buyers, and to be one of their number, and he invites the public to have confidence in the purchase upon that account; while at the same time he is really identified with the vendors, contributing nothing of his own to the purchase-money, and taking for himself and his firm a share of the price. It is said that he was not in a fiduciary position when the provisional agreement was made. That would be of no consequence if he was a party to a wrongful agreement after he became a director. But he did more than that, because he made himself a party to the representations in the prospectus upon which the public were invited to take shares. I think it right to say, however, because questions of this kind involve character, that I do not suppose Mr Walker intended to wrong the shareholders. I do not doubt, upon consideration of the evidence, and of a very voluminous correspondence which I have read, that he believed the adventure to be a promising one, and his part in the transaction to be perfectly legitimate. His error was that he mistook his position. But acquitting him of any wrongful intention, the fact remains that while he was charged as a director of the company with the duty of protecting their interests, he made a contract on their behalf for the purchase of a property, having, at the time when he made it, an agreement with the vendors to receive a portion—amounting to 35,000 dollars—of the price. The case appears to me to be a very clear one for the application of the rule which is established by many decisions, and which is thus stated by Lord Young in one of the most recent: 'Whenever it can be

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money depended upon the question whether the person alleged to have taken promotion-money filled the double capacity of buyer and seller.

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shown that the trustee has so arranged matters as to obtain an advantage, whether in money or money's worth, to himself personally through the execution of his trust, he will not be permitted to retain it, but will be compelled to make it over to his constituent.'—*Huntington Copper Company* v. *Henderson*, 4 R. 299.

"It is said that the whole transaction was made known to all the directors. This would be of no consequence if it were not made known to the company,—that is to the shareholders, and to the public who are invited to take shares. But I see no reason to distrust the testimony of those directors who have been examined, and who depone that they knew nothing of the matter. The active conduct of the company's affairs seems to have been left almost entirely to Mr Menzies; and there can be no doubt that the arrangement between Sutherland and Falkner, Bell, & Company was perfectly well known to him, or that, failing to advert to Mr Walker's fiduciary position, he supposed it to be a legitimate arrangement, and accordingly consented to it, and carried it into effect. But he is unable to say that he explained the matter to the other directors, and they, in the witness-box, have distinctly denied all knowledge of it. There is a conflict between their evidence and that of Messrs Walker and Sutherland. But it is quite impossible that they should be mistaken on such a point; and, on the other hand, it is by no means improbable either that Messrs Walker and Sutherland, in speaking at this distance of time to what took place in conversation, may not have a perfectly accurate recollection of the part taken by particular gentlemen, or that they may have supposed without sufficient ground that what was known to Mr Menzies was known to his co-directors also. It may be, also, that things may have been said in the presence of the other directors which, if they had had the key to them, might have shewn that there was some arrangement with Mr Walker, or Falkner, Bell, & Company. But however the discrepancy is to be accounted for, I prefer the evidence of the directors who were examined, both because they are perfectly clear and positive in all their statements on the subject, and because, while there is a possibility of honest error on the other side, I think there is no such possibility on theirs. The question, however, is not material to the present action, because if all of the directors had known of the transaction their knowledge would not have bound the company.

"The remaining question is whether, assuming the illegality of the transaction by which Falkner, Bell, & Company have been benefited, the liquidator is entitled to the remedy which he maintains against them. It is said that he cannot retain the money due to the firm against the liabilities of one of its partners; that the firm cannot be made liable in damages for the wrong done by a partner, so as to bring the case within the rule of *M'Kay's* case, 2 Ch. Div. 1, and *Pearson's* case, 5 Ch. Div. 336; and that, although they might be bound to account for any benefit which had been communicated to them by their partner, they have in fact received no benefit except in the shape of a transfer of shares, and their liability will therefore be satisfied if the shares are retransferred. I cannot assent to this argument. I do not think it doubtful that the firm must refund whatever benefit they have taken, just as Mr Walker must have done so had he been acting for himself alone; and I do not think their liability will be satisfied by a transfer of the shares.

"It is clear upon the evidence and the correspondence that they were acquainted with the whole transaction from first to last. The two bargains which Mr Walker made for them, first for a portion of the price, and secondly for a certain number of shares, were made with their authority; and they accepted and ratified both by directing the shares to be registered in the name of their nominee, Mr Harrison. But they were aware at the same time of Mr Walker's fiduciary position, because they were the agents of the company, and knew that he was a managing director. In these circumstances the doctrine laid down by the House of Lords in the *Imperial Mercantile Association* v.

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In the present case there never had been any duty upon Walker to advise or decide as to whether the property should be bought or not. It was true he was a provisional director, but the responsibility for the purchase rested solely with the provisional committee, of whom Walker was not one. That committee had an absolute discretion even after they got the engineer's report. The principle of liability must be carried further than it had yet been carried if Walker were to be held liable. For example, he was not a promoter like the defender in the case of the *Huntington Copper Company*.[1] There was no legal duty here upon Walker to advise as to the purchase of the mines, and this being so, on the authorities there was no case against him.[2] He had acted neither as agent nor as trustee for the company in the matter, and the fact that he was a provisional director did not necessarily place him in any fiduciary relation to it.[3]

II. But even if Walker was liable, Falkner, Bell, & Company ought not to suffer for his wrongdoing. It was not within the scope of their business that Walker should have become a director of the company, and accordingly they should not be debarred because of his actings, which were outwith his mandate, from recovering their commission in terms of the agreement between Sutherland and them, which was made in California. The *Imperial Mercantile Association* case[4] was very different. In that case the promotion-money had been paid over in hard cash. Here Falkner, Bell, & Company had never got anything from the company. There, too, the whole transaction from beginning to end was known to both partners. Here Falkner, Bell, & Company saw only the provisional

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Coleman, 6 E. and I. App. 203, appears to me to be applicable. The other partners, as the Lord Chancellor says in that case, are 'parties to and implicated in the breach of trust'; with the knowledge they had, their 'liability cannot be separated from that of' Mr Walker, and they are liable to refund to the liquidator whatever he could have been compelled to refund if he had been the sole partner of his firm.

"But if that be so, I think they are liable, on the authority of *Hay's* case, L. R., 10 Ch. App. 593, for the whole amount which was put to their credit in the books of the company, and applied in the purchase of the shares which stand registered in the name of Mr Harrison. They have contracted to become shareholders in respect of these shares; and *ex facie* of the transaction they have paid for them by applying a sum of money which did not belong to them but to the company, and which they would undoubtedly have been compelled to refund in full, if it had been applied for their benefit in any other way. On the authority of the case cited, I think the liquidator is entitled to say that the transaction must be treated in one or other of two ways. The shares held for Falkner, Bell, & Company stand in the books as paid up to the extent of £8, 10s. They must either be treated as already paid for, but paid for with the money of the company; and in that case Falkner, Bell, & Company will be liable to refund the money which has wrongly been applied for their benefit. Or they have not been paid for; and then the shareholders will be liable as contributories for the unpaid calls.

"In either view the liquidator is, in my opinion, entitled to retain as against the claims made in these actions. . . . ."

[1] Huntington Copper Co. v. Henderson, Jan. 12, 1877, 4 R. 294.

[2] Buckley on the Companies Acts, 363; Erlanger v. The New Sombrero Phosphate Co., July 31, 1878, L. R., 3 App. Ca. 1218 (Lord Penzance, p. 1229); Bagnall v. Carlton, 1877, L. R., 6 Chanc. Div. 371 (L.-J. Cotton, p. 407).

[3] Arkwright v. Newbold, 1881, L. R., 17 Chanc. Div. 301 (L.-J. James, 319).

[4] Liquidators of the Imperial Mercantile Credit Association v. Coleman & Knight, 1873, L. R., 6 E. and I. Apps. 189.

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agreement and the prospectus,—from which they were entitled to gather that Walker was excluded from any fiduciary position in regard to the company,—and they had reason to believe further that there had been a complete disclosure about the commission. The action accordingly resolved itself into one of misfeasance or breach of trust by a partner unknown to his firm, whom it was afterwards sought to render liable.[1] But that was not enough to infer liability against them, and the sum in question could not be set off in a question with Falkner, Bell, & Company. The *Cape Breton Company* case applied here. It shewed that the point of time to be looked at was the date of the agreement as to the purchase-money, and that being so, it could not be held here that Falkner, Bell, & Company were in a fiduciary position towards the company at that time.

III. In any view, Falkner, Bell, & Company could not be treated as contributories. Their agreement was in no sense an agreement to take shares as ordinary shareholders. They were to take fully paid-up shares. Their names ought not therefore to be placed on the list of contributories. *Hay's* case[2] did not apply. It might be that the company had a remedy under the 165th section of the Companies Act, 1862, but that had not been pleaded.[3] As to the 8775 dollars, or £1809, it had not been paid to anyone. It was still *in bonis* of the company, and yet they asked to get credit for it just as if it had been paid away.

Argued for the respondents;—I. Their case was rested on the principle of the *Huntington Copper Company's*[4] and *Sir John Hay's*[5] cases. It was proved that Walker occupied a fiduciary position towards the company, and the fact that he was not one of the committee appointed to consider as to the purchase of the mine did not affect his relation to the public as one of the ultimate directors of the company.[6] The law went further now than it did in the *Huntington* case. It was not now considered necessary that the person taking the benefit should be a director of the company, or even have figured towards the public in a position of trust, so long as he was a promoter in the sense of bringing the company into existence, and having an interest adverse to the company.[7] If he was in that position, he became liable as a trustee to refund his promotion-money. Walker put himself forward as occupying a fiduciary position towards the company from the earliest period of the company's history. At the first meetings that were held he represented himself as a buyer, and acted as such, and he also introduced the seller. He was a party to the incorporation, because he signed both the memorandum of association and the articles. It was said,—relying on the *Cape Breton Company* case,[8] that the time to be looked at was the date of the agree-

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[1] Lydney and Wigpool Iron Ore Co. v. Bird, 1886, L. R., 33 Chanc. Div. 85; *In re* Canadian Oil Works Corporation (Hay's Case), 1875, L. R., 10 Chanc. Apps. 593; *In re* Cape Breton Co. 1885, L. R., 29 Chan. Div. 795; Ladywell Mining Co. v. Brookes, &c., 1886, L. R., 34 Chanc. Div. 398, affd. 35 Chanc. Div. 400.

[2] L. R., 10 Chanc. Apps. 593; *cf.* Carling, Hespeler, and Walsh's cases, 1875, L. R., 1 Chanc. Div. 115.

[3] Coventry v. Dixon, 1880, L. R., 14 Chanc. Div. 660; Du Ruvigne's case, 1877, L. R., 5 Chanc. Div. 306; Gover's case, 1875, L. R., 1 Chanc. Div. 182.

[4] 4 R. 294.

[5] L. R., 10 Chanc. Apps. 593.

[6] *Ex parte* Bennet, 1805, 10 Vesey's Reps. 380 (Lord Chancellor Eldon, p. 393).

[7] Lydney and Wigpool Iron Co. v. Bird, 1886, L. R., 33 Chanc. Div. 85.

[8] L. R., 29 Chanc. Div. 795.

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ment as to the purchase-money. But that case established the rule that if a person—with a certain property in his hands for sale—became a director of a limited company with the view of buying that property which he sells to the company in the name of someone else, while he concealed his own interest, the transaction is reducible. Accordingly, that case applied here.

II. It was said that although Walker created the company or assisted to do so, his firm were not in that position. But a firm could not retain a benefit got by the fraud of one of its partners.[1] It was enough to shew Falkner, Bell, & Company's knowledge to refer to the two letters from them of July and August 1881 (quoted above). They therefore adopted what had been done by Walker, and the shares were registered in the name of one of the partners of the firm. In answer to the dilemma put by the Lord Ordinary on this question in his note, the case of *Carling*[2] had been referred to. But there the vendor got certain shares allotted to him as paid up, some of which he transferred as paid up to persons becoming directors. These persons having no contract with the company to acquire the shares, could not be made liable as holders of unpaid shares. The respondents were therefore entitled to retain the shares,—Falkner, Bell, & Company having undertaken to take them,—and that contract falling to be fulfilled by a payment in money. If there was no such contract, then the other alternative put by the Lord Ordinary applied. As to the £1809, it had been put to the credit of Falkner, Bell, & Company at their own request. The case of the *Imperial Mercantile Credit Association* was altogether in point.[3]

At advising,—

Lord Mure.—It does not, as it appears to me, admit of doubt, upon the evidence adduced in the conjoined actions—(1) That before the formation of the complainers' company, the respondents Falkner, Bell, & Company had entered into an agreement, under which they were to receive a very considerable sum of money, from the vendor of the mines afterwards acquired by the complainers, in the event of a company being formed for the purchase of those mines through the influence and co-operation of the respondents and their partner Mr Walker; (2) that the mines in question were acquired and the complainers' company formed for their acquisition in a great measure through the introduction and exertions of the respondents, and of their partner Mr Walker in particular; and (3) that the stipulated promotion-money was paid to the respondents, after the complainers' company was formed, in the shape of paid-up shares of the company, which were duly issued to the respondents, and which they deliberately agreed to take in payment of the monies due to them under their agreement.

So standing these facts it cannot, I apprehend, well be disputed that, under the rules of law applicable to such transactions, as the law has for some time been administered both in this country and in England, the respondents are liable to refund money so paid, if it is proved that, at the time the complainers' company was incorporated, the respondents' partner Mr Walker, who took an active part in promoting the sale of the mines, stood towards that company in a fiduciary position, more particularly if the fact that he was in that position was

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[1] Blaikie Brothers v. Aberdeen Railway Co., July 20, 1854, 1 Macq. (H. L.) 461; M'Kay's case, 1875, L. R., 1 Chanc. Div. 1; Pearson's case, 1877, L. R., 5 Chanc. Div. 336.

[2] L. R., 1 Chanc. Div. 115.

[3] 1873, L. R., 6 E. and I. Apps. 189.

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well known to the respondents. The discussion, accordingly, which took place under the reclaiming note was, in a great measure, confined to this important point; and the main question to which, as it appears to me, your Lordships have now to direct your attention with a view to the disposal of the present case, is as to whether there has been evidence adduced sufficient to instruct that Mr Walker must be held to have stood in a fiduciary relation to the complainers' company at the time when that company was incorporated.

Now, the solution of this question appears to me in this case to depend upon what is proved to have taken place relative to the formation of the complainers' company between the date of the agreement entered into between the vendor and Falkner, Bell, & Company in San Francisco in December 1880 and the 8th of March 1881, being the date of the company's incorporation; and the evidence as to this, which is, I think, chiefly documentary, is substantially to the following effect.

Upon the agreement between Mr Sutherland and Falkner, Bell, & Company being concluded, Mr Sutherland appears to have proceeded to London to put himself in communication with Mr Walker as provided for in the agreement. For the correspondence which took place between Mr Walker and Mr Menzies of Edinburgh in the beginning of January 1881 shews that Mr Sutherland had then arrived in London and had met with Mr Walker, Mr Menzies, and some other gentlemen from Edinburgh, and that a meeting had been arranged to be held in Edinburgh for the further consideration of the proposed purchase. This meeting, at which Mr Walker and Mr Sutherland were present, was held on the 13th of January, and a provisional agreement appears to have been then entered into for the purchase of the mines, subject to some further inquiries. That document is produced, and bears to have been entered into between Mr Sutherland on the first part and the parties whose names are subscribed thereto on the second part, and among the parties so subscribing on the second part I find the name of Mr Walker. In this agreement the price to be paid for the property is fixed subject to inquiries as to title, &c., and subject to the report of an engineer to be named by the second parties as to the position and condition of the mines; and by the fourth head of the agreement five gentlemen are named, of whom Mr Walker is not one, who are to "have the sole right to determine whether in terms of this agreement, the investigation made by the second parties has so resulted that the company ought to be incorporated; and if they so determine, to adjust the terms of the articles of association and incorporate the company; and the company in that case shall pay the price above stipulated."

The next step taken by the promoters, after selecting an engineer to report upon the mines, appears to have been the preparation of a prospectus of the proposed company, which was issued to the public about the 21st of January 1881. This document is an important one, for it gives among other things the names of the provisional directors, and among them is the name of Mr Walker "of the firm of Falkner, Bell, & Company, San Francisco." It contains the usual information supposed to be necessary to enable parties intending to take shares to judge of the advantages or disadvantages of such a proposal; and it also contains the following clauses:—"It is proposed that, if the company be incorporated, Mr James D. Walker, of the well-known firm of Falkner, Bell, & Company, San Francisco, should be managing director in California. His firm and other parties in San Francisco will subscribe £10,000. The company will not

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be incorporated until the above statements, which are made on the authority of the vendors, are confirmed by Mr Price," and it concludes by stating that "a copy of the articles of association may be seen at the office of the company."

This prospectus appears from the correspondence to have been largely circulated. Copies were admittedly sent out to Falkner, Bell, & Company at San Francisco, and to Mr Walker, who had returned to London, for circulation there; and it appears from the evidence that those sent to London were duly distributed by Mr Walker among parties likely to apply for shares. The result of all this was, that by the beginning of March 1881 the promoters considered themselves in a position to have the company incorporated. The articles of association, which are mentioned in the prospectus as lying for inspection at the office of the company in Edinburgh, were by that time adjusted; and in those articles, which were admittedly signed by Mr Walker, his name is entered as one of the first directors of the company.

It thus appears from the prospectus of the company, and from the articles of association, that Mr Walker was announced as a provisional director and as one of the first directors of the incorporated company; and that he acted in both capacities is, I think, shewn by the minutes of the meeting of the 25th of February 1881, in which his name is entered as one of the parties present when the report of the engineer's inspection of the mines was received from San Francisco, and by the minutes of the meetings of directors on 14th May, and of shareholders on the 22d of May 1883, at which he was present; and the minute of the latter of these meetings bears that "Mr Lawrie and Mr Walker, the retiring directors, were re-elected."

The accuracy of the statement in these documents, as to Mr Walker being appointed a director, is challenged in the record by the respondents, who allege that Mr Walker was not qualified to act as a provisional director, and that it was never intended to do more than make him managing director in California, as stated in the prospectus. It is also denied on record that he ever was a director of the company, or ever acted as such; and it is alleged that his name erroneously, and without his consent, was inserted in the articles of association. With reference to the last of these averments, it appears to me that the respondents cannot now be allowed to raise any such objection, because Mr Walker deliberately signed the articles of association, in one of which he is named as one of the first directors, and he afterwards attended meetings of the directors when he happened to be in this country.

As regards the prospectus, on the other hand, it is plain from Mr Walker's own evidence, that although he may not have been originally aware that he was to be appointed a provisional director, he raised no objection to his name being included as one of them when he saw it in the prospectus, but assumed and acted upon the duties of the office with considerable zeal.

Upon this his evidence is very frank and explicit. When asked as to the prospectus he says, "I was present when Mr Menzies was preparing the prospectus that was to be issued to the public. I had no means of giving him any information except what I had got from Mr Sutherland. I had no hand in framing the prospectus. I had never drawn a prospectus in my life. After I went to London, which I think was towards the end of January, a completed copy of the prospectus was sent to me there; I saw then that my name was in the list of directors. That was a new idea to me. I did not know before that it was intended to make me a director. The suggestion had never been made to me. I then proceeded to bestir myself to get friends to take shares in the company. About the 8th of February I returned to Edinburgh, and again paid visits to Mr Menzies' office. I was to be managing director of the company in California, and Mr Menzies was to be managing director in this country. When intending shareholders communicated with me I gave them any information I could, in fact I went a little further than that, because there was a small meeting of shareholders called one day in Mr Menzies' office, and the map was spread out, and I told those present what I knew about the Empire property, and about the property generally, explaining at the same time that personally I had no knowledge of it. I was never asked as to whether Mr Price's report was satisfactory or not. His cable report had come to hand before I left this country, but not the detailed one. I sailed for New York on the 5th of March. I never was a member of the provisional committee."

In saying that he never was a member of the provisional committee, Mr Walker must have meant that he was not one of the committee of five who were nominated to decide whether the company should be incorporated after receiving the report of the engineer Mr Price, because he was undoubtedly one of the provisional directors, for he signed the provisional agreement as one of the second parties to it, and appears to have attended a meeting of that committee when they were considering the report on the 25th of February 1881, after he was fully aware that he had been named a provisional director in the prospectus, and had, as he himself explained in the passage I have just read, acted in that capacity. In a subsequent part of his evidence, when again questioned as to the prospectus, and as to whether, after explanation, he was satisfied the prospectus was substantially correct, he says, "I suppose so. I was not surprised to find in the prospectus that I was to be managing director in California, because that had been arranged. I was surprised to find my name appear as a director, because I did not see what use I could be to the company here, and I had never been asked to be a director. I got copies of the prospectus sent to me immediately on its issue, and I sent copies to various of my friends. I did not take any objection when I saw my name included as a director. I did not mention to the friends to whom I sent copies of the prospectus that that was a mistake, because when I got the prospectus and saw my name in it, I took no objection to it, and I thereby gave consent. I afterwards signed the articles of association, in which I was named as one of the first directors of the company. I cannot say whether I attended any of the meetings of directors in Edinburgh after the company was formed, but if the minutes shew that I did I will accept that."

Upon considering this evidence I have been unable to see my way to any other conclusion than that of holding that the case must be dealt with on the footing that Mr Walker was appointed and acted as one of the provisional directors for the formation of the complainers' company, and that he was also appointed and acted as one of the first directors of the incorporated company. And if I am right in this the case is, I think, clear, and distinctly ruled, in so far as Mr Walker is concerned, by the decision of this Court in the case of the *Huntington Copper Company*, referred to by the Lord Ordinary in his opinion. Here, as in the *Huntington* case, the interest of Mr Walker, as a partner of Falkner, Bell, & Company, was in direct conflict with his duty as a director or trustee for the complainers' company. His duty as a director was to acquire the property at as low a price as possible for the company. His interest as a

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partner of the complainers' company was to get as large a sum as possible for it for the vendor, because the larger the price obtained by the vendor the larger, under the terms of the agreement, would be the profit divisible between the vendor and Falkner, Bell, & Company; and wherever such a conflict between duty and interest exists, the party who has the duty to discharge cannot, I conceive, as the law now stands, be allowed to retain money paid to him under any such agreement as that here in question.

I therefore concur in the result at which the Lord Ordinary has arrived on the main question raised, and generally in the able exposition he has given of the law and of the evidence applicable to the various branches of the case.

The circumstance that the question is here raised with the firm of Falkner, Bell, & Company and not directly with Mr Walker, which is the main distinction I see between this and the case of *Huntington*, cannot, in my opinion, be held to make any difference in the application of the general rule, more particularly in a case where, as here, the firm were throughout quite well aware that their leading partner was acting as a director of the company. The firm, in a question of this description cannot, in the view I take of it, be in any better position than the partner himself who assumed the fiduciary character, and the general rule has been applied by this Court in the case of a firm of law-agents, in which the whole Court was consulted. I refer to the case of *Paterson's Trustees*, 12th November 1856 (19 D. p. 1), where one of a firm which acted as agents for a trust-estate was himself one of the trustees for whom the firm acted, and an objection was on that ground taken to the accounts of the firm. It was not disputed that the objection must have been sustained had the trustee been sole agent for the trust; but it was contended that the objection was obviated by the circumstance that it was not the firm but only one of the partners who had acted as trustee. There was some difference of opinion on the bench, but the great majority of the Court were agreed that the objection was well founded, and disallowed the claim of the firm. That was decided relative to the claim of a firm of law-agents. But in principle I am unable to see any good reason why the same rule should not be applied in the case of a mercantile firm; and upon the whole matter I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD ADAM.—The leading question in this case is whether Mr Walker, at the date when the sale of the mines was completed by their purchase by the Scottish Pacific Coast Mining Company, occupied a fiduciary position towards that company, by which sale Messrs Falkner, Bell, & Company are alleged to have made a profit of 35,000 dollars.

I think with Lord Mure and the Lord Ordinary that at that time there can be no doubt that Mr Walker was both a promoter and a provisional director, and that he subsequently became a director of the company. He is the person who introduced Mr Sutherland, the vendor, to the company. His name appears as a provisional director in the prospectus which was issued for the purpose of inducing parties to become shareholders in the company. Then, again, he signs the memorandum of association, and in the articles of association his name again appears as a director of the company, and Lord Mure has pointed out from the evidence of Mr Walker, that although Mr Walker did not at first know he was to be a provisional director, he saw his name printed in the prospectus, and after seeing it he adopted it, and allowed it to be circulated. That is just

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the same as if he had originally been a consenting party. It appears to me in the face of all that to be quite impossible to say that he did not occupy a fiduciary position towards the future company. Again, it appears to be pretty clear from the evidence which Lord Mure has read, that he was not only a provisional director, but he took an active part, as he himself says, in communicating with intending shareholders with the view of getting them to join the company, and if that is not conduct which one would expect from no one but an interested and active promoter, I do not know what is. I have therefore no hesitation in holding that Mr Walker acted as a provisional director and as an active promoter of the company.

The next important document is the provisional agreement between Mr Sutherland and the second parties, because that provisional agreement afterwards became the substantive agreement under which the purchase of this mine took place. It is an agreement between Charles Sutherland on the first part and certain parties on the second part (one of whom I find was Mr Walker), the purchasers of this mine. It appears therefore on the face of this document, which was afterwards carried out, that Mr Walker was beyond all question a purchaser of the mine from Sutherland, and then, that being so, what is his position with reference to the vendors?

At that time, and about that time there was no dispute at all; there was a subsisting agreement between Falkner, Bell, & Company, of which Mr Walker was a partner, and Mr Sutherland, that Falkner, Bell, & Company should have half the profit of the sale of the mine; and if that be so, it is clear upon the face of this document that he was both vendor and purchaser. He occupied these two totally inconsistent positions, and that being his position, it humbly appears to me that this case falls perfectly clearly under the principle of the case of the *Huntington Copper Company*, to which Lord Mure has referred. That being so, and his duty being to protect the purchasers against the vendors to the utmost extent of his ability, he was, from his pecuniary interest as vendor, not in a position in which he could properly fulfil his duties to his constituents, the purchasers. Upon that part of the case I confess I am clearly of opinion that there can be no doubt.

Now, it was argued to us with great force that although Walker was in a fiduciary position so far, he was relieved from that position by the fact that there was a clause in this provisional agreement by which it was remitted to five gentlemen, of whom he was not one, to determine whether or not the company should be incorporated and registered and the matter gone on with. But I confess I have been unable to see how that fact can relieve Mr Walker of his fiduciary position. It did not make him any the less a promoter or any the less a director. I cannot hold that the fact that a particular piece of business was not committed to him made him any the less a director. He was a director and remained a director of the company up to the date of its incorporation, and therefore I do not think that makes any difference in this case.

It is quite true, as Lord Mure has pointed out, that although he was not a member of that committee of directors charged with an official judgment of that kind, he, nevertheless, attended the meetings of the committee. I do not know how far he took part in the deliberations of the committee, or in regard to their official resolution to incorporate the company, but that is immaterial, and makes no difference in his fiduciary position.

There is a great deal of parole and other evidence upon this point, as to whether or not it is proved that Mr Walker communicated his position with reference to the vendor to his co-directors. The Lord Ordinary thinks it is not proved that he did so to any of the directors except Mr Menzies. Now, my view of the evidence on this point is, that it is entirely immaterial whether he did or did not communicate his position to his co-directors. What I think is material is, that he concealed his position,—that he was to make a profit out of the transaction,—from the company. Whether he concealed that, not from his co-directors, but from the company, is the question. In my opinion no amount of disclosure to his co-directors would relieve him from liability in respect of concealment from the company. It might have raised a very unpleasant question for the other directors, as to whether they also concealed their knowledge of Mr Walker's position from the company, and as to what the consequence of that might be to them, but I cannot see how the fact of his communicating his position to his co-directors can relieve him of liability. The question is whether this agreement between Falkner, Bell, & Company and Mr Sutherland was concealed from the company.

Now, I have no doubt that if this had been a question solely with Walker whether he was bound to repay the money—the profit which he thus made—there could only have been one answer. The only remaining question is whether, if Walker was in that position, his firm of Falkner, Bell, & Company are bound to repay it? Upon that question I think we are perfectly within the authority of the case of the *Imperial Mercantile Association* v. *Coleman*. That case decided, and I think quite rightly decided, that where parties in the position of a company are implicated in a breach of trust by one of its partners, and take the benefit of that breach of trust, they are just as much bound to repay any sum they may have got in that way as the individual partner whose active agency procured this money.

As for the knowledge of the firm of Falkner, Bell, & Company of the proceedings of Mr Walker from first to last, there can be no doubt. He was sent by the firm of Falkner, Bell, & Company to arrange this matter, and from first to last he kept them advised of these proceedings, and they knew of the breach of trust that was being committed, and therefore I think, as I have already said, that the case is entirely ruled by the *Imperial Mercantile Association* case.

The next question is whether it has been proved that this money was paid to the firm of Falkner, Bell, & Company, and that they got the benefit of it. The undertaking which was set forth in the prospectus was that Falkner, Bell, & Company, and their friends, should subscribe £10,000. It was not in accordance with the undertaking that they were to get paid-up shares or anything of that sort, but they were to subscribe £10,000. That was their undertaking. Now the money was paid in this way. The price of the mine was 400,000 dollars. Of that, 350,000 dollars was paid in cash or bills sent to Falkner, Bell, & Company; and of that 350,000 dollars, 330,000 were paid to the prior holders of the mine,—not to Mr Sutherland the vendor, but to the mortgagees of the mine,—and 20,000 dollars went in cash to Sutherland himself. Now, that left a sum of 50,000 dollars, equivalent to £10,309. That sum was expended in this way: 35,000 dollars was Falkner, Bell, & Company's share of the money, and the 15,000 which remained was Sutherland's. On 30th June 1881, the Pacific Company took up and paid for 1000 shares, of which £8, 10s. had been paid up. These 1000 shares cost 41,225 dollars, equal to £8500. Of these, by the direct orders of Falkner, Bell, & Company, 700 were afterwards registered in the name of Mr Harrison, one of their partners, for them, and at the request and order of Falkner, Bell, & Company. Now, these 700 shares so registered in Harrison's name cost £5950. There was thus left a balance of 8775 dollars or £1809; and what became of that was this,—by the order of Mr Walker on 31st May 1882 that £1809 was transferred from the books of the company where it stood at the credit of Falkner, Bell, & Company, to that of Mr Menzies, acting on behalf of a syndicate, to take up and pay for unsubscribed shares in the company.

It humbly appears to me that the 700 shares were paid for by the cash of the company by the order of Falkner, Bell, & Company, just as much as if they had ordered the Pacific Company to purchase shares in any other company for them and pay for them with the company's funds. These shares were purchased and stood at the credit of Falkner, Bell, & Company, being registered in the name of one of the partners of that firm. The £1809 was exactly in the same position, standing at the credit of Falkner, Bell, & Company in the books of the company, just as if it had been paid to Falkner, Bell, & Company, because it was paid to their order. That being so, I think it is impossible to dispute that this firm of Falkner, Bell, & Company had the benefit of or got this money, and the question therefore is, are they bound to repay it?

Now, if this had been a direct action by the Pacific Company against Falkner, Bell, & Company, I see no reason to doubt that they would have been bound to repay this money, which was profit obtained by them for the promotion of the company. And if they would have been bound to repay it, are not the company entitled to set it off against Falkner, Bell, & Company's claim on the bills? I confess that I entertain no doubt that the company are entitled to set it off.

LORD PRESIDENT.—I am entirely of the same opinion, and your Lordships have completely exhausted the grounds of judgment which are satisfactory to my mind.

LORD SHAND was absent.

THE COURT adhered.

DAVIDSON & SYME, W.S.—HENRY & SCOTT, S.S.C.—Agents.

MRS MARION CARLAW OR WALLACE, Pursuer.—*J. C. Thomson—Hay.* WEST CALDER CO-OPERATIVE SOCIETY, LIMITED, Defenders.—*Lord-Adv. Macdonald—Rhind.*

No. 57.

Jan. 18, 1888.
Wallace v. West Calder Co-operative Society, Limited.

Reparation—Damages for personal injury—Excessive damages.—A widow brought an action of damages for the death of her husband, resulting from personal injuries caused by the defenders. He was a builder by trade, and his whole income from that and other sources amounted to £150. The widow was left unprovided for. The jury awarded her £900. On a motion for a new trial the Court *held* the award excessive, and reduced it to £500.

1ST DIVISION.
Lord Lee.
B.

JOHN WALLACE died on 29th June 1887 from injuries received by his being thrown out of a car which collided with a bread van belonging to the West Calder Co-operative Society on 20th April previously. His widow subsequently brought an action of damages against the company, which was tried before Lord Lee and a jury, in November 1887, when a

No. 57.

Jan. 13, 1888.
Wallace v.
West Calder
Co-operative
Society,
Limited.

verdict was returned for the pursuer,—the damages being assessed at £900,—"being £800 as damages, and £100 as solatium."

The defenders afterwards obtained a rule on the ground of excessive damages.

It was proved at the trial that Wallace was a builder in West Calder, and that he also held the offices of inspector of poor and collector of poor-rates for Livingstone parish. His income was admitted to be £150 per annum from all sources. His widow, who was forty years of age, was left without means.

The pursuer in shewing cause argued that the amount of damages must be clearly exorbitant before the Court would interfere.[1] There had been cases where the Court had reduced such damages,[2] either where they had been on the face of them unreasonable, or where no substantial injury had been sustained, but the present was not one of these. In a recent case the Court had refused to set aside a verdict, where a father was awarded £400 for the death of his son—a lad of sixteen.[3]

The defenders argued that the deceased had not been engaged in any prosperous and increasing business,—particularly looking to the fact that £80 of his admitted income of £150 came from the public offices which he held. The £100 given as solatium was not objected to, but otherwise the amount given was practically double what it ought to have been.

LORD PRESIDENT.—The Court are of opinion that this is a very excessive award of damages, and of course if we were to give effect to this view in the ordinary way we should have to allow a new trial. But the parties are willing to leave the matter in our hands. The amount which the jury have given as solatium is not challenged, and therefore the sum we have to deal with is the £800. The Court are of opinion that this should be reduced to £400.

LORD MURE, LORD ADAM, and LORD LEE concurred.

LORD SHAND was absent.

THE COURT pronounced this interlocutor:—"In respect that the pursuer consents that the amount of damages found by the verdict of the jury shall be reduced to £500, discharge the rule for a new trial, and find the defenders entitled to expenses in connection with the application for and discussion upon the rule," &c.

BY a subsequent interlocutor on the same day the Court applied the verdict, and decerned for £500; and found the pursuer entitled to expenses in so far as not already disposed of.

W. & W. SAUNDERS, S.S.C.—ROBERT MENZIES, S.S.C.—Agents.

No. 58.

Jan. 19, 1888.
Strachan v.
Binnie.

WILLIAM STRACHAN, Objector (Appellant).—*Armour—Blackburn.*
DAVID BINNIE, Claimant (Respondent).—*Shaw.*

Election Law—Service Franchise—Inhabitant-occupier—Miner out on strike—Representation of the People Act, 1884 (48 *and* 49 *Vict. cap.* 3), *sec.* 3.—A miner who occupied a dwelling-house by virtue of his contract of employment having gone out on strike, his employer, on 24th August 1887, obtained decree of ejection. The decree had not been extracted, and he still occupied the house on 6th October 1887, when the Sheriff proceeded to consider his claim to be put upon the roll of voters. *Held* that having left the employment and suffered decree of ejection to go out against him, he was not in occupation by virtue of any right, and was therefore not entitled to be put upon the roll.

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[1] Landell v. Landell, March 6, 1841, 3 D. 819; Shields v. North British Railway Co., Nov. 24, 1874, 2 R. 126; Young v. Glasgow Tramway Co., Nov. 29, 1882, 10 R. 242.

[2] Johnston v. Dilke, June 16, 1875, 2 R. 836.

[3] M'Master v. Caledonian Railway Co., Nov. 27, 1885, 13 R. 252.

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Jan. 19, 1888.
Strachan v. Binnie.

Registration Appeal Court.
Lord Mure.
Ld. Craighill.
Lord Kinnear.
Sheriff of Linlithgowshire.

At a Registration Court for the county of Linlithgow, held on 6th October 1887, William Strachan objected to the name of David Binnie, who stood on the assessor's list of persons entitled to vote in the county, as "miner, tenant of house 80 Holygate," being placed on the roll of voters.

The Sheriff-substitute (Melville) repelled the objection, and the objector took a case.

The case bore,—"In the Valuation-rolls for the years 1886-7, and 1887-8, the said David Binnie is entered as 'inhabitant-occupier, not rated (48 Victoria, caput 3, sections 3 and 9),' of the house No. 80 Holygate, Broxburn, of which house the Broxburn Oil Company, Limited, are the proprietors.

"The said David Binnie was a miner in the employment of the said Oil Company, and occupied said house in virtue of said employment, on the condition that the rent thereof should be retained by the said company from his wages, and that he should remove therefrom on leaving the employment of the said company. A strike of the miners in the employment of the said Oil Company took place, and a summons was issued against him at the instance of the said Oil Company, upon which the Sheriff, on 24th August 1887, granted a warrant for removing and ejecting him from the said house—such ejection not being sooner than 1st September 1887. This warrant has not been enforced, and the said David Binnie still retains possession of said dwelling-house.

"The objection was that the said David Binnie, having left the employment or service of the said Oil Company, was not an inhabitant-occupier of the said house, in virtue of service or employment with the company; that having received notice to leave the said house, and a warrant of ejectment therefrom having been obtained against him, he was in illegal possession, and that he was not entitled to be on the roll.

"The Sheriff-substitute repelled the objection, on the ground that Binnie was an inhabitant-occupier of the house until a decree of ejection was carried out. . . .

"The question of law for the decision of the Court of Appeal is, Whether, in the circumstances stated, the said David Binnie is an inhabitant-occupier of the said house as a tenant within the meaning of the 3d section of the Representation of the People (Scotland) Act, 1884,* and as such entitled to be enrolled as a voter for said county for the current year?"

Argued for the appellant;—The Act of 1884 did not by its 2d and 3d sections create a new franchise. It extended the inhabitant-occupier franchise to a person who had his house as part of his wages under a contract of employment. The man must be tenant as well as occupier. Where, therefore, the employment ceased, and, with it, the right to the

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* The Representation of the People (Scotland) Act, 1884 (48 and 49 Vict. c. 3), sec. 3, enacts,—"Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed . . . to be an inhabitant-occupier of such dwelling-house as a tenant."

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Strachan v.
Binnie.

house, the right to the franchise, which was founded on these two facts, ceased also.[1] The mistake of the Sheriff-substitute was in holding that mere occupancy, irrespective of right, founded on the contract of service, was sufficient. The respondent's right to occupy had clearly ceased. He had gone out on strike, and his employer had desired him to leave and had obtained decree of ejection against him.

Argued for the respondent;—The respondent had occupied for twelve months prior to 31st July in virtue of his contract. He was still in occupation when the Sheriff came to consider his claim. If it were thought competent to go farther and look at the proceedings in the action of ejection, the case should be remitted for farther statement, as it would be shewn thereby that when the Registration Court was held the employer and the respondent, and others in a like position, were in treaty for a resumption of work.

The Court, on 23d November 1887, pronounced this interlocutor:— "Remit to the Sheriff to amend the case by stating first, whether he had found that the said David Binnie was an inhabitant-occupier of the house in question in respect of any right of tenancy vested in him at the date of the Registration Court, and if so, upon what title? secondly, the grounds in facts and law upon which the decree of removal was obtained; and thirdly, whether it was maintained before him that a contract of employment between the Broxburn Oil Company and the said David Binnie was still in subsistence at the date of the Registration Court, and if so, upon what ground."

The Sheriff-substitute, on 9th December 1887, stated,—"(1) That he found Binnie was an inhabitant-occupier of the house in question, and in possession of the house in respect of a contract with the Broxburn Oil Company that he should occupy the house, pay rent, and work for the company. Both parties were anxious that the contract should be carried out, and as soon as the strike was at an end Binnie would resume work. (2) The decree of removal was granted in a summary ejection case, which formed one of 121 that came up for decision. The facts varied in different cases. No note of the facts was made at the time, and therefore it is scarcely possible now to state accurately what took place in reference to this particular case. A copy of the record in the Court books is annexed. The recollection of the Sheriff-substitute is that the pursuer's procurator urged that Binnie had left the company's employment prior to 19th August last, and that in law the company were entitled, on that ground alone, to have him evicted. At the same time he said the company were anxious the defenders should return to their employment and remain in possession of their houses. In these circumstances the Sheriff-substitute, on 24th August 1887, gave decree of ejection, but superseded execution of the decree till 1st September 1887. (3) The Sheriff-substitute held that the contract still subsisted, and that there was no intention to eject Binnie, as the decree had not been extracted at the time the Court was held. Binnie might have brought a suspension of the decree, or have been reponed. The Sheriff-substitute did not hear counsel for Binnie."

An extract from the Sheriff Court books shewing what had taken place in the action of ejection was also laid before the Court. It shewed only that the action had been contested, and that the decree was extracted on 6th October.

On the Court resuming consideration of the case as amended, neither party desired to add further argument.

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[1] Smith v. M'Donald, Nov. 26, 1886, 14 R. 125.

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Lord Craighill.—In the present case we have to consider whether David Binnie has proved his right to be put upon the roll,—whether he had, at the time the Sheriff held his Registration Court the necessary qualification. The qualification founded upon here is that which is contained in section 3 of the Representation of the People Act, 1884 (48 and 49 Vict. c. 3, sec. 3), which provides that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act, and of the Representation of the People Acts, to be an inhabitant-occupier of such dwelling-house as a tenant." Now, it will be seen that this section is conditional. Two things must be established, the first that the person claiming has been for the requisite period an inhabitant-occupier, the second that he has occupied as tenant,—that is to say, under a contract of service. Tenancy and occupancy, the one as much as the other, must be established. Let us see what was the view of the Sheriff-substitute when he dismissed the objection. He says that he "repelled the objection on the ground that Binnie was an inhabitant-occupier of the house until a decree of ejection was carried out." There is nothing whatever about tenancy there, only inhabitant-occupancy is regarded. That is a misconception, and thinking so we sent back the case for amendment in order to have the other facts brought before us. The amendment made by the Sheriff-substitute states that he found "Binnie was an inhabitant-occupier of the house in question, and in possession of the house in respect of a contract with the Broxburn Oil Company that he should occupy the house, pay rent, and work for the company. Both parties were anxious that the contract should be carried out, and as soon as the strike was at an end Binnie would resume work." For a time, then, after the strike both parties were anxious that the contract should still subsist, but before the Registration Court was held one party had become dissatisfied with the contract, and was unwilling to go on with it. The Sheriff-substitute then says—(His Lordship quoted the second and third paragraphs of the amended case, as printed above). I think there is great difficulty about this ground of judgment. The ground on which the Sheriff-substitute proceeded was that the original contract by virtue of which Binnie entered on occupation was a contract existing at 6th October, the date of the Registration Court. He does not give any effect at all to the view that there was a strike. The contract had, I think, come to an end. The most general case is that a strike takes place either to obtain higher wages or to resist an attempt to reduce wages. These are sufficient causes, it may be, for a strike, but if the men retire from the employment and cease to do work or to earn wages, it is impossible to say that they continue parties to a contract by which they are to earn wages, pay the rents, and have the occupancy of the houses. That is a strong consideration, but not all, for on 24th August decree of ejectment was given. Now, we desired to know the facts which would shew whether at the date of the decree of ejection the contract was terminated. We thought that one way to obtain these facts would be to get the petition on which the decree proceeded. It seems that cannot be given, but a copy of the record in the Court books has been laid before us. From it we see nothing but the fact that decree was pronounced. This does not enable us to see what was the ground of the termination of the contract, for we do not have the ground on which the decree of ejection was granted. But, in my opinion, there need be no difficulty

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on that score. There could be no ground for the decree except that the contract was terminated. Any difficulty that could be raised on that score is met by the consideration that the *onus* is on the claimant to make out his case. He does not shew us any contract existing at the date of the Registration Court by which he is in tenancy as well as occupancy of the house. On the ground that tenancy is not made out, I am of opinion that we must sustain the objection and disallow the claim.

Lord Kinnear.—I am of the same opinion. I quite understand the view of counsel in thinking it unnecessary to add anything to the argument, for we had a full argument on the original case, and the amended case states no facts requiring further argument. The only difficulty lies in ascertaining what are the facts on which the question is to be decided, and the amended case does not remove that difficulty. It is essential to the supporting of the Sheriff's judgment that we be satisfied not merely that the claimant Binnie is in occupation, but that he is in occupation on a contract of employment. I agree with Lord Craighill that the *onus* lies on the claimant, and reading the case with that consideration in view I do not come to any conclusion but that the contract on which he held the house was put an end to by the claimant himself. He having done so his employer brought an action of ejection, decree in which was obtained, but the execution of the decree was for reasons I quite appreciate not to take place before 1st September, and had not in fact taken place at the date of the Registration Court. The question for the Sheriff at that Court on 6th October was whether the contract was still in force. The only conclusion I can come to is that the claimant was then occupying by tolerance, and not under any subsisting contract which bound either him or his employer.

Lord Mure.—I come to the same conclusion. The view of the Sheriff, both in the original case and in the amendment, refers to occupation only. He says that he put the claimant on the roll as an inhabitant-occupier, and he states nothing which meets the difficulty caused by the fact that the contract of employment appears to have terminated before the Registration Court was held. By section 3 of the Act of 1884 the basis of this franchise is service or employment. The statute gives it to a man who has the house in respect of his employment or service. The claimant had a house in respect of his employment with the Broxburn Oil Company. When he went out on strike he was no longer working in their employment. If he allowed decree of ejection, also, to go out against him, he lost right to the house. I was anxious when we remitted the case to the Sheriff to see what was the ground on which the decree of ejection proceeded. We have not ascertained that by any statement in the amended case, but it seems certain that it must have proceeded on the ground that the claimant was no longer in the employment. I therefore think that the qualification founded on is bad, and that the Sheriff was wrong in thinking that the claimant was entitled to remain on the roll merely because the "decree had not been extracted at the time the Court was held."

The third question put in our interlocutor sending the case for amendment is whether it was maintained before the Sheriff that a contract of employment between the Broxburn Oil Company and Binnie was still in existence at the date of the Registration Court, and if so, upon what ground. The amended case does not answer that. The Sheriff says that "Binnie might have brought

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a suspension of the decree, or have been reponed." It may be he might have brought a suspension, but I much doubt as to the reponing, for I see that both the company and he were represented by agents in the ejection process.

I think that when the contract ceased the right to be put on the roll ceased also.

The Court sustained the appeal, and remitted to the Sheriff to expunge from the roll the name of the respondent.

Russell & Dunlop, W.S.—R. R. Simpson, W.S.—Agents.

No. 59.
Jan. 24, 1888.
Taylor's Trustee v. Paul.

George S. Caird (Taylor's Trustee), Appellant.—*Low.*
William Paul, Respondent.—*Balfour—Ferguson.*

Process—Appeal—Competency—Cessio—Debtors (Scotland) Act, 1880 (43 *and* 44 *Vict. cap.* 34).—An interlocutor by a Sheriff in a process of *cessio* under the Debtors Act, 1880, reviewing a trustee's deliverance, and ranking a claimant, may competently be appealed to the Court of Session.

Lease—Sequestration—Compensation—Balancing accounts in bankruptcy.—A tenant under an agricultural lease for nineteen years, having during its currency granted a disposition *omnium bonorum,* the trustee declined to adopt the lease, but entered into an agreement with the landlord whereby, on the narrative that it was expedient to arrange for laying down the crops for the current year, he continued the occupation of the farm till the following Whitsunday. By a second agreement the landlord agreed to take over and pay for certain articles which were on the farm at a valuation. These articles having been valued, the landlord sought to compensate the claim against him for their value by a debt due to him by the tenant, for which he could only rank as an ordinary creditor. *Held* that the debt due by the landlord had been incurred subsequently to the tenant's bankruptcy, and could not be compensated by the debt incurred by the tenant prior to bankruptcy.

1st Division.
Sheriff of Aberdeen, Kincardine, and Banff.
M.

On 26th January 1887 decree of *cessio* was pronounced in the Sheriff Court of Stonehaven, on a petition at the instance of William Taylor, farmer, Muchalls, Kincardineshire, and his estates were transferred under the Cessio Acts to a trustee for behoof of his creditors. He was at that time tenant of the farm of Blackbutts, on the estate of Muchalls,—of which Dr John Milne's trustees were proprietors,—holding under a nineteen years' lease from Martinmas 1873 at a yearly rent of £100.

The lease was granted subject to the conditions, stipulations, and reservations contained in the general regulations applicable to the estate of Muchalls, which by article 9 provided that the straw forage and green crops should be used on the farm, and by article 10, *inter alia,* that at the end of the lease the outgoing tenant should receive from the incoming tenant the value of the ploughing done by the former preceding the term of his removal, but not the value of the land as for a crop. There was also provision for valuing the away-going corn crop and the first year's grass, if the incoming tenant desired to have these. The 10th article also bore:—"The outgoing tenant shall leave at his removal the whole dung prepared during the preceding year, and the value thereof, which shall be ascertained as aforesaid, shall be paid to him by the incoming tenant. The incoming tenant shall have liberty to sow grass seeds with the outgoing tenant's last grain crop, which the latter shall harrow in and roll out without payment." Upon the lease was written,—"8th May 1876.—The proprietors agree to take over by valuation at the end of the lease the threshing-mill on the farm of Blackbutts, if it shall then be in good order and condition, and suitable for the farm. William Paul, for Dr Milne's Trustees."

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In February 1887 a minute of agreement was entered into between Mr George S. Caird, the trustee on Taylor's estates, and Mr William Paul, factor for Dr Milne's trustees, as follows:—"The said first party, as trustee foresaid, has intimated that he is not to continue the possession and occupation of said farm of Blackbutts, or to adopt said lease, and it is consequently expedient that an arrangement should be made for the laying down of the grain crops for the present year: Therefore the said George Scott Caird . . . and the said William Paul . . . hereby contract and agree, under reservation of the right of hypothec of the landlords for the rent of said farm for the crop of 1886, for which sequestration was used on or about the 8th day of December 1886, and of their further right of hypothec for the rent of said .farm, payable at Martinmas 1887, and Whitsunday 1888, for crop and year 1887, in so far as the same may be exigible, and subject always to the provisions and stipulations contained in the 10th article of the general regulations and conditions of the estate of Muchalls, . . . and all action competent thereanent, as follows: —(First) that the said first party hereto shall, as trustee foresaid, continue in the occupation of said farm of Blackbutts until the term of Whitsunday next, when he shall remove therefrom as outgoing tenant in manner provided in the said general regulations and conditions, and shall have all the privileges of an outgoing tenant as if the lease had then come to its natural termination; (second) that in the preparation of the ground for the crops of 1887 the first party hereto shall observe the regulations above mentioned, and perform the necessary work in an efficient manner, and lay down the crops at the sight and to the satisfaction of the ground officer on the estate; and (third) that the said first party shall grant at his expense, if required by the said second party, a formal and valid renunciation of said lease in favour of the said proprietors as at and from the term of Whitsunday 1887."

In May 1887 a second minute of agreement was entered into between the same parties under which, after narrating the obligation in the lease on the tenant to leave the houses in good repair, two referees were appointed to inspect the houses on the farm, and to state what sum, if any, would be required to put them into the condition stipulated in the lease, "which sum shall form the amount of the said second party's claim as an ordinary creditor against the said William Taylor's estate." The arbiters were also to value certain articles which were to be taken by the proprietors at a valuation, viz:—"(First) the threshing-mill, water-wheel, and machinery; (second) the whole gates, wire and wood fences on the farm, with the pumps; (third) the berry bushes in the garden; (fourth) the whole dung and manure at present on the farm, or which may yet be made from the current year's crop; (fifth) the grass and clover seeds sown with the last or present year's crop; (sixth) the ploughing and labour employed on the land in preparation for green crop."*

Mr Paul, for the landlords, lodged two claims in Taylor's sequestration, —(1) A preferable claim for £104, 19s. 7d.; and (2) an ordinary claim for £328, 14s. 2d., from which he proposed to deduct £108, 7s. 6d., being

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* In accordance with that provision the arbiters valued the following subjects:—(1) Grates in house; (2) pump and flag-staff; (3) garden produce; (4) 27 cattle bindings, at 6d. each; (5) the whole fencing on the farm, gates, and two iron gates; (6) threshing-mill; (7) 139 cubic yards 3 feet dung, at 5s. 2d. per yard; (8) ploughing of upper field turnip land, at 18s. per acre; (9) ploughing and labour of field beside houses, at 30s. per acre; (10) green dung. There were certain other charges which need not be specified,—the valuation amounting in whole to £108, 7s. 6d.

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the sum due to the trustee upon the valuations carried out in terms of the minute of agreement second above mentioned, thereby leaving as the amount of the claim the sum of £220, 6s. 8d.

Upon the second branch of the claim the trustee pronounced the following deliverance,—"The trustee is of opinion that the claimants are not entitled to take credit, or to plead compensation, in respect of their claim against the bankrupt for the said sum of £108, 7s. 6d., and thereby to obtain an illegal preference to the prejudice of the other creditors, and the trustee hereby disallows and rejects the said deduction of £108, 7s. 6d., and *quoad ultra* admits the claim as stated at the sum of £328, 14s. 2d. for a dividend." The trustee stated that he held that the £108, 7s. 6d. should be set against the preferable claim for £104, 19s. 7d., and the balance paid over to him, and he accordingly rejected the preferable claim *in toto*.

Mr Paul having appealed, by letter addressed to the trustee, against the ranking, the Sheriff-substitute (Brown) on 16th November 1887 pronounced this interlocutor:—"Having heard parties on the appeal of Mr Paul against the trustee's ranking, makes avizandum therewith"; and on 26th November 1887 he further pronounced this interlocutor:—"Having considered the cause, recalls the deliverance of the trustee: Finds (1) that the claimant, William Paul, is entitled to be ranked preferably on the bankrupt's estate for the sum of £104, 19s. 7d., in terms of his claim No. of process; (2) that the said William Paul is entitled to compensate the amount of the valuations under the minute of agreement, submission, and award referred to by the trustee in his deliverance, by his claim for arrears of rent, amounting to £328, 14s. 2d., and to be ranked as an ordinary creditor for the balance of £220, 6s. 8d., in terms of his claim No. of process: Remits to the trustee to rank the claimant accordingly, and to make up a new list of ranking," &c.*

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* "NOTE.—The circumstances under which this bankrupt estate is in process of being extricated are somewhat peculiar, and to that I am disposed, in a large measure, to impute the error which I think the trustee has made in dealing with the landlord's claim. The position which the trustee takes up is that the valuations due under the lease and the relative regulations of the estate, which have been liquidated by arrangement between the parties, are both by law and covenant payable to him, and that no concourse between landlord and tenant having existed prior to bankruptcy, his duty requires him to retain these sums for division among the general body of creditors.

"Apart from covenant with the trustee, there seems to be no doubt of the extent of the landlord's right. He is entitled to set off arrears of rent against any liquid claim of his tenant, and as the right to set off passes against assignees, legal or voluntary, and as a trustee in bankruptcy takes the estate *tantum et tale* as it was vested in the bankrupt, the landlord was in a position to enforce his claims, whether he were settling with the trustee or as incoming tenant. The landlord's right rests on the general principle that claims arising *hinc inde* on a consensual contract may be compensated, and it has been quite decisively established that the effect of bankruptcy is to strengthen the plea of compensation in the mouth of the landlord. In balancing accounts in bankruptcy, Mr Bell (Com. vol. ii. 7th ed. p. 122) says that if one party have failed, and a demand be made upon the other, he will not be obliged to pay the liquid debt, and come in as a creditor only for a dividend, and that is precisely the case here. It appears to me, therefore, that the equitable obligation to permit the landlord to set off claims arising under the lease is a burden on the bankrupt's estate, which the creditors are not entitled to get rid of without the landlord's express consent.

"But the landlord, instead of having lost or compromised the rights which

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The trustee appealed to the Court of Session.

The respondent objected to the competency of the appeal, and argued;—There was no provision for appeal in the Debtors Act of 1880, and the Act of Sederunt of 22d December 1882, which introduced machinery for the working of the Act, only gave a right of appeal from the trustee to the Sheriff, who was to hear the case summarily.* Sec. 7 of the Debtors Act carried one back to the previously recognised procedure under the Cessio Act of 1834 (6 and 7 Will. IV. cap. 56), and the Sheriff Courts Act of 1876 (39 and 40 Vict. cap. 70). But under these Acts no judgment was appealable after the final one giving decree of *cessio*.[1] After that the debtor retired from the process, and the administration of the estate commenced, there being no provision for appeal. Such a proceeding as the present was outwith the petition for *cessio* altogether. This view was confirmed by the provisions of the 5th and 11th sections of the Bankruptcy and Cessio Act, 1881 (44 and 45 Vict. cap. 22). It was the

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the law gives him by negotiations with the trustee appears to me to have most carefully safeguarded these.

"On entering upon his office the trustee found a lease with several years to run, and at once intimated his intention not to continue the tenancy, and on that view there is no doubt he did not adopt the lease. But he proceeded, no doubt with the intention and result of doing the best for the creditors, to invite the landlord to concur in his taking another crop, and having certain claims arising under the lease and the regulations of the estate liquidated, stipulating at the same time that he was to have the privilege of an outgoing tenant, as if the lease had come to a natural termination as at Whitsunday 1887; and in that sense it appears to me that the claimant is perfectly right in his contention that the trustee did adopt the lease. The effect of that adoption was very beneficial to the creditors, for it gave the trustee the benefit of a large deduction of rent; but apart altogether from the question as to who took most advantage from the agreement into which the parties entered, it appears to me that that had the effect of operating not a surrender, but a ratification of the landlord's right. The error into which I conceive the trustee has fallen is in forgetting that the lease is the measure of the rights of parties in regard to all claims arising under it, and he has accordingly misinterpreted the negotiations with the landlord, the effect of which, in my opinion, is very wide of ousting his rights.

"There is no dispute as to the landlord's preferable claim, the only question being whether the landlord is entitled to impute the valuations *pro tanto* to extinguish his unsecured debt arising from arrears of rent, and the mistake which the trustee makes is in assuming, in taking up the estate or transacting about it, that the concourse which lies at the root of the plea of compensation lies between him and the landlord, instead of being, as it is, between the latter and the tenant."

* The 11th section of the Act of Sederunt provided,—" . . . The debtor or any creditor (notice having been given as above provided) shall be heard orally in support of objections to the trustee's deliverances, admitting in whole or in part claims, and any creditor may in like manner be heard in support of his objections to the rejection in whole or in part of his own claim, and the Sheriff shall, if desired by the trustee, or by the debtor, or by any creditor, make a note of such objections, and of the answers made thereto . . . and on a *viva voce* hearing, and after such proof, if any, as he may allow (which proof shall be recorded if desired by the trustee or by the debtor or by any creditor) shall dispose of the objections summarily, and settle the rankings of the creditors. The debtor shall be bound to submit at the second meeting to such further examination relative to his affairs as the Sheriff may appoint . . . ."

[1] Adam v. Kinnes, Feb. 27, 1883, 10 R. 670; Galbraith v. Ritchie, Dec. 6, 1856, 19 D. 136, 29 Scot. Jur. 45.

policy of the statutes that the Sheriff's judgment should be final in the winding up of small estates, and where an estate was of large amount the 11th section of the last mentioned statute provided for the *cessio* being turned into a sequestration under the Bankruptcy Acts.

Argued for the appellant;—The object of the Cessio Acts prior to 1880 was to grant protection to the debtor against imprisonment. Under the Act of that year the process of *cessio* became a process of distribution. It gave a creditor power to petition for *cessio* at his own instance, and provision was made for the appointment of a trustee. The new process was one of sequestration for small estates, and looking to the terms of the Act of Sederunt of 1882 it was clearly in the contemplation of the Court that there should be an appeal from the Sheriff just as there was in sequestration processes under the Act of 1856. Further, the 4th subsection of the 9th section of the Act of 1880 (quoted *infra* in the Lord President's opinion, p. 318) favoured this view. The only question, therefore, was whether the Sheriff had disposed of the whole merits of the case. The interlocutor clearly disposed of the whole merits as between the present claimant and the trustee, and that was sufficient.

Further, it would be most inexpedient that there should be no appeal, looking to the new importance of the process of *cessio*.

LORD PRESIDENT.—No one can read the interlocutor which it is now sought to bring under review without seeing that it is a judgment pronounced in a process of distribution of a bankrupt estate. The interlocutor would have been very much in the same terms if the estate had been under process of distribution in terms of the Bankruptcy Act of 1856. But it is not under that Act that the present process is brought. It is brought under the Debtors Act of 1880, which provides among other things for a considerable extension of the old process of *cessio bonorum*.

The Debtors Act of 1880 is very imperfect in itself as regards the details necessary for working out a process of distribution, and it has been supplemented by the Act of Sederunt of 1882. It is under the combined operation of the Act and the Act of Sederunt that this process is going on, and that the Sheriff-substitute is enabled to pronounce the interlocutor now under review. If the Act of Sederunt had not been passed I do not see how the Sheriff could have possibly pronounced the interlocutor, and yet that seems to suggest the very great anomaly that he receives his jurisdiction from the Act of Sederunt instead of from the statute. That is just one of the consequences of such legislation as we see before us in the Act of 1880, which professes to introduce a process of distribution as part of a process of *cessio*, and yet contains no machinery for carrying that process into effect.

This Court was of opinion that under various Acts of Parliament power was given to them to make regulations regarding proceedings in processes of *cessio*, and to introduce machinery for the purpose of giving effect to the declaratory provisions of the statute. Accordingly regulations were drawn up in the Act of Sederunt, which we must assume it was in the power of the Court to pass, as nearly as possible in accordance with the regulations provided in the Bankruptcy Act of 1856 for working out that Act. For instance, it is provided in the 6th section of the Act of Sederunt that "the rules of the Bankruptcy (Scotland) Act, 1856, regarding the nature and form of affidavits, or claims of creditors for ranking, and the valuation of securities and deductions to be made, and regarding the documents of debt to be produced therewith, shall, *mutatis mutandis*,

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apply to claiming and being ranked for dividends in processes of *cessio*." Then there is in the 7th section a provision for the way in which affidavits and claims are to be made, and as to the time when this is to be done; and there is further provision for what is to be done in contemplation of what is called a second meeting, at which all the objections are to be brought up and disposed of by the Sheriff under the 11th section immediately following. It is provided by that section that the Sheriff shall hear parties upon the trustee's deliverance, and shall dispose of the matter summarily, and shall settle the ranking of creditors—that is, he shall dispose of all the claims and objections and the deliverances of the trustee. Nothing is said as to whether the Sheriff's interlocutor is to be final, or whether it is to be subject to appeal, and I think the reason of that is very obvious, because this Court has no power by Act of Sederunt either to confer a right of appeal or to take it away. If it existed before, it remains, and if there was no right of appeal before the Act of Sederunt, then it cannot confer it.

But the deliverances or judgments or interlocutors of a Sheriff pronounced in a process of distribution of a bankrupt estate are all appealable under the Bankruptcy Act of 1856. And even prior to the passing of that Act all deliverances of a trustee were appealable to this Court,—I mean before sequestration processes were appointed to be sent to the Sheriff at all.

So that the class of cases to which the present process belongs were always in use to be brought to this Court on appeal from the deliverance of the trustee, and subsequently to 1856 they were in the first place taken to the Sheriff, who for the first time had jurisdiction in them under the Act of 1856. Accordingly, unless that right of appeal has been taken away, it must still exist. It is no sufficient answer to say that it is provided by the Act of Sederunt that the proceedings before the Sheriff are to be summary—that is not enough. The most summary proceedings are subject to appeal, and the more summary they are the more necessary it appears to be to have a right of appeal in order to prevent abuse. That argument, in my opinion, has nothing to do with the existence of a right of appeal.

But we must look at the Act of 1880, and see what it says on the subject of appeal, because there is in it a section which is obviously intended to give a right of appeal, and whether it is limited to any particular class of interlocutors under that statute or not, or is to be extended to all interlocutors, decrees, and judgments which may competently be pronounced under that Act of Parliament. I am not disposed to admit that the 4th subsection of section 9 of that Act is necessary for the sustaining of the competency of this appeal, but I think the appeal is competent, because the right of appeal has not been taken away. Subsection 4 of section 9 provides that "any judgment or interlocutor or decree pronounced in such petition" (*i.e.* a petition of *cessio* brought under this Act) "may be reviewed on appeal in the same form, and subject to the like provisions, restrictions, and conditions as are by law provided in regard to appeals against any judgment or interlocutor or decree pronounced in any other process of *cessio bonorum.*" It must be kept in view that this Act plainly contemplates that a process of *cessio* shall be in itself a process of distribution. I do not see how it is possible to say that a right of appeal given there against any judgment or interlocutor or decree pronounced in a process of *cessio*, including a process of distribution, can be restricted to any one class of judgment. The language is in itself quite sufficient to entitle a party to say that he is entitled to appeal against any interlocutor or judgment or decree that may competently be pronounced in the process. It appears to me that on this ground the present appeal is competent.

LORD MURE.—I am of the same opinion. Claims in processes of *cessio* may now be made on affidavits, in the same way as in a sequestration process under the Bankruptcy Act of 1856. This is done under the Debtors Act of 1880, by which a process of *cessio* is made a process of distribution, and the machinery for giving effect to the provisions of the Act is supplied by the Act of Sederunt of 1882, as explained by your Lordship. The clauses were referred to in the course of the discussion, and it is under the 11th section of the Act of Sederunt that claims which have been made and dealt with by the trustee may be objected to and brought under review. Parties, it is provided, may be heard orally upon those claims, and I may observe that Mr Paul's appeal is contained in his letter addressed to the trustee, and that the interlocutor of the Sheriff-substitute of 16th November runs,—"Having heard parties on the appeal of Mr Paul against the trustee's ranking," makes avizandum, and on the 26th of November he recalls the deliverance of the trustee.

The question is whether the Sheriff-substitute's interlocutor, pronounced under this 11th section of the Act of Sederunt, is appealable. It appears to me plain that it is, because the 4th subsection of the 9th section of the Debtors Act, 1880, provides that "any judgment or interlocutor or decree pronounced in such petition may be reviewed on appeal in the same form, and subject to the like provisions, restrictions, and conditions as are by law provided in regard to appeals against any judgment or interlocutor or decree pronounced in any other process of *cessio bonorum*." We are thus referred back to the earlier Acts, and among them to the Sheriff Courts Act of 1876, which deals with processes of *cessio* by its 26th section. The 4th subsection of that section enacts that "judgments or interlocutors pronounced in such actions shall be reviewed on appeal in the same form, and subject to the like provisions, restrictions, and conditions as are by law provided in regard to appeals against any judgment or interlocutor pronounced in any other action in the Sheriff's ordinary Court. . . ." Now, the Sheriff's interlocutor of the 26th November is a final judgment relative to Mr Paul's claim in the process. It is no doubt pronounced in an incidental proceeding for the distribution of the estate; but it has been pronounced in a process of *cessio*, and as the judgment is final it is, I think, appealable under the provisions of the recent statutes.

LORD ADAM.—My view is that the interlocutor of the Sheriff-substitute, which is now appealed against, is a competent interlocutor pronounced in a competent process in the Sheriff Court. The action is one subject to the ordinary rules applicable to cases in the Sheriff Court, except in so far as these are competently altered and modified by statutory provision.

The question is whether the Act of Sederunt of 1882 has taken away the right of appeal which, but for it, would undoubtedly have existed. I do not think that the right could competently have been taken away by an Act of Sederunt, and I do not think the Court in passing that Act endeavoured to do what they could not competently do.

This, therefore, being an interlocutor which disposes of the whole merits of the case between the parties in the competition, is a final interlocutor in the process, and being so it may be appealed, and accordingly I think the present objection ought to be repelled.

LORD SHAND was absent.

THE COURT accordingly repelled the objection to the competency.

On the merits, argued for the appellant;—The landlord was not entitled to set off the amount of his ordinary claim against the £108, 7s. 6d. due by him as the amount of the valuations under the agreements. The question was whether the debt due by him arose before or after the bankruptcy, because if it arose after it the Sheriff was clearly wrong. There was no irritancy upon bankruptcy under the lease, and a disposition *omnium bonorum* operated an assignation of the lease to the trustee. If assignees were not expressly excluded by the lease, then it was only in the event of the landlord objecting that exclusion was effected. The Sheriff-substitute had dealt with the case as if the lease came to an end on the 26th January 1887, when the decree of *cessio* was pronounced. The lease really subsisted until the minutes of agreement were entered into, but they put an end to it, and it was in virtue of them that the claim for £108, 7s. 6d. against the landlord came into existence. The lease not having been adopted by the trustee came to a premature termination by the agreements. The trustee might no doubt be said to have taken up the lease to a limited extent, but that was only for the purpose of granting a renunciation of it, and subject to the modification introduced by the agreements. A debt incurred by the landlord to the trustee after bankruptcy, and in terms of an arrangement subsequently entered into, could not be compensated by a debt incurred by the tenant to the landlord while the tenant was lessee. Besides, the fact that the landlord came under an obligation in the lease to take over certain articles could not prevent other creditors from attaching them. The stipulation in the lease about a valuation was really in the tenant's favour, but viewed as in the landlord's favour it was one of a purely personal nature.[1] The provision in the agreement regarding the dung illustrated the position, for after the decree of *cessio* was pronounced there was no obligation on the landlord to pay the tenant its value.

Argued for Mr Paul;—The trustee took over the bankrupt's estate *tantum et tale* as it existed in the bankrupt. While there was not such an adoption on the part of the trustee as to infer a contract on his part which was to continue till the end of the lease, there was a limited adoption to the extent of his intromitting with the subject of the lease, and he was liable for its obligations apart from the agreements subsequently entered into.[2] He was entitled to wind up the lease, and a reasonable period was allowed for this purpose. The items dealt with under the valuation all arose under the lease, and the agreements all depended upon it.

LORD PRESIDENT.—In this case the respondent, Mr Paul, as representing the bankrupt's landlords, has a preferential claim against the bankrupt estate for £104, 19s. 7d. About that there is no dispute, and it is unnecessary to take it into account. But besides the preferential claim, there is also a claim for £328,

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[1] Stewart v. Rose, 1816, Hume's Dec. 229.

[2] Munro v. Fraser, Dec. 11, 1858, 21 D. 103, 31 Scot. Jur. 70; Kirkland & Sharpe v. Wilson & Son's Trustee, May 17, 1831, 9 S. 596, affd. March 1, 1833, 6 W. & S. 340; Murdoch on Bankruptcy (4th ed.), 92.

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14s. 2d., which it is conceded can only obtain a ranking as an ordinary debt. But the landlords' representative says that he is owing the estate of the bankrupt a sum of £108, 7s. 6d., being the amount of the valuation of certain articles upon the farm, and that upon the ordinary rules of balancing accounts in bankruptcy he is entitled to set the one sum against the other, so that he shall obtain credit in full to the extent of his counter claim, and rank for the balance of £220. If the ordinary rules of balancing accounts are applicable, then that contention is well founded. But the whole matter seems to me to turn upon that consideration, the question being whether the sum of £108, 7s. 6d., which the landlord admits he owes, is a debt which existed at the date of the bankruptcy, or is one of a different description. In the latter case, there will be no balancing of accounts, in the former there may be.

The inquiry which we have to make is how and when did the debt come into existence? I think the answer must be that it came into existence in consequence of two minutes of agreement between the landlords and the trustee under the *cessio*. The trustee might have adopted the lease of the bankrupt tenant with the assent of the landlords, and in that case he would have become personally tenant for the unexpired period of the lease. But he did not do so. On the other hand, it is contended that all that the trustee did was to enter into possession of the farm, and to intromit with it for the purpose of winding up the lease. There have been many cases in which difficult questions have arisen as to whether there has been adoption of a lease or not, and the solution of them has generally depended upon the conduct of the parties after the bankruptcy takes place. From the conduct of the parties we have frequently had to spell out whether there has been adoption or intromission. But there is no such question here, because the whole matter was arranged between the landlords and the trustee in two distinct written agreements. Accordingly, the question is determined by reference to these agreements without going any further.

By the first of them it is set out that the first party, the trustee, has intimated that he is not to continue the possession and occupation of the farm, or to adopt the lease, and that it is consequently expedient that an arrangement should be made for the laying down of the grain crops for the present year. That statement is to be taken with a certain qualifying provision which follows, because it is agreed that the trustee as trustee shall continue in the occupation of the farm until the following Whitsunday, when he shall remove therefrom in manner provided in the general regulations and conditions, and shall have all the privileges of an outgoing tenant as if the lease had come to its natural termination. Secondly, it is provided that in preparing the ground for the crops of 1887, he shall observe the estate regulations and perform the necessary work in an efficient manner, and lay down the crops; and thirdly, that if required, he shall grant a formal and valid renunciation of the lease at the term of Whitsunday following.

I do not think there can be any doubt about the meaning of that agreement, and that the lease was to be put an end to at the following Whitsunday. Accordingly, there was no adoption of the lease in any proper sense of the term, although there undoubtedly was a continuation of possession and a certain limited adoption for the purpose of putting an end to the lease, and the trustee agrees to do certain things up to Whitsunday in the way of cultivating the farm. He bound himself personally and not the bankrupt, and the landlords,

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on the other hand, bound themselves to the extent that they undertook to give the trustee the privileges of an outgoing tenant.

Accordingly, a second minute of agreement is entered into for the purpose of settling what these privileges are to be, and providing that the landlords were to take over certain things at a valuation. It is needless to go into a specification of these items. But taking both agreements together, it is very clear that what the trustee and the landlords undertook were new obligations which did not exist before these agreements were executed, and which could not have come into existence but for the agreements, which were entered into subsequent to the tenant's bankruptcy. That is sufficient to shew us that the debt incurred by the landlords for the price of the things which they took over was a debt incurred under the agreements, and in following them out, and was non-existent at the date of the bankruptcy. I do not go into details; it is enough to say there are matters dealt with which could not have been brought into a settlement between the landlords and the trustee at the end of the lease. The important thing is that they are brought into existence while the process of division is going on, and subsequent to the date of the bankruptcy.

There is no room, therefore, for applying the principle of balancing accounts, because the £108, 7s. 6d. never was due to the bankrupt. It is a debt due to the trustee personally. No doubt the trustee is acting for the creditors in the matter, but what I mean is that the contract was one between the landlords and the trustee, with which the bankrupt had nothing to do.

I therefore think that the Sheriff has mistaken the nature of the case, and has applied the principle of balancing accounts in a case where it is entirely inapplicable, and that the trustee has taken the proper view of the case.

LORD MURE.—The respondent, as factor for the landlords, has admittedly a preferable claim on the bankrupt estate for £104, 19s. 7d., and it is not disputed that he has also right to rank as an ordinary creditor for £328, 14s. 2d. of arrears of rent. But the main question is whether the respondent is entitled before ranking to deduct from this £328 a sum of £108, 7s. 6d., which he has undertaken under a separate agreement to pay to the trustee, and then to rank for the difference, and so in effect to obtain a preference for that sum. I am of opinion that he is not entitled to make this deduction, and that for the reasons which have been so distinctly laid down by your Lordship.

At the date of the *cessio* several years of the lease had still to run. It was accordingly necessary for the trustee to make arrangements for the remainder of the lease, and that is made matter of express stipulation between the landlords and the trustee in the first of the two agreements which have been under our consideration. If the matter had stood upon that agreement alone, there could have been no question that the ranking as an ordinary creditor would have been for the £328. The lease would have been renounced in terms of the agreement, and the claim for £108, 7s. 6d. would not then have arisen. But after it was agreed that the lease should be renounced it was sometime afterwards arranged by the second minute of agreement that certain articles on the farm should be taken over by the landlords at a valuation, the price falling to be paid to the trustee under the obligations to that effect undertaken by the respondent in that agreement. Now, this, in the view I take of the case, was the creation of a new debt, and in compliance with the express provisions of that arrangement the amount of the valuation must be paid to the trustee, and

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credited to the general assets of the bankrupt estate. I see no good grounds in law on which the landlord can claim to set this sum off as a deduction from the amount of his claim as an ordinary creditor on the estate. The sum must, I think, be paid to the trustee, and will thus go to swell the amount of the general bankrupt estate, out of which the landlords will be entitled to rank with the other creditors for the £328 of arrears.

Lord Adam.—The question is whether the £108, 7s. 6d. was a debt due to the bankrupt prior to his bankruptcy, although liquidated only after the bankruptcy, or a debt due to the trustee and arising after bankruptcy. If it was the former, there is no doubt that the landlords may set off their obligation in this respect against the tenant's obligations to them; if, again, it was the latter, then there was no *concursus debiti et crediti.*

If the trustee in this case had taken the course open to him at common law, and had not entered into the minutes of agreements which have been before us, the present claim could never have arisen. It was open to him either to abandon the lease, or, on the other hand, to adopt it, in either of which cases his claim would have been a very different one from the present. But he took neither of these courses. He entered into the agreements, and it is under these that this debt of £108, 7s. 6d. has arisen. That being so, it is clear that the debt is due by the one party under the agreements to the other; it is due by the landlords to the trustee, and not to the bankrupt, who was no party to these. The case is not at all such a one as was put by Mr Balfour of an adoption of the lease by the trustee for the purpose of winding up. Under the agreements the parties undertook positive and substantial obligations to each other, for which they were liable in damages to each other if they failed to fulfil them. But that was not adoption for the purpose of winding-up. The obligations arose under agreements to which both were parties, and the landlords cannot set off their liability under the agreements against a debt which was due to them by the bankrupt prior to the execution of the agreements.

Lord Shand was absent.

The Court pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute of date 26th November 1887: Affirm the deliverance of the trustee, and decern: Remit the proceedings back to the Sheriff," &c.

Todd, Murray, & Jamieson, W.S.—Gordon, Pringle, Dallas, & Co., W.S.—Agents.

No. 60.

Jan. 24, 1888.
Forbes v. Aberdeen Harbour Commissioners.

Gordon Forbes, Pursuer (Appellant).—*Ure.*
Aberdeen Harbour Commissioners, Defenders (Respondents).—*C. S. Dickson.*

Reparation—Precautions for safety of public—Pond in place accessible to public.—Harbour commissioners in reclaiming land from a river bed in the immediate vicinity of the harbour left a piece of water, about half-an-acre in extent and in some parts over six feet deep, unfenced at a place to which the public had free access. As a boy of sixteen was amusing himself at this place, by floating on a raft which he had made, he fell into the water and was drowned. In an action of damages raised by the boy's father against the harbour commissioners *held* that no fault had been proved on the part of the defenders, and, therefore, that they were not liable in damages.

No. 60.

Jan. 24, 1888.
Forbes v. Aberdeen Harbour Commissioners.

2d Division.
Sheriff of Aberdeen.
I.

Gordon Forbes, Cove, Kincardineshire, raised an action in the Sheriff Court at Aberdeen against the Aberdeen Harbour Commissioners to recover damages for the death of his son, who had been drowned on 28th June 1885 in a piece of water near the harbour on the property of the Harbour Commissioners.

The pursuer averred that the place where his son was drowned was wholly unfenced and unprotected, and was very dangerous, and that, "being within a few yards of public thoroughfares, it was readily accessible to the public on all sides."

The pursuer pleaded, *inter alia*;—(2) The defenders having failed to protect and fence the said hole, which was very dangerous, and to which they gave unrestricted access, they are liable in any consequences that may arise therefrom.

The defenders stated that the piece of water was about half-an-acre in extent, and that on the morning of the day when the accident happened the deceased and another lad had been amusing themselves by floating on rafts which they had formed from logs and planks lying in or near the water, and that the deceased when thus engaged had fallen in and been drowned.

The defenders pleaded, *inter alia*;—(3) The area of water referred to not being situated in close proximity to a public thoroughfare, the defenders were not bound to take any extra precautions in the way of fencing. (4) The deceased's own recklessness and negligence being the direct cause of his death, or having materially contributed thereto, the defenders are not liable in reparation, or otherwise.

The proof shewed that the accident happened in the manner stated by the defenders. It appeared that the piece of water, which was about half-an-acre in extent, was a portion of the old channel of the river Dee, which was being gradually filled up by the Harbour Commissioners. The surface of the pond was from five to ten feet below the surface of the reclaimed ground. The slope around the pond was the natural one formed by the tipping of carts. The reclaimed ground was of considerable extent, and the public had free access to it. The deceased was an apprentice to a joiner who was engaged in erecting a recreation hall near the pond. The place in question was near Market Street, and was resorted to by the public and, in particular, by young people for purposes of amusement. About a fortnight after the accident to the pursuer's son a younger boy, about seven years of age, named Robertson, was drowned at the same spot, and his father in an action in the Sheriff Court recovered damages for his death. It was also proved that when the pool was frozen the Commissioners put up notices that the ice was dangerous.

The Sheriff-substitute (Brown) found that the pursuer's son was drowned through the fault of the defenders, and that they were liable in damages, which he assessed at £100.

On appeal the Sheriff (Guthrie Smith) found it not proved that the death of the pursuer's son was due to the fault of the defenders, and therefore assoilzied them.

The pursuer appealed, and argued;—The negligence of the defenders was clear. The negligence of the pursuer must be as clear as that of the defenders, and not less a cause of the accident.[1] The place was one open to the public, and to which they were in use to come, and the pool was a danger to young persons, who were known to be wont to play there. The boy could not be expected to know the depth of the pool. A boy of his age might be expected to get into just such a danger, and was not bound to guard against it as an older person might be.[1] Besides, here the danger was not manifest. A notice should have been, at the least, put up to shew that the pond was dangerous, as had been done when ice was on the pool.

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[1] M'Martin v. Hannay, Jan. 24, 1872, 10 Macph. 411, 44 Scot. Jur. 230.

The respondents were not called on.

Lord Justice-Clerk.—This is a sad casualty, but I am entirely of the same opinion as the Sheriff. I think that no case at all of fault on the part of the Aberdeen Harbour Commissioners has been made out, so far as this accident is concerned.

I have no doubt the judgment was right in the case of the boy named Robertson, for the boy there was only seven years of age, and so was incapable of taking care of himself. I think there did exist a danger for boys of that age which the defenders were bound to provide against. But for a boy of sixteen years old I think there was no such danger and no obligation on the Commissioners to provide against his voluntary acts. I have always thought that the term contributory negligence is very much misapplied. The obligation of an employer, for example, is not lessened, nor is a proprietor or master, as the case may be, liberated from his obligation by the act of the person who suffers by his own negligence. If the obligation of the master be once admitted, that obligation continues as much where there is negligence of the other party as before. It is not a question of contract, but only this, that while a man is entitled to be protected from ordinary risks, he is not entitled to increase these risks, and, having so increased them, to be protected against them if he suffers in any way.

I see no ground in the facts of this case for the application of the doctrine of contributory negligence. The boy saw the danger, and knew it well, equally as did his fellows, who used to float on rafts on the water. Probably, no fence would have kept them out. The boy's death resulted from a piece of adventurous foolhardiness for which the Commissioners are not responsible. We must therefore, I think, affirm the Sheriff's judgment.

Lord Craighill.—I am of the same opinion. This accident took place in broad daylight. The boy was left in charge of his fellow-workmen's tools, but left his charge and went to enjoy himself. He was sixteen years of age—a boy old enough to take care of himself, and to take the risk. I do not think there was any obligation, as suggested, on the Commissioners to keep a watchman to warn boys of sixteen off the sheet of water.

Lord Rutherfurd Clark concurred.

Lord Young was absent.

The Court pronounced this interlocutor:—"The Lords having heard counsel for the pursuer on his appeal, find that he has failed to prove that his son's death is attributable to the fault of the defenders: Therefore dismiss the appeal, and affirm the judgment of the Sheriff appealed against."

Ronald & Ritchie, S.S.C.—Morton, Neilson, & Smart, W.S.—Agents.

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[1] Galloway v. King, June 11, 1872, 10 Macph. 788, 44 Scot. Jur. 449; M'Gregor v. Ross & Marshall, March 2, 1883, 10 R. 725; Sharp v. Pathhead Spinning Co., Jan. 30, 1885, 12 R. 574; Findlay v. Angus, Jan. 14, 1887, 14 R. 312.

No. 61.

Jan. 25, 1888.
Cruickshank v. Gow & Sons.

WILLIAM VINCENT CRUICKSHANK, Pursuer (Appellant).—*Fleming.*
J. GOW & SONS, Defenders (Respondents).—*Shaw.*

Process—Mismomer in Summons—Interdict.—A small-debt summons was raised against "William Cruickshanks," and was served personally on William Vincent Cruickshank, who did not defend the action. Decree was obtained and a charge given thereon, and a poinding followed. William Vincent Cruickshank then brought an action to have the sale under the poinding interdicted, and for damages, on the ground that his name was "William Vincent Cruickshank," that he was not the William Cruickshanks who was the pursuer's debtor, and that he had intimated by letter when the summons was served that he knew nothing of the alleged debt. *Held* that he ought to have defended the action, and that his action came too late.

2D DIVISION.
Sheriff of Lanarkshire.
I.

WILLIAM VINCENT CRUICKSHANK, compositor, 78 Waddell Street, Glasgow, brought an action, on 18th August 1886, against J. Gow & Sons, upholsterers, Glasgow, in the Sheriff Court there, concluding (first) to have the defenders interdicted from selling certain furniture belonging to the pursuer under an alleged extract small-debt decree containing warrant to poind; and (second) for £25 as damages.

He stated that on 13th July 1886 while he was confined to the house by illness, the defenders sent a messenger to him for payment of an alleged account, that he told the messenger he had never bought any goods from the defenders and owed them no account, and was then informed that the defenders had employed an officer of Court to recover the account, that his wife called on the officer and explained that he owed the defenders nothing, and that the officer promised that the matter would be inquired into and a letter of apology for her trouble would be sent her; that on 29th July 1886 a small-debt summons at the defenders' instance against "William Cruickshanks" was served upon him with a relative account against "William Cruickshanks, 70 Waddell Street"; that he sent a letter on 3d August to the officer whose name was on the summons, saying that he had received it but knew nothing of the alleged debt,* but that the defenders without inquiry proceeded with their action, took decree against the defender named in the summons, and thereafter wrongfully executed the poinding of the pursuer's effects now complained of. He further averred;—"The said decree is not *ex facie* regular. The summons bears to be in name of William Cruickshanks, 78 Waddell Street, while the relative account thereto annexed is in name of the same person at 70 Waddell Street. The pursuer avers that there was formerly a William Cruickshank or Cruickshanks at 70 Waddell Street, and he believes that the latter, who was a tailor, must be the debtor of the defenders." He further stated that he had lived seven years at 78 Waddell Street, and never dealt with the defenders or received any account from them till that rendered with the summons, and that his credit and feelings had been injured by the publication of the decree in the local newspapers.

The defenders admitted that the summons was against "William Cruickshanks." They stated that their decree was against the pursuer, that it was obtained on 5th August, and that he was charged on it on 6th August.

They pleaded, *inter alia*;—(3) The pursuer not having taken the usual means of having the decree reviewed, he is not entitled to have the same set aside now, as the judgment has become final and is not open to review.

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* The letter, receipt of which was admitted, bore,—"Sir,—I received a summons to attend Court on Thursday first at your instance, for an account of furniture supplied in 1882 by J. Gow & Sons, which I never received, and know nothing about.—Yours, etc., W. V. Cruickshank."

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Jan. 25, 1888.
Cruickshank v. Gow & Sons.

The pursuer in obedience to an interlocutor of the Sheriff-substitute consigned the sum of £12, being that contained in the decree.

The Sheriff-substitute (Spens) sustained the defenders' third plea, and assoilzied them.

On appeal the Sheriff (Berry) adhered.

The pursuer appealed, and argued;—The case was ruled by *Brown* v. *Rodger*.[1] There a mistake in the defender's name led to a suspension of the proceedings, and the Court refused a proof that the suspender had been personally cited and personally charged on the decree.

Argued for the respondents;—The decree was against the pursuer. The mistake Cruickshanks for Cruickshank was trifling, and did not excuse the defender for not defending the action. If the defence was good on the merits it should have been stated. This was an attempt to get the case re-tried. The only way to do so was under the Small-Debt Act, 1837 (1 Vict. cap. 41), sec. 16.

LORD JUSTICE-CLERK.—I think that the appellant has himself to blame. It seems that, though the summons was served upon him with the relative account appended, he took no proper steps to have the error rectified which he now says there was. I do not see that we would now be justified in interfering.

LORD CRAIGHILL.—This man got the summons and the account. There was the same alleged error of name in both. But he remained at home and took no steps to prevent decree being taken against him. I think he has now no answer.

LORD RUTHERFURD CLARK.—I think the only question is whether there is or is not a decree against the pursuer of this action. If there is, it can be enforced, and we cannot interfere on the merits. But it is said—and I think it is the only thing that can be said—that the decree is no decree against the pursuer, because the only decree which exists, and which is said to be against him, does not set forth his name correctly. If that be well founded I think the pursuer is entitled to redress. The question therefore comes to be whether when the summons was left at the pursuer's house, and it was erroneous only to the extent of the name being spelt Cruickshanks instead of Cruickshank, he was entitled to disregard it and assume that it was not intended for him at all, and that the decree would not affect him. I do not think he was entitled to take up that position. I think a person in the pursuer's position must know whether a summons is intended for him, and that if the objection to it is good he is bound to appear and state it, or, if he do not, and decree goes out against him, the slight error will not avail to make the decree not a decree against him.

LORD YOUNG was absent.

THE COURT dismissed the appeal, affirmed the interlocutors of the Sheriff-substitute and the Sheriff appealed against, and of new assoilzied the defenders from the conclusions of the action.

WINCHESTER & NICOLSON, S.S.C.—M'GREGOR & COCHRANE, S.S.C.—Agents.

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[1] Brown v. Rodger (Morton's Factor), Dec. 13, 1884, 12 R. 340; *cf.* also Spalding v. Valentine, July 4, 1883, 10 R. 1092.

No. 62.

Jan. 25, 1888.
Jones' Trustee v. Jones.

JAMES TAYLOR (Jones' Trustee), Pursuer (Respondent).—*Sir Charles Pearson—Kennedy.*
MARIA BORLAND JONES, Defender (Appellant).—*Goudy—A. S. D. Thomson.*

Bankruptcy—Cash payment by insolvent debtor to conjunct and confident person—Fraud.—A trader employed his daughter as a saleswoman in December 1883. In December 1885, being insolvent, he attempted unsuccessfully to compound with his creditors. Thereafter the daughter, at a time when she believed sequestration to be imminent, obtained from him payments amounting to £69 as the alleged amount of two years' wages. On 10th March 1886 the trader was sequestrated.

In an action by the trustee for repetition of the amount paid to the daughter as a fraudulent preference, *held* that the pursuer was entitled to repetition,—the Lord Justice-Clerk and Lord Craighill holding, that assuming the alleged debt to be due to the defender, the payment was a fraudulent preference; Lord Craighill further holding with Lord Rutherfurd Clark that the resting owing of the alleged debt had not been proved.

Opinion (*per* Lord Rutherfurd Clark) that if the debt had been due to the defender she would, on the principle of *Thomas* v. *Thomson* (3 Macph. 358), have been entitled to retain the payments made to her.

2D DIVISION.
Sheriff of Lanarkshire.
L.

THE estates of Robert Jones, hardware merchant, 104 Gallowgate, Glasgow, were sequestrated on 10th March 1886.

In September 1886, James Taylor, the trustee, raised an action in the Sheriff Court of Lanarkshire against Maria Borland Jones, the bankrupt's daughter, for payment of £69 as part of the sequestrated estate. He stated that the proceeds of stock realised by the bankrupt and his family within about three months before the sequestration had been transferred to the bankrupt's family without true, just, and necessary cause and without value, in defraud of his creditors, and that the defender had so received, on 27th February 1886, £19, on 4th March £29, on 8th March £18, and on 30th March £3, amounting in all to £69, the sum sued for. Further, he averred that the defender was conjunct and confident with the bankrupt, by reason both of her near relationship and of knowledge of his business, and had received the £69 well knowing that he was insolvent and that his creditors were thereby defrauded.

The defender denied these statements. She averred that she had been assistant and saleswoman with the bankrupt from 17th December 1883 till 22d December 1885, at 15s. per week, together with her board, and had received no payment of her wages during that time, but that at the dates of payment mentioned, and after an attempted private settlement of her father's affairs had fallen through, she had demanded and received in part payment of her wages the sum sued for.

The pursuer pleaded;—(2) The said sums having been handed over by the bankrupt and received by the defender in the knowledge of the bankrupt's insolvency within sixty days of bankruptcy, and having been handed over gratuitously and without just, true, and necessary cause, and the bankrupt being still insolvent, the transaction constitutes an alienation struck at by the Act 1621, cap. 18, and a fraud against Robert Jones' creditors reducible at common law.

The defender pleaded;—(1) The bankrupt having been justly indebted to defender in said sums as wages due to her for services rendered, he was entitled to pay the same on receiving a discharge thereof. (2) The sums paid to defender being for value, and for a true, just, and necessary cause, the transaction in question is not struck at by the Act 1621, cap. 18, and is not reducible at common law.

The Sheriff-substitute (Guthrie) allowed the defender a proof of her averments, and to the pursuer a conjunct probation.

From the proof it appeared that prior to December 1885 the bankrupt kept no books. The defender, a young woman of about 25, lived in family with her father. She and her father and brother deponed that she, having previously been assisting at intervals, was verbally engaged in December 1883 to serve in the shop in place of a man named Smith who was leaving; that his salary was 22s. a-week, and hers was fixed at 15s., the remaining 7s. being taken as the value of her board, and that she served continuously thereafter till December 1885; that the wages of other servants were paid weekly, but that the defender had never received payment of her wages until she threatened to leave, when she received the sums sued for. The defender explained this by saying that knowing her father to have demands upon him, she let the question of her wages rest till after the failure of a proposed composition arrangement which was under discussion between the bankrupt and his creditors in December 1885 and January 1886. She stated that in these negotiations her claim, along with a claim by her brother for repayment of a loan of £129, was laid before the creditors, and that both claims were admitted to be good. After these negotiations fell through, the defender began in February 1886 to press her father for her wages, saying she would leave if they were not paid, and "kept at him till I got all the payments" which were the subject of the action. The defender then knew that sequestration must follow.

It appeared from a cash-book that payments to the amount of £69 were made to the defender, and of £129 to her brother, between February and the date of sequestration, which exhausted the bulk of the drawings, and that no trade debts were paid in cash during that period. The defender and her brother were then in the management of the shop. After the sequestration she set up another business of the same kind as the bankrupt's, and the bankrupt lived with her, and was, at least in part, supported by her.

Persons who had formerly been employed in the bankrupt's business deponed that the defender was well qualified for the business, and that her services were worth 22s. per week.

The Sheriff-substitute (Guthrie) found "that the defender is the daughter of Robert Jones, formerly hardware merchant in Gallowgate, and that she was in his employment as saleswoman from December 1883 till his estates were sequestrated . . . Finds that the said Robert Jones became insolvent in or before December 1885, and that his circumstances were well known to the defender: Finds that an attempt to carry through an arrangement for the bankrupt's discharge on payment of a composition failed, and that a sequestration followed on 10th March 1886, in which the pursuer was appointed trustee: Finds that between 27th February and 30th March, inclusive, and after the attempt to carry the said proposed arrangement had failed, the bankrupt paid to the defender various sums in name of wages alleged to have been earned by her and unpaid, amounting in all to £69: Finds that it is not proved that the defender's wages during the whole period of her employment in the bankrupt's shop were unpaid and resting owing when these sums respectively were paid to her, and *separatim*, and on the assumption that the defender's wages were unpaid, that these payments were made fraudulently, either for the purpose of giving the defender a preference over the bankrupt's other creditors, or of defeating their just claims, and that the pursuer is at common law entitled to repetition thereof: Therefore decerns as craved."

On appeal the Sheriff (Berry) adhered.*

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* "NOTE.—If I felt myself shut up by the evidence to the view that the defender in this case was a true creditor of her father to an amount equal to or

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The defender appealed, and argued;—This being a cash payment the Act 1621, cap. 18, could not apply. At common law a cash payment to a creditor shortly prior to sequestration, even though he knew the debtor to be insolvent, was not reducible.[1] Nor was this doctrine weakened by

exceeding the sum of £69, which was paid to her at or about the time of her father's sequestration, I should have difficulty in deciding the case in favour of the pursuer. Whether the rule of law be an expedient one or not, it seems to me that the decisions do establish it as a rule that a payment in cash by an insolvent person to a creditor is a valid payment which cannot be set aside, although both debtor and creditor are aware at the time of the payment that the debtor is insolvent. Undoubtedly the circumstances here make it a strong case in which to allow such a rule of law to be applied in the creditor's favour. It is obvious that the daughter knew that sequestration was unavoidable, and that it was impossible that her father could retrieve his position; but in the absence of authority for the proposition that knowledge of the debtor's circumstances being so hopeless justifies an exception to the rule which I have stated, and is sufficient to make the payment fraudulent and reducible at law, I do not think I am free to recognise such an exception. The decision in *Thomas* v. *Thomson*, 3 Macph. 358, seems to me to lead to that conclusion. On a consideration of the evidence, however, I do not feel myself shut up to the conclusion that it has been proved on the part of the defender that a valid debt to the amount of £69 was resting owing to her by her father as she alleges. I think in the circumstances that the burden of proof lies upon her to establish the existence of the alleged debt, and she has, in my opinion, failed to sustain that burden. There can be no doubt that she acted in the shop as her father's saleswoman. What her remuneration was to be is spoken to only by herself, her father, and her brother, and whether any part of her remuneration or wages was paid to her during the period of two years, for which the agreement is said to have subsisted, depends on the evidence of her father and herself, the alleged debtor and creditor. No doubt her brother also speaks of his being 'aware' that his sister never got any wages during the two years, but he did not live in family with his father and his sister, and it is plain that his evidence on that point cannot be of any weight. At the best it can only be hearsay evidence, for he cannot possibly know whether his father did or did not make any payment to his sister. Taking then the case of the alleged non-payment as depending on the evidence of the alleged debtor and creditor, I cannot regard it as proved that no payment during the whole period of two years was made of the wages which are said to have been agreed upon. There is strong improbability in face of the allegation to that effect. It is hardly credible that, if the daughter was entitled to wages in cash at the rate 15s. a-week, she would have remained for two years without making any demand for payment. The practice in the father's business seems to have been to pay all other wages or salary weekly or at short intervals, and no sufficient explanation is given for a similar course not having been followed in regard to the defender. No doubt she boarded with her father, and had not to pay for board and lodging, but she must have required articles of clothing, although it is said that she was well provided in that way, for during a period of two years clothing which she had at the commencement of it can hardly have been sufficient. The story is attended with such suspicion that I cannot regard it as proved. I think, therefore, that the pursuer is entitled to succeed, on the ground that it is not shewn that a just debt to the amount of £69 was owing to the defender at the time of the bankruptcy. In considering the law of the case, I have confined myself to the rules of common law, and have avoided considering the question under the first branch of the Act of 1621. The language of that statute is not favourable to its being applicable to the case of payment in cash, and although there are obvious dangers in allowing such payments not to be included within its operation, I do not feel justified, in the absence of authority, in holding that such a case falls within the scope of the statute."

[1] Thomas v. Thomson, Jan. 13, 1865, 3 Macph. 358, 37 Scot. Jur. 166; Coutts' Trustee and Doe v. Webster, July 8, 1886, 13 R. 1112.

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the case of *Shaw's Trustee*,[1] for the basis of that decision was that *cessio* proceedings had already begun and an order been pronounced in them before the payment was made, which the trustee was held entitled to challenge. The proof shewed that there was a debt due to the defender. It had been established that the defender gave her whole services to the bankrupt. Such services presumed a right to remuneration. The Sheriffs seemed to think some special *onus* was on the defender, and that her evidence and that of the bankrupt needed corroboration. But she had no further burden of proof than to prove that her services were rendered. In such a case no other proof could be imagined than that which she had supplied.

Argued for the pursuer;—It was unnecessary to consider whether the Act 1621, c. 18, applied. The common law would reach the case.[2] Professor Bell's doctrine in the passages cited was not contradicted in *Coutts' Trustee* v. *Webster*. The defender had to prove that the debt was (1) an honest debt, and (2) resting owing, and had failed to do so. The cardinal fact in the case was that this alleged debt was on the defender's own shewing paid, after much pressure, by the bankrupt, after a proposal for composition had fallen through. If it was an honest debt, the ground for the bankrupt's hesitation was hard to understand. The presumption from the facts was that the defender like other servants had been paid or satisfied from time to time, and this all the more that she was the daughter of the bankrupt. It was further to be presumed in law that her services were given for nothing.[3] The case was one of a conjunct and confident person who had control over the business, and in the knowledge of the bankrupt's irretrievable insolvency took payment out of the business, leaving all others unpaid. There was enough to put the case into the same class as that of *Shaw's Trustee*. There was, to use the words of Lord Craighill in that case, "aiding and abetting" in a transference of a great part of the insolvent's estate to a favoured creditor.

LORD JUSTICE-CLERK.—The question relates to the payment made to or retained by a daughter, of a sum said to be the amount of two years' wages in the service of her father, who has become bankrupt.

It appears that the daughter succeeded in the management of the business of her father a regular shopman, who had left the employment. She says it was agreed that she was to have wages at 15s. per week. There is no evidence to the contrary, and the father and brother concur in the defender's statement. The first question is whether the statement is true,—whether she was entitled at the dates at which she obtained the payments in question, as her father's creditor, to a sum in respect of unpaid wages at 15s. per week. In ordinary circumstances that is a simple issue. She was the shopwoman actually conducting the business in the father's shop in the face of the public. *Prima facie*, if she had been a stranger, she must have had wages. Now, her being a daughter does not disentitle her to wages, and the only persons who could give evidence to the effect that she was so entitled are examined.

But it is said that even if she had a right against her father, she was not entitled to receive the payment in question in the circumstances in which it was made. At that point the case assumes a very different aspect. The simple

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[1] Shaw's Trustee v. Stuart & Bisset, Nov. 15, 1887, *ante*, p. 32.

[2] Main v. Fleming's Trustees, June 30, 1881, 8 R. 881; Shaw's Trustee v. Stuart & Bisset, *supra*.

[3] Bell's Com. 226-228 (7th ed.); Fraser, Parent and Child, 45-46.

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narrative of the facts is this: The father was in difficulties in December 1885. A meeting of creditors was called, at which the various claims were discussed, and a proposal for a composition settlement was entertained for consideration. I attach, for my part, some importance to the fact that the claims of this sister and brother were then tabled, and as there is no denial of that upon record, I assume that they were considered and admitted. It is said that that may be true enough, but that a fraud was committed upon the other creditors, because in the full knowledge of the father's insolvency the daughter retained the amount of her own debt out of the money she drew in the business. Now, holding, as I do, that the claim for wages is sufficiently made out, which I see no reason to doubt, I am still of opinion that for the daughter to take full payment as a creditor in the knowledge of insolvency, and while acting as a servant, amounted to an illegal preference, and was a fraud upon the other creditors. A creditor obtaining a preference in such circumstances as that comes within the common law rule. There is here no case under the Act 1696. I doubt if there is a case under the Act 1621. But I think it is a simple case of a fraud at common law. I think that after what took place, and the knowledge she had of her father's insolvency, she was not entitled to take payment as she did.

Lord Craighill.—I am of the same opinion. The case is peculiar, and I know of none in which a payment has been sustained in such circumstances. There was not here a cash payment by the father to the daughter. On the contrary, the truth of the case is, that once the compromise fell through the daughter decided to get, at all hazards, payment of her alleged claims. She insisted with her father for payment, and threatened to leave if it were not made. So we see there was an unwillingness on the father's part to pay her. What occurred after that was that the father seems to have consented that the money drawn partly by sales and partly by the collection of the accounts in his business, which his son and daughter were managing, should be applied by them in payment of their demands. That is what took place according to the way in which I read the evidence of the son and daughter. That is not a cash payment by the father, but, on the contrary, a taking payment by the son and daughter out of the drawings of the business which they managed. The business was just handed over to one creditor to the prejudice of the others. To say that that transaction cannot be impugned at common law is to state a proposition which I cannot accept. The business seems to have been really being carried on for the benefit of the son and daughter (the world knowing nothing of it), to accomplish a preference for them. That preference, I think, cannot stand.

Further, while I put my judgment on the same ground as your Lordship, I doubt the constitution of the debt. The evidence of the parties interested is inconsistent with their conduct. I agree with the Sheriff in thinking that if week by week a debt of 15s. had become owing and payable to the daughter, she would not have been content to be paid nothing, when all the other persons connected with the business were being paid.

Lord Rutherfurd Clark.—I agree in thinking that the judgment of the Sheriff should be affirmed, and upon the grounds which the Sheriff has assigned. If I thought it proved that there was a just debt due to the daughter, the appellant, I should hold that the case of *Thomas* v. *Thomson* applied, and I should

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feel myself bound to follow that decision, not only because of the decision itself, but of the repeated approval of it in subsequent cases. Nor do I see in any of the facts of this case any fraud upon the creditors beyond what was there held not to be fraud.

But while that is so, I think that in a case of this kind it is incumbent on the person who has received payment of the alleged debt to shew clearly that the debt was due. A person who has received payment of a sum from an insolvent person, knowing him to be so, must be prepared to shew that his alleged debt is an honest and true one, otherwise the payment will not be sustained. I think there is nothing like sufficient proof of that here. I am not going to examine the proof at length. We have the statement by the father of the daughter's engagement, and so far that is corroborated by the son. But mere evidence of an engagement is not sufficient. The appellant must prove also that the alleged claim for wages arising under it was subsisting at the time when the payment was made, or, in other words, that she did not in the two years receive a farthing of remuneration for her services. It is, I think, impossible to believe that, if this relation were indeed established, it was so acted upon. I am therefore very clearly of opinion that there has not been sufficient proof of the existence of the debt.

On these grounds I am also for affirming the judgment of the Sheriff.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"Find it not proved that the sum of £69 received and retained by the defender out of funds belonging to her father was due and resting owing by him to her on account of wages as alleged: Therefore dismiss the appeal, and affirm the interlocutors of the Sheriff-substitute and of the Sheriff appealed against: Of new decern in terms of the conclusions of the action."

GREGOR M'GREGOR, S.S.C.—W. R. PATRICK, L.A.—Agents.

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Jan. 26, 1888.
Lord Advocate v. Duke of Buccleuch.

THE LORD ADVOCATE, Pursuer (Respondent).—*Sol.-Gen. Robertson—A. J. Young.*

THE DUKE OF BUCCLEUCH AND QUEENSBERRY, Defender (Reclaimer).—*R. Johnstone—Low.*

Revenue—Succession-Duty—Unlet shootings—Succession-Duty Act, 1853 (16 *and* 17 *Vict. c.* 51), *sec.* 21.—*Held* that a successor to landed property is subject, under sec. 21 of the Succession-Duty Act, 1853, to succession-duty in respect of unlet shootings.

1ST DIVISION.
Lord Fraser.
M.

IN November 1887 the Lord Advocate, on behalf of the Commissioners of Inland Revenue, raised an action in the Court of Session against His Grace the Duke of Buccleuch and Queensberry, concluding for payment of £606, 1s. 4d., with interest, being the amount of the first six instalments of succession-duty alleged to be payable by the defender "in respect of the value of the unlet shootings on landed estates in Scotland to which, or the income thereof, the defender became beneficially entitled as successor on the death of" the late Duke on 16th April 1884.

The pursuer alleged that the defender had not included, as he ought to have done, the annual value of the shootings which were unlet on the estates at the time of his succession in the returns rendered by him for the purposes of the Succession-Duty Act, 1853. He further stated that the annual value of the shootings amounted to £6815, 5s. 7d. at the date of the succession. The succession-duty thereon, calculated under the provisions of sec. 21 of the Succession-Duty Act, 1853,* amounted to £808, 1s. 9d., payable in eight instalments, of which six were past due.

The defender averred that the shootings of the Buccleuch and Queensberry estates had never been let prior to his succession. Further, "that at and prior to the date of the defender's succession the shootings referred to yielded no income or profits, and that the present is the first claim which has been made for payment of succession-duty upon the value of unlet shootings."

The pursuer pleaded;—(1) The annual value of the unlet shootings ought to be taken into account in ascertaining the value of the interest to which the defender became entitled on succeeding to his father in the said estates. (2) Succession-duty being chargeable at one per cent on the value of an annuity equal to the annual value of the said shootings, the pursuer is entitled to decree for the instalments thereof which have already fallen due, with interest at four per cent from the dates when each instalment became payable.

The defender pleaded;—(1) The pursuer's statements are irrelevant, and insufficient in law to support the conclusions of the summons. (2) The defender should be assoilzied in respect that the said shootings were yielding no annual income when he succeeded, and had not previously been let.

He subsequently added a plea that, in any view, the claim of the pursuer was excessive.

On 12th January 1888 the Lord Ordinary (Fraser) pronounced an interlocutor in which he repelled the defender's 1st and 2d pleas in law, and appointed the cause to be put to the roll for further procedure.†

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* By section 21 of the Succession-Duty Act of 1853 (16 and 17 Vict. c. 51), it is provided that "the interest of every successor . . . in real property shall be considered to be of the value of an annuity equal to the annual value of such property, . . . payable from the date of his becoming entitled thereto in possession, and every such annuity for the purposes of this Act shall be valued according to the tables in the schedule annexed to the Act."

† "OPINION.—It was stated at the debate that this is the first case in which a claim for succession-duty on unlet shootings has been made the subject of judicial discussion in Scotland, though the revenue department have been in use to make the claim and have exacted the duty, and it was also stated, and not contradicted, that such claims have been made and regularly sustained in England. The whole question turns upon the construction of the 21st section of the Succession-Duty Act of 1853, which is in the following terms, so far as bearing upon the point here raised:—'The interest of every successor, except as hereinafter provided, in real property shall be considered to be of the value of an annuity equal to the annual value of such property.' The fact that by the Act 49 Vict. cap. 15, unlet shootings must now be valued and enter the Valuation-roll has no bearing upon the question as to the liability for succession-duty under the Act of 1853. The Valuation Act and the various amendments upon it were all subsequent to the Succession-Duty Act, and consequently the only matter here to be determined is the construction of the 21st section of the latter Act. The defender admits that a proprietor cannot escape liability for duty merely by allowing his lands to go to waste. But, on the other hand, it is said that if he makes a reasonable use of his property, and if by such reasonable use no annual income is returned, then there is no liability. At the time when the succession here opened none of the shootings of the Duke of Buccleuch were let—they were all in his own hands; but how he disposed of the game there is no averment on the one side or the other. It must be assumed therefore in the

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The defender reclaimed, and argued;—The words "annual value" in the 21st section of the Succession-Duty Act must be held to mean the value which the property was actually yielding at the date of the succession. Here admittedly at that date the shootings were yielding nothing, and never had yielded anything.[1] [LORD PRESIDENT.—In estimating the value of estates for the purpose of settling the amount of provisions under the Entail Acts, unlet shootings are taken into account.] That was admitted, and those cases which decided that point, so far as they went, were directly against the defender's contention here, but they were under a different statute, and the valuation was made for a totally different purpose.

Argued for the Lord Advocate;—The question was precisely decided by the cases referred to by the Lord President under the Aberdeen Act.[2] The shootings certainly had a value though they were unlet, and that value ought to be taken into account, even though they were not in the Valuation-roll at the date of the succession.[3]

LORD PRESIDENT.—I cannot find any ground for doubting the soundness of the Lord Ordinary's judgment. Section 21 of the Succession-Duty Act provides that "the interest of every successor, except as hereinafter provided, in real property, shall be considered to be of the value of an annuity equal to the annual value of such property" after making certain allowances. The words we are to construe are "annual value of such property." Everything else is quite plain. The question raised is whether the value of unlet shootings is part of the "annual value of such property." If this question had been quite open it might perhaps have admitted of a good deal of argument; but unfortunately there is a class of cases, not indeed under the same Act, but *in pari materia*, and under a clause very like the present in expression, which I think are conclusive of the matter. The case of *Menzies* and the case of *Leith* decide that in estimating the annual value of an entailed estate, for the purpose of fixing the amount of locality lands, or of children's provisions under the Aberdeen Act, unlet shootings must be taken into account. As regards the case of *Leith*, in particular, the words of the Aberdeen Act are the yearly "value" of said lands as at "the death of the granter"; while here it is the "annual value of such property" as at the death of the predecessor. I do not see any distinction; and I therefore hold these decisions to be not only applicable to, but conclusive of, the present question. I am therefore for adhering.

LORD MURE.—I am of the same opinion. I think this case is ruled by the

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Duke's favour that all the game obtained on the land was disposed of without pecuniary return therefor. And, taking the case upon that footing, what does it come to? He is the owner of property which admittedly has annual value, and such being the case it comes within the very words of the Act of Parliament. The only case relied upon by the defender as bearing upon the question was that of the *Attorney-General* v. *Sefton* (2 Hurlst & Colt, 362, 11 Clark's H. of L. cases, 257), but the answer is that in that case it was admitted that there was no annual value derivable from the property, which is not the case here."

[1] Attorney-General v. Lord Sefton, 1863, 2 Hurl. & Colt, 362 and 1865, 11 Clark (H. of L.) 257; Lord Advocate v. Marquis of Ailsa, Oct. 28, 1881, 9 R. 40.

[2] Leith v. Leith, June 10, 1862, 24 D. 1059, 34 Scot. Jur. 523; Macpherson v. Macpherson, May 24, 1839, 1 D. 794, Aug. 13, 1846, 5 Bell's App. Ca. 280.

[3] Menzies v. Inland Revenue, Jan. 18, 1878, 5 R. 531.

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principle of previous decisions. The case of *Menzies* was decided after gre deliberation, and on the ground that unlet shootings were in reality lands a heritages. The old view was that shootings were a privilege; but it came be decided that shootings are really just part of the rent or value of the lan and that if they were unlet you were getting the value which you would ha otherwise had in the shape of rent.

LORD ADAM concurred.

LORD SHAND was absent.

THE COURT adhered.

D. CROLE, Solicitor of Inland Revenue—GIBSON & STRATHERN, W.S.—Agents.

No. 64. Jan. 27, 1888. Rose v. Stevenson.

ANDREW ROSE, Pursuer (Respondent).—*Watt.*
JAMES STEVENSON AND OTHERS, Defenders (Reclaimers).—*J. Reid.*

Title to sue—Decree for expenses—Assignation.—A defender obtained decree for expenses against the pursuer, and thereafter assigned his inter therein to a third party. The assignee raised an action for the amount of expenses against persons who were not named in the decree, averring they had been the true *domini litis* in the former action. *Held* (*reversing* j ment of Lord Lee, Ordinary) that he had no title to sue.

1st Division. Lord Lee. B.

ANDREW BRODIE AND MALCOLM NEIL, weavers, Kilbarchan, raised action of declarator of right of way against Mr Thomas Mann of Glentya in the county of Renfrew. Mr Mann defended the action. After sundr procedure, including an appeal to the House of Lords and a petition to th Court of Session, to have the judgment of the House of Lords applie Mr Mann was assoilzied from the conclusions of the action; and the pur suers Andrew Brodie and Malcolm Neil were decerned and ordained t make payment to him of the expenses in the action, amounting in all t £860, 19s. 4d.[1]

In July 1887 Andrew Rose, commercial traveller, Glasgow, raised an action in the Court of Session against James Stevenson, spirit-dealer, Kilbarchan, and others, residents there, concluding for payment of the above-mentioned sum of £860, 19s. 4d.

After narrating the circumstances of the action above set forth, he averred;—(Cond. 9) "Notwithstanding that the said action of declarator was raised in the names of the said Andrew Brodie and Malcolm Neil against Mr Mann, it was truly instituted and carried on by and for behoof of the defenders, who were the true *domini* thereof, and directed and controlled the same, and gave instructions to the agents at every stage thereof, the said Andrew Brodie and Malcolm Neil having been selected as pursuers to represent the defenders because of their poverty, and with the object and intention of preventing Mr Mann, in the event, which happened, of his being successful in the litigation, from recovering the expenses thereof from the defenders. The defenders, who were members of a committee appointed at a public meeting to institute and carry on the said action, advanced funds for the carrying on of the same, and guaranteed payment of the account of the agents for the pretended pursuers, and all through gave instructions for the conduct of the case. The defender Gray was treasurer of the fund subscribed by the defenders for the carrying on of the litigation. The said Andrew Brodie and Malcolm

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[1] Brodie v. Mann, June 13, 1884, 11 R. 925, revd. May 4, 1885, 14 R. (H. L.) 52.

Neil gave no instructions regarding the said action, and contributed nothing to the carrying on of the same. They were put forward as nominal pursuers by the defenders, who are men in a better position in life, in order to secure an immunity to the latter from all possibility of being found liable in expenses. The defenders were interested in the result of the said action of declarator of right of way to a much greater extent than the nominal pursuers. The nominal pursuers have been asked for payment of the expenses decerned for, but they are unable to pay any part thereof." (Cond. 10) "By assignation dated 11th February 1887, the said Thomas Mann assigned, conveyed, and made over to and in favour of the pursuer, his executors or assignees, the said sums of £438, 6s. 5d., £1, 3s. 8d., and £421, 9s. 3d., amounting in all to £860, 19s. 4d., and whole interest due or to become due thereon during the not-payment, together with the said decree of the Court of Session, the said order and judgment of the House of Lords, and the said certificate by the depute-clerk of the Parliaments, and the whole tenor and contents thereof, with all that has followed or may be competent to follow thereupon in so far as relative to the said several sums, with all his, the said Thomas Mann's, right, title, and interest in and to the premises, the pursuer and his foresaids being thereby surrogated and substituted in the said Thomas Mann's full right and place in the premises, with power to the pursuer and his foresaids to ask, crave, sue for, and uplift the sums of money thereby assigned, and upon payment to grant discharges or conveyances thereof either in whole or in part, and generally to do everything in the premises that the said Thomas Mann might have done himself before granting the said assignation. The said assignation is herewith produced and referred to. The pursuer has called upon the defenders to make payment to him of the sum sued for, but they refuse or at least delay to do so, and the present action has therefore been rendered necessary. Mr Mann has nothing whatever to do with the present action, has no interest in the result thereof, and has not supplied, and is not supplying, one farthing towards the carrying on of it."

The pursuer pleaded;—(1) Defenders being the real *domini* of the action of declarator and interdict mentioned in the condescendence are liable conjunctly and severally in payment of the expenses incurred by the said Thomas Mann in the said action, and decerned for in his favour, and the pursuer, as assignee of the said Thomas Mann, is entitled to decree as concluded for, with expenses. (2) In virtue of the assignation by Thomas Mann, in pursuer's favour, of 11th February 1887, condescended on, pursuer is entitled to payment of the sum concluded for, with expenses.

The defenders averred;—(Ans. 10) "The pursuer has no interest or title to sue in this action. The assignation founded on is merely of a decree against Messrs Neil and Brodie, the pursuers in the action of declarator and interdict, who are not defenders in this action. It confers no right upon the pursuer to sue these defenders. It was granted by Mr Mann to the pursuer without onerous consideration, with a view to raising and for the purposes of this action, and to conceal the true pursuer thereof. The pursuer has entered into a collusive agreement with Mr Mann to allow his name to be put forward as nominal pursuer, so as to cause annoyance to these defenders, and to escape liability for expenses. It is believed and averred that Mr Mann is the real *dominus litis*, and before further procedure he should be ordained to sist himself as a pursuer. He is the person really interested in this action. He gave instructions for raising, and he is now directing it, and supplying funds for carrying it on. The pursuer was at one time in the employment of Mr Mann. He

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is now acting as a grocer's assistant, earning a weekly wage, a no means to carry on a litigation in the Court of Session."

The defenders pleaded, *inter alia;*—(2) The pursuer has n sue. (3) The true *dominus litis* being Mr Mann, he should be to sist himself before further procedure. (5) These defenders assoilzied in respect that Mr Mann, the defender in the action o tor and interdict condescended on, accepted Messrs Neil and the real pursuers of that action, and carried the action to a c with them alone.

On 11th January 1888 the Lord Ordinary (Lee) allowed the a proof of their allegations in answer to condescendence 10, a pursuer a conjunct probation.*

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* "OPINION.—In this action the pursuer founds upon an assigna favour by Mr Thomas Mann of two sums, amounting together to £86 being the expenses connected with a litigation in the Court of Se House of Lords, and for which Mr Mann obtained against Andrew Malcolm Neil, other parties to the litigation, a decree of the Court of the extent of £438, 6s. 5d., and an order and judgment by the Hous to the extent of £421, 9s. 3d.

"The pursuer alleges as his ground of action that the debtors nar assignation, and against whom alone the debt is constituted (viz Brodie and Malcolm Neil), were merely nominal pursuers in that litig were truly put forward by the defenders in this action in order to se against liability for expenses.

"The first question raised by the defenders is, Whether the p virtue of the alleged assignation, had a title to sue such an acti assignation makes mention only of the sums themselves, together decree of the Court of Session, the order and judgment of the House 'and the whole tenor and contents thereof; with all that has follow be competent to follow thereupon, in so far as relative to the said sev with all his, the said Thomas Mann's right, title, and interest in a premises.' But although there is no mention made of any right to debtors as being truly liable in the sums contained in the decree agai and Neil, the assignation contains the usual clause, surrogating and su the pursuer in Mr Mann's full right and place in the premises; with ask, crave, sue for, and uplift the sums of money thereby assigned, payment to grant discharges, and generally to do everything in the that the said Thomas Mann might have done himself before grantin assignation. The assignation contains the usual warrandice from deed.

"I have had some difficulty in sustaining the title, more especi authority or precedent was cited for allowing the assignee to a debt c against one person to raise action against another as being the true d have come, however, to be of opinion that the title is sufficient. As carry to the assignee all rights that corroborate or strengthen the right though these corroborative rights should not be specially mentioned in veyance—(Ersk. iii. 5, 8; Stair, iii. 1, 17; *Cultie* v. *Earl of Airlie*, re Stair, 2 Br. Sup. 197; *Lyell* v. *Chrystie*, 11th March 1823, 2 Shaw It appears, therefore, to be sufficient to entitle the assignee to proce all persons who are liable, that the debt itself be conveyed, with all th rights therein.

"II. Another point raised by the defenders, however, is, that Mr M not the pursuer, is the real *dominus litis* in the case. It is alleged Mann is the person really interested in the action; that he gave instru raising it, and is now directing it, and supplying funds for carrying it also alleged that the pursuer is a person without means, who has ente collusive agreement with Mr Mann for the purposes of this action. A sideration appears to have been given for the assignation, I think that

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The defenders James Stevenson and others reclaimed, and argued;—The assignation of a decree against two individuals only entitled the assignee to proceed against those persons mentioned in the decree, and against no one else. Mr Mann, the cedent, might have reserved the right to sue. The authorities quoted by the Lord Ordinary applied to cases of bonds of corroboration or caution, which were merely subsidiary rights. Here there was nothing assigned except the debt against Brodie and Neil.[1] Even though the pursuer proved Stevenson to have been the *dominus litis*, he could not better his case thereby. The action should be dismissed on the ground of want of title.

Argued for the respondent;—The only question at this stage was the effect of the assignation. That deed conveyed to the pursuer every right which Mr Mann had.[2] It was not merely a corroborative right.

Lord President.—I am of opinion that the pursuer has no title to sue under the assignation. The Lord Ordinary entertained some doubt on this point, but from his note it appears he hardly realised the true question. He says,—"I have had some difficulty in sustaining the title, more especially as no authority or precedent was cited for allowing the assignee to a debt constituted against one person to raise action against another as being the true debtor."

Now, I do not think the pursuer was assignee to a debt at all. He was assignee to a decree, and to nothing else. The sum in the decree consists of the amount of expenses awarded to the successful party. That is a claim which has no antecedent existence. When the Court decern, they, for the first time, bring into existence the debt, and the only debt in question. What Mr Mann assigned was and could be nothing but that decree, and it clearly cannot be used against anybody else. But the decree is not the ground of action. The ground of action consists of the special facts condescended on in article 9 of the condescendence, which sets forth the ground for trying to make the defenders liable as being the true *domini litis*.

Looking to the assignation it is impossible to hold that Mr Mann is assigning a right of action against different parties altogether. The cases cited have no bearing on the point. I am therefore for recalling the Lord Ordinary's interlocutor, and dismissing the action.

Lord Mure concurred.

Lord Adam.—In my opinion the only debt assigned was the claim against Brodie and Neil. If Mr Mann had raised an action against the defenders this decree would have been of no avail except *in modo probationis.*

Lord Shand was absent.

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course must be followed here as was adopted in the case of *Jenkins* v. *Robertson*, 7 Macph. 739; and that, before deciding anything as to the pursuer's right to sue this action, without either bringing forward Mr Mann or finding caution for expenses, the defenders must be allowed a proof of the allegations contained in answer to cond. 10, so far as bearing on this point."

[1] Cultie v. Earl of Airlie, cited by the Lord Ordinary; Matthieson v. Thomson, Nov. 8, 1853, 16 D. 19.

[2] Hepburn v. Tait, May 12, 1874, 1 R. 875; Thomson v. Magistrates of Kirkcudbright, Jan. 23, 1878, 5 R. 561; Kyle v. Kyle's Trustees, Nov. 30, 1821, 1 S. (N. E.) 215; Barbour v. Bell, Jan. 25, 1831, 9 S. 334.

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THE COURT recalled the interlocutor reclaimed against, and dismissed the action.

WINCHESTER & NICOLSON, S.S.C.—MACPHERSON & MACKAY, W.S.—GORDON PETRIE & SHAND, S.S.C.—Agents.

No. 65.
Jan. 27, 1888.
Stobie's Trustees.

GEORGE REID AND ANOTHER (Stobie's Trustees), First Parties.—*J. C. Lorimer.*

MRS MARGARET STOBIE OR RONALDSON AND OTHERS, Second Parties.—*J. C. Lorimer.*

ALEXANDER CRUM BROWN AND OTHERS (Miss M. J. Clark's Trustees), Third Parties—*Low.*

Succession—Accretion—Liferent—Residue.—A testatrix directed her trustees as soon as they should think expedient after her death to realise her estate, and to hold the proceeds thereof for behoof of her two sisters in liferent, and to pay over the annual proceeds to "them equally during their joint lives, and in the event of either of my said sisters predeceasing me, or upon the death of either of them after my decease, my trustees shall pay over one half of the said free proceeds or income to her children equally, share and share alike, if more than one, during the lifetime of the survivor of my said sisters, and the other half to such survivor." She further directed that after the death of the longest liver of her sisters "my trustees shall pay over and divide the whole free residue" of the estate to and among their children. Both sisters survived the testatrix, but one of them subsequently died leaving a child. After the death of the child the surviving sister claimed the liferent of the other half of the residue, on the ground that it accresced to her under the settlement, or alternatively she maintained that it fell into intestacy, and that she was entitled to it as heir *in mobilibus* to the testatrix. *Held* that it did not accresce to her, but that it fell to be accumulated with the capital of the residue, and to be divided among the nephews and nieces in terms of the deed.

Paxton's Trustees v. *Cowie*, July 16, 1886, 13 R. 1191, *followed.*

1ST DIVISION.
B.

MISS HELEN STOBIE of Easter Balgedie, in the county of Kinross, died on 16th September 1883, leaving a trust-disposition and settlement and codicil, dated 19th December 1877 and 19th March 1881 respectively. Mr George Reid and another were appointed trustees under the deed. The fourth and fifth purposes of the deed were,—"That my said trustees shall, as soon as they shall judge expedient after my decease, and in such way and manner as they shall think proper, realise and convert into cash the whole residue and remainder of my said means and estates, including my property of Easter Balgedie, and shall hold the whole of the said residue and remainder, and the price and proceeds thereof, for behoof of the said Margaret Stobie or Ronaldson and Jane Stobie or Clark in liferent, and shall annually, or at such other times as my trustees shall judge expedient, pay over to them, equally between them, the free annual produce or income thereof during their joint lives, and in the event of either of my said sisters predeceasing me, or upon the death of either of them after my decease, my trustees shall pay over one half of the said free proceeds or income to her children equally, share and share alike, if more than one, during the lifetime of the survivor of my said sisters, and the other half to such survivor; and fifth, that as soon as conveniently may be after the death of the longest liver of the said Margaret Stobie or Ronaldson and Jane Stobie or Clark, or after my own death should they both predecease me, my trustees shall pay over and divide the whole free residue and remainder of my said means and estates, and the price and proceeds thereof, to and among the said William Ronaldson, Thomas Ronaldson,

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John Ronaldson, Eliza Ronaldson or Thomson, and Maggie Jane Clark, my nephews and nieces equally, share and share alike."

Miss Helen Stobie was survived by two sisters, Mrs Margaret Stobie or Ronaldson and Mrs Jane Stobie or Clark, both widows, but Mrs Clark died on 17th September 1883, the day after Miss Stobie's death, leaving an only child, Miss Maggie Jane Clark.

On the death of Miss Helen Stobie her trustees entered upon possession of her estate and proceeded to execute the purposes of the trust. After giving effect to the prior purposes they, as instructed by the fourth purpose above quoted, sold the property of Easter Balgedie and realised the other portions of the trust-estate so far as necessary, and in terms of the fourth purpose they paid over to Mrs Ronaldson and Miss Clark, equally between them, the free annual produce of the estate until the death of Miss Clark, which took place on 10th November 1885.

Miss Clark died unmarried, leaving a trust-disposition and settlement whereby she conveyed her whole means and estate to Alexander Crum Brown, M.D., and others as trustees. In this conveyance Miss Clark expressly included all her right and interest under Miss Helen Stobie's trust-disposition and codicil by conveying the same to her trustees in these words:—"(Second) All my right and interest under the trust-disposition and settlement of my late aunt, Miss Helen Stobie of Easter Balgedie, in the county of Kinross, dated the 19th day of December 1877, and codicil thereto, dated the 19th day of March 1881." After Miss Clark's death a difficulty arose as to the disposal of the one-half of the annual produce of Miss Helen Stobie's estate accruing during the lifetime of Mrs Ronaldson. The present special case was accordingly presented for the opinion and judgment of the Court. To this case Miss Helen Stobie's trustees were the first parties. The second parties were Mrs Ronaldson and her surviving children, and the third parties were the trustees of Miss Maggie Jane Clark.

The second parties maintained (1) that upon the death of Miss Clark the liferent of the one-half of the residue enjoyed by her passed by force of the settlement to Mrs Ronaldson; or otherwise (2) that both Mrs Clark and her daughter, Miss Maggie Jane Clark, having survived the testatrix and predeceased Mrs Ronaldson, which event was unprovided for by Miss Helen Stobie's trust-disposition and settlement, the one-half of the said free annual proceeds or income of Miss Helen Stobie's estate which was payable to Mrs Clark and her daughter, Miss Maggie Jane Clark, and which would, since Miss Clark's death, accrue during the lifetime of Mrs Ronaldson, fell into intestacy, and that Mrs Ronaldson was entitled to payment thereof during her lifetime as Miss Helen Stobie's next of kin.

The third parties maintained that the one-half of the free annual proceeds or income of Miss Helen Stobie's estate which was payable to Mrs Clark and her daughter, Miss Maggie Jane Clark, and which would, since Miss Clark's death, accrue during the lifetime of Mrs Ronaldson, formed part of the residue of the said Miss Helen Stobie's estate conveyed by her trust-disposition and settlement, and should be accumulated with the capital of her estate from time to time as it fell due until the residue became divisible in terms of the fifth purpose.

The questions of law presented for the opinion of the Court were;—"(1) Is the said Mrs Margaret Stobie or Ronaldson, as the survivor of the two liferentrices nominated and appointed by the said Miss Helen Stobie, entitled since the death of the said Miss Maggie Jane Clark, to the liferent of the whole residue of Miss Helen Stobie's trust-estate? (2) Is the said Mrs Margaret Stobie or Ronaldson, as the heir *in mobilibus* of the

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said Miss Helen Stobie, entitled since the death of the said Miss Maggie Jane Clark to payment during her lifetime of the one-half of the said free annual proceeds or income of the said Miss Helen Stobie's estate which was payable to Mrs Clark and her daughter, Miss Maggie Jane Clark? (4) Does the said one-half of the free annual proceeds or income of the said Miss Helen Stobie's estate which was payable to Mrs Clark and her daughter, Miss Maggie Jane Clark, and which will, since Miss Clark's death, accrue during the lifetime of Mrs Ronaldson, form part of the residue of the said Miss Helen Stobie's estate conveyed by her trust-disposition and settlement, and should it be accumulated with the capital of her estate from time to time as it falls due until the residue becomes divisible in terms of the said fifth purpose?"

Argued for the second parties;—Mrs Ronaldson became entitled to the liferent of the whole residue on the death of her niece. The occurrence which actually took place had not been provided for in the trust-disposition and settlement, and therefore it was necessary to look back to the primary purpose. Clearly accretion should take place here, and the surviving liferentrix should be found entitled to the liferent of the whole residue. Otherwise the produce of one-half of the residue would be undisposed of, and would fall into intestacy.[1]

Argued for the third parties;—The half of the free yearly interest of the estate set free by Miss Clark's death fell into residue, and went according to the directions of the residuary clause. The case was provided for under the fifth purpose of the deed.[2]

Lord President.—There are two questions to solve here. The first is whether Mrs Ronaldson, as the survivor of two liferentrices, is entitled to the liferent of the whole residue of Miss Helen Stobie's trust-estate, in consequence of the predecease of Mrs Clark and her daughter. That depends on whether there existed a right of accretion as between the two liferenters. The second question is whether one-half of the free annual proceeds or income of the trust-estate is to fall into residue, or to pass into the estate not disposed of.

On the first question there is not much room for doubt. Mr Lorimer endeavours to separate the liferent clauses. I do not think that is a fair mode of construing the deed. The provision is this. The trustees were directed in the fourth purpose of the deed to "hold the whole of the said residue and remainder, and the price and proceeds thereof, for behoof of the said Margaret Stobie or Ronaldson and Jane Stobie or Clark in liferent, and shall annually, or at such other times as my trustees shall judge expedient, pay over to them equally between them the free annual produce or income thereof during their joint lives, and in the event of either of my said sisters predeceasing me, or upon the death of either of them after my decease, my trustees shall pay over one-half of the said free proceeds or income to her children equally, share and share alike, if more than one, during the lifetime of the survivor of my said sisters."

I do not concede that if all that was said was "shall hold the whole of the said residue and remainder, and the price and proceeds thereof, for behoof of the said Margaret Stobie or Ronaldson and Jane Stobie or Clark in liferent," these words taken alone would have created a right of accretion; but taking the clause altogether there is a clear equality between the sisters. Each is to

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[1] Tulloch v. Welsh, Nov. 23, 1838, 1 D. 94; Barber v. Findlater, Feb. 6, 1835, 13 S. 422.

[2] Paxton's Trustees v. Cowie, July 16, 1886, 13 R. 1191; Pursell v. Elder, June 13, 1865, 3 Macph. (H. L.) 59, 37 Scot. Jur. 394.

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get one-half. They are clearly to enjoy the liferent equally, but it is even more clear that the right of each is separable. On the decease of the first sister the liferent does not accresce. There is a provision to the contrary.

Taking that clause altogether, one does not require the case of *Paxton*. I think, however, that that case is applicable, and that this case is *a fortiori* of it.

The next question is, what is to become of the one-half of the liferent undisposed of after the death of Miss Clark, the daughter of the first deceasing liferentrix. As a general rule, where there is a residuary clause, that prevents all intestacy. This is not a universal but a general rule. Something special is required to prevent it, but the construction of the deed here makes it clear that there is no intestacy. There are two residues mentioned in this settlement. The first is the residue referred to in the fourth purpose; after disposing of the corporeal moveables and two or three pecuniary legacies, the testatrix directs,—"That my said trustees shall realise and convert into cash the whole residue and remainder of my said means and estate, including my property of Easter Balgedie," that is to say, the trustees are to create a residue by means of sale and realisation, and this residue is to bear the burden of the liferents. But at the end of this clause reference is made to another residue, the nature of which is set forth in the fifth purpose of the deed,—"As soon as conveniently may be after the death of the longest liver of the said Margaret Stobie or Ronaldson and Jane Stobie or Clark, or after my own death should they both predecease me, my trustees shall pay over and divide the whole free residue and remainder of my said means and estates" to and among certain nephews and nieces.

There is no reference back there to the residue in the fourth purpose as "said residue"; on the contrary, it is quite separate. Whatever belongs to the estate at the death of the liferentrix is declared to fall into the residue created by this clause, because it is the "free residue of my estate" at that date.

There is no room for distinction. There is no room for intestacy, there being a proper residuary clause.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

THE COURT answered the first and second questions in the negative, and the fourth question in the affirmative.

N. BRIGGS CONSTABLE, W.S.—FYFE, IRELAND, & MACKAY, W.S.—Agents.

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THE GREENOCK HARBOUR TRUSTEES, First Parties.—*Balfour—M'Kechnie.*
THE BROWN SOCIETY AND OTHERS, Second, Third, Fourth, Fifth, and Sixth Parties.—*Asher—C. S. Dickson.*
VIOLET GRAY, Seventh Party.—*G. R. Gillespie.*
THOMAS AITKEN AND OTHERS, Eighth and Ninth Parties.—*Sol.-Gen. Robertson—C. J. Guthrie.*
MRS J. G. MURRAY OR HILL (Hill's Executrix), Tenth Party.—*Darling—H. Johnston.*
JOHN M'ARTHUR AND OTHERS (Macfarlane's Trustees), Eleventh Parties.—*D.-F. Mackintosh—Murray.*
THE GALBREATH MORTIFICATION AND OTHERS, Twelfth Parties.—*Sir Charles Pearson—Low.*

Process—Special Case—Competency.—In a special case presented by the Greenock Harbour Trustees and by certain classes of lenders holding assignments under the different Acts of the Trust, it was stated that the funds of the Trust

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"were not at Whitsunday last and have not since been adequate to meet the repayment of certain loans then and since payable, and the payments of interest due in respect of money borrowed." The Court entertained the case and decided questions of preference raised therein.

Bankruptcy—Preference—Uncompleted Security—Right to assignation of rates and duties.—The Greenock Harbour Trustees were authorised by their Acts to borrow money, and in security therefor to grant assignations of the rates and duties leviable by the trust. Some of the creditors of the trust held only interim receipts for their advances signed by the treasurer of the trust, with an undertaking that an assignment would afterwards be completed. The trustees became unable to meet all their liabilities. A question of preference between the holders of the statutory assignations and the holders of the interim receipts having arisen, *held* that creditors holding assignations granted in terms of the statute had a preference over the interim receipt holders, who held no statutory security.

Right in Security—Public Harbour—Assignation of "works and property."—Statutory assignments for moneys borrowed by Harbour Trustees contained assignations to "the rates, duties, and other revenues of the trust, and the works and property of the trust." *Held* that the words "works and property of the trust" were of no practical effect, as it was obviously not contemplated by the Legislature to give a security which could not be made effectual without the use of real diligence.

1st Division.
B.

THE harbours of Greenock were originally constructed under the authority of a series of Acts of Parliament ending in the year 1817.

The next local Act dealing with them was passed in 1842 (5 Vict. sess. 2, cap. liv.). It gave the Harbour Trustees power to borrow up to £220,000 on the credit of the rates and duties, and in the form of assignment appended in the schedule to that Act it was provided that the security should remain until the sum borrowed, "with the legal interest thereof (or such interest as may be agreed on, if less than £5 per centum), shall be fully satisfied and paid." Section 22 enacted,—"That all persons to whom securities have, before the passing of this Act, been granted under the said recited Acts, and all persons to whom assignments or securities shall hereafter be made, or who are or shall be entitled to the moneys thereby secured, shall, in proportion to the sums therein respectively mentioned, be creditors on the said rates or duties, equally, one with another, without any preference in respect of the priority of advancing such moneys, or of the dates of any such securities or assignments respectively."

The Act of 1866 (29 and 30 Vict. cap. clvi.) repeated certain previous Acts, including that of 1842, and gave power to the trustees to borrow up to £650,000. The form of assignment therein provided was in similar terms to that under the Act of 1842. Sec. 72 of the Act of 1866 enacted,—"All assignments or mortgages for money borrowed under the authority of the recited Acts, and which shall be in force at the time of the passing of this Act, shall, during the continuance thereof, have priority over any assignments or mortgages for money borrowed by virtue of this Act, and the several holders of the assignments or mortgages first mentioned shall have the same priority among themselves in respect thereof as they would have had if this Act had not been passed."

The Act of 1867 merely raised the borrowing powers from £650,000 to £750,000.

The Act of 1872 (35 and 36 Vict. cap. lxxi.) gave the trustees power to borrow up to £1,000,000, and provided by the 34th section that "for securing repayment of the money so borrowed, with interest, the trustees may assign over the rates and duties and other revenues of the trust, and the works and property of the trust, or any part thereof, or any of those securities, to the lender accordingly." Section 35 provided,—"All moneys to be raised by the trustees under this Act from the time when the same shall be advanced, and the interest for the time being due thereon shall

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have priority against the trustees, and all the rates, duties, and other revenues of the trust, and the works and property of the trust, over all other claims on account of any debts incurred, or to be incurred, or engagements entered into, or to be entered into, by them. . . . ." The 38th section provided,—" In relation to the borrowing of money by the trustees, the following farther provisions shall have effect, namely, (1) every assignment in security made by the trustees after the passing of this Act, by virtue of their borrowing powers under their former Acts, or this Act, and interest warrants or coupons to be delivered with such assignments, and minutes of renewal and discharges of such assignments, may be in the respective forms given in the fifth schedule to this Act, or to the like effect. . . . ."* The 40th section provided,—" All assignments for money borrowed by the trustees before the passing of this Act in force at the passing of this Act shall, during their respective

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* The fifth schedule of the Act gave this form of assignment,—" By virtue of the Greenock Port and Harbours Acts, 1866, 1867, and 1872, the trustees of the port and harbours of Greenock in consideration of the sum of pounds sterling paid to them by do hereby bind themselves to pay to the said executors, administrators, or assigns, the principal sum of pounds at the principal office of the trustees on the day of eighteen hundred and with a fifth part more of liquidate penalty in case of failure, together with interest on the said principal sum at the rate of per centum per annum, payable half-yearly (as per coupons or interest warrants delivered herewith), or in the option of the said or foresaids, the said principal sum shall thereafter in virtue hereof remain as a loan to the said trustees until the expiry of a further term of years to be afterwards agreed on, or the said principal sum shall be payable at the dates, and subject to the provisions contained in the said Acts in the same manner as if the said sum had been advanced on the day of payment first above specified without any period being fixed for the repayment thereof, and subject to the provisions of the said Acts the trustees do hereby assign and make over to the said his executors, administrators, and assignees, All and Sundry the rates, duties, and other revenues of the trust, and the works and property of the trust, payable or belonging to the trust in virtue of the said Acts, and all their right, title, and interest, of, in, and to the same, to be held by the said assignee and his foresaids until the said sum of with the interest thereof, shall be fully satisfied and paid.

"In witness whereof these presents, written (so far as not printed) by are sealed with the common seal of the said trustees, and subscribed by us, three of the trustees and their clerk, at Greenock, the day of eighteen hundred and before these witnesses.

Trustee.
Trustee.
Trustee.
" Clerk of the Trust.

"Form of Minute of Renewal.—No. 1.

" 18 .—It has been mutually stipulated and agreed upon that the repayment of the principal sum contained in the within assignment shall be postponed, and the same shall not be due and exigible until the day of eighteen hundred and , and that interest shall become due on the said principal sum to the date last mentioned at the rate of per centum per annum, and shall be paid half-yearly on presentation of the respective coupons or interest warrants in number issued herewith.

(Signature of Assignee)

Trustee.
Trustee.
Trustee."

The forms of minutes of renewal Nos. 2 and 3 were in similar terms, except that the word " mortgage " was used in place of the word " assignment."

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continuance, have priority over any assignments for money borrowed by them after the passing of this Act; and the several holders of assignments in force at the passing of this Act shall have the same priority among themselves in respect thereof as they would have had if this Act had not been passed."

The Act of 1880 (43 and 44 Vict. cap. clxx.), provided,—Section 66,—"The trustees may, under the authority of this Act, borrow at interest on the security of the rates and duties and other revenues of the trust any sum which, together with the amount already authorised to be borrowed before the passing of this Act, shall not exceed £1,300,000; . . . . and for securing the repayment of the money so borrowed, with interest, the trustees may assign over the rates and duties and other revenues of the trust, or any part thereof, or any of those securities, to the lender accordingly." Section 71 provided,—"All moneys to be borrowed under the authority of this Act may be borrowed in the several ways and manners by the Acts of 1866 and 1872 provided, and may be secured, and the security thereof be transferred in such manner and form as directed by the said Acts with respect to the money borrowed or to be borrowed under the authority thereof, and all the provisions of the said Acts with respect to the borrowing, and to the security, and to the transfer or assignment, shall extend and apply to the moneys by this Act authorised to be borrowed as if the same had been borrowed under the said Acts: Provided that in regard to sums to be borrowed under the authority of this Act, the deed of assignment shall bear reference to this Act as well as to the trustees' former Acts, and that the form of transfers of assignments . . . contained in the said Harbour Acts of 1866 and 1872, shall apply to the transfer of all sums borrowed and due by the trust." Section 72 provided,—"All assignments for money borrowed by the trustees before the passing of this Act, in force at the passing of this Act, shall, during their respective continuance, and subject to the provisions of the Acts under which the same were respectively granted, have priority over any assignments for money borrowed by them after the passing of this Act, and the several holders of assignments in force at the passing of this Act shall have the same priority among themselves in respect thereof as they would have had if this Act had not been passed." Section 73 provided that the trustees, in lieu of continuing on mortgage money borrowed under that or former Acts, might resolve to fund the whole or any part thereof, and might issue certificates to the holders of such funded debt entitling them to annuities on the sums lent by them,—to rank *pari passu* with the other mortgages and assignations granted under the Act.

An Act passed in 1884 raised the borrowing powers of the trustees to £1,800,000.

The Harbour Trustees finding at Whitsunday 1887 that they were unable to meet their liabilities as at that term in full, it was arranged that a special case should be presented to the Court to have certain questions relating to the preferences and priorities of the various classes of creditors under the different Acts determined.

The case stated that "owing to various causes the funds at the command of the first parties (the trustees) were not at Whitsunday last, *and have not since been*, adequate to meet the repayment of certain loans then *and since* payable, and the payments of interest due in respect of money borrowed under the various Acts of Parliament." (The words printed in *italics* were added after the case had appeared in the Single Bills and in answer to a doubt expressed by the Court as to the competency of their entertaining it.[1])

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[1] *Cf.* Trustees of North British Building Society, July 14, 1885, 12 R. 1271.

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The Harbour Trustees were the first parties to the case. The other parties, and the Acts under which they were creditors, were,—(2) 1842 Act. (The Brown Society.) The holders of an assignment issued under the Act of 1842, which had never been renewed. (3) 1842 Act. (Adam's Trustees.) The holders of an assignment issued under the Act of 1842, which was renewed by minutes of renewal appended thereto, of dates 19th September 1876 and 24th April 1883. (4) 1866-7 Acts. (Mrs M'Pherson.) The holder of an assignment issued under the 1866 and 1867 Acts, which had never been renewed. (5) 1866-7 Acts. (Mr and Mrs Mumme.) The holders of an assignment issued under the 1866 and 1867 Acts, which was renewed by minutes of renewal, of dates 4th December 1876 and 23d September 1881. (6) 1872 Act. (George Baine and Mrs Denniston.) The holders of (A) an assignment issued under the 1866, 1867, and 1872 Acts, the term of payment whereof fell before the passing of the 1880 Act, and which assignment had never been renewed; and (B) an assignment issued under the 1866, 1867, and 1872 Acts previous to the passing of the 1880 Act, the term of payment whereof had not yet expired. (7) 1872 Act. (Miss Violet Gray.) The holder of an assignment, dated 21st July 1876, issued under the 1866, 1867, and 1872 Acts, the term of payment whereof was 15th May 1881, and which assignment was renewed by minute of renewal in the statutory form, dated 21st October 1881, the period of renewal expiring on 15th May 1886. The assignment bore this marginal note:—"Greenock, 2d March 1886.—It has been agreed to continue this loan at the rate of four pounds per cent per annum until further notice. WM. HUTCHESON, Treasurer." (8) 1872 Act. (Thomas Aitken.) The holder of an assignment issued under the 1866, 1867, and 1872 Acts, which fell due after the Act of 1880 on 11th November 1883, and was renewed by minute of renewal in the statutory form, of date 21st December 1883. The postponed term of payment was 11th November 1891. (9) 1872 Act. (Robert Macfarlane's Trustees.) The holders of an assignment issued under the 1866, 1867, and 1872 Acts, which fell due before the passing of the 1880 Act, and was renewed twice by minutes of renewal, of dates 23d April 1880 and 24th March 1885, both dates being prior to the arrival of the term specified for payment of the assignment. The postponed term of payment was 15th May 1893. (10) 1872 Act. (Executrix of Alexander Hill.) The holder of an assignment issued under the Acts of 1866, 1867, and 1872, and being of an amount within the borrowing powers of the 1872 Act, but issued of date 19th November 1880, being after the passing of the Act of 1880. (11) 1880 and 1884 Acts. (Hugh Macfarlane's Trustees and Charles Broadfoot Connell.) (A) The holders of an assignment issued under the Acts of 1866, 1867, 1872, 1880, 1882, and 1884, and (B) the holders of a certificate for £500 of the funded debt. (12) (The Galbreath Mortification, Greenock Charitable Society, and Mr and Mrs M'Murrich.) Holders of interim receipts for sums advanced by them respectively, which were dated 28th December 1867, 7th January 1870, and 19th January 1887. The total amount of loans on interim receipts was £6375.

In regard to the case of the 12th parties (the interim receipt holders), it was stated in the case,—"All sums received in loan by the parties of the first part were entered as received in a book called the Loans Book, from which the formal assignments were prepared. The assignments as issued were entered in the Register of Assignments. Formal assignments were not executed in the case of the said loans of £6375. In the ordinary course of dealing, the trustees, in borrowing money under their statutory powers, granted an interim receipt therefor, which was exchangeable, and was usually exchanged for a formal assignment at a later date.

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No distinction was made between money borrowed under interim receipts and money borrowed under formal assignments, both being equally represented in the accounts and balance-sheets of the trustees as borrowed under the said Acts. The annual accounts published by the trustees, to which they were in use to refer intending lenders for information, shewed the full amount of indebtedness in respect of money borrowed under statutory powers at the time, and described it as 'debt due on assignments,' without distinguishing between money standing on interim receipt and on formal assignment."

The following questions were submitted to the Court:—"1. Do the second parties rank on the rates and revenues of the trust preferably to the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth parties, or to any, and which of them? 2. Are the third parties in the same position as the second parties, or does their preference, if any, rank as if the loan had been granted of the date of one or other, and which, of the minutes of renewal? 3. Do the fourth parties rank on the rates and revenues of the trust preferably to the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth parties, or to any, and which of them? 4. Are the fifth parties in the same position as the fourth parties, or does their preference, if any, rank as if the loan had been granted of the date of one or other, and which of the minutes of renewal? 5. Do the sixth parties rank on the rates and revenues of the trust preferably to the seventh, eighth, ninth, tenth, eleventh, and twelfth parties, or to any, and which of them? 6. Do the sixth parties rank on the works and property of the trust preferably to all the other parties, or to any, and which of them? 7. Is the seventh party as regards the rates and revenues of the trust entitled to rank *pari passu* with the sixth parties? 8. Is the seventh party entitled to rank *pari passu* with the sixth, eighth, and ninth parties on the works and property of the trust, and preferably to all the other parties to the case? or, Is she entitled to rank preferably as aforesaid only on the works and property of the trust existing at the date of her assignment? 9. Do the eighth and ninth parties rank on the rates and revenues of the trust preferably to the seventh, tenth, eleventh, and twelfth parties, or any, and which of them, and *pari passu* with the sixth party? 10. Do the eighth and ninth parties rank on the works and property of the trust preferably to all the parties in the case except the sixth parties? or, Do the eighth and ninth parties rank preferably as aforesaid only on the works and property of the trust existing at the dates of their respective assignments? 11. Is the tenth party entitled to rank on the rates and revenues of the trust *pari passu* with the sixth parties, class (B), and preferably to all the other parties in the case except the second and fourth parties, or to any, and which of them? 12. Is the tenth party entitled to rank on the works and property of the trust preferably to all the parties in the case, or to any, and which of them? or, Is she entitled to rank preferably as aforesaid only on the works and property of the trust existing at the date of her assignment? 13. Have the twelfth parties, or any, and which of them, the same rights and preferences as if formal assignments had been delivered to them of the dates of their respective interim receipts; or are they, or any, and which of them, now entitled to demand such assignments from the first parties to that effect? 14. Assuming that the sixth, seventh, eighth, ninth, and tenth parties are entitled to the preferences which they claim over the works and property of the trust, are they entitled to effectuate their rights over the said works and property either (1) by bringing the said works and property, or such part thereof as may be necessary to meet their claims to public sale, or (2) by administering

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said works and property for their behoof until their claims are satisfied, or by which of these modes? 15. Alternatively to the whole of the foregoing questions, Do the whole parties other than the first rank *pari passu* upon the said rates and revenues?"

The arguments in regard to all except two of the questions involved turned upon the construction of the respective Acts of Parliament, and need not be set forth.

I. The twelfth parties—the interim receipt-holders—argued that they were in the same position as if they had got formal assignations. These could have been demanded at any time, and the interest was always paid just as if there had been assignations from the first. It would make no difference even if the trust were in a position of insolvency, which it was not. The only objection to the trustees giving assignations now was that that would be *in fraudem* of the rights of the other creditors. But such assignations would not be reducible under the Act of 1696, even if granted within sixty days of bankruptcy.[1] They would be granted in implement of obligations undertaken concurrently with the issue of the receipts. They were not new debts.

In answer it was argued that in order to accede to the demand of the twelfth parties it would be necessary to antedate the assignations, which was impossible. Further, the trust was practically insolvent, and the position of the creditors could not be varied.[2] If granted the bonds could not be antedated, and must be granted under the Act of 1880. But interim receipts were not contemplated under that Act, and no effect could be given to them.

II. It was argued, upon the terms of the assignations in the 1872 Act, on behalf of the parties holding assignations under that Act, that the words "works and property" gave an additional security upon which real diligence could be done,[3] thereby giving to these parties rights which those holding under the previous Acts had not.

In answer it was argued, *inter alia*, that the fact that it would be impossible to work out such a security as was contended for was enough to shew that it could not be successfully maintained.[4]

At advising,—

LORD PRESIDENT.—The first parties in this special case are the trustees of the port and harbours of Greenock, who are, under various Acts of Parliament, vested in the property of the harbour and in the management and application of all the revenues received from the use of the harbours.

The other parties are creditors under the assignments which have been granted by the trustees for money borrowed under the authority of the Acts of Parliament which I shall immediately refer to.

It is stated by the first parties, with the assent of all the other parties to the case, that "owing to various causes the funds at the command of the first parties were not at Whitsunday last, and have not since been, adequate to meet the payment of certain loans then and since payable, and the payments of interest due in respect of money borrowed under the various Acts of Parliament."

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[1] Stiven v. Scott & Simson, June 30, 1871, 9 Macph. 923, 43 Scot. Jur. 511; Gourlay v. Mackie, Jan. 27, 1887, 14 R. 403; Rose v. Falconer, June 26, 1868, 6 Macph. 960, 40 Scot. Jur. 550.

[2] Nelson Mitchell v. City of Glasgow Bank, Dec. 21, 1878, 6 R. 420 (Lord Deas, p. 433).

[3] Mersey Docks Trustees v. Gibbs, &c., June 5, 1866, L. R., 1 E. and I. Apps. 93; Virtue v. Police Commissioners of Alloa, Dec. 12, 1873, 1 R. 285.

[4] Dundee Union Bank v. Dundee and Newtyle Railway Co., Jan. 25, 1844, 6 D. 521; Gardner v. London, Chatham, and Dover Railway Co., Dec., 1866, L. R., 2 Chan. Apps. 201.

The special case has therefore been presented for the purpose of determining what may be called the order of ranking of the various classes of creditors represented by the parties before us; and as regards certain classes of these creditors the case is not attended with any difficulty.

There are four Acts of Parliament that require particular attention. The first was passed in the year 1842, by which the trustees were empowered to borrow the sum of £220,000 for the purposes of the harbour and works. The second was passed in 1866, and, along with a supplementary Act of the following year, 1867, it authorised borrowing powers up to £750,000, including the previous borrowing powers.

In the Act of 1872 the borrowing powers were extended to £1,000,000, and in 1880 to £1,300,000.

Now, as regards the Act of 1842, it would rather appear that at that time there were some loans outstanding under the previous Acts of Parliament; for by the 22d section of that Act it is appointed that the sums borrowed under the Act of 1842 should rank *pari passu* with all the previous loans; and money having been borrowed under the Act of 1842 to a considerable extent, the Act of 1866 was passed, and contained a clause which again secured a priority to creditors who had lent their money under the Act of 1842, and as this clause is repeated in subsequent Acts of Parliament, I may as well read it at once, and once for all. It is the 72d section of the Act of 1866. "All assignments or mortgages for money borrowed under the authority of the recited Acts, and which shall be in force at the time of the passing of this Act, shall, during the continuance thereof, have priority over any assignments or mortgages for money borrowed by virtue of this Act, and the several holders of the assignments or mortgages first mentioned shall have the same priority among themselves in respect thereof as they would have had if this Act had not been passed." That clause therefore makes it quite plain that the creditors under the Act of 1842 have a priority over the creditors under the Act of 1866.

And, in like manner, when the next Act was passed in 1872, there was a similar clause introduced—section 40—which gave priority to all the creditors who had already lent their money under the provisions of the Acts, including the Act of 1866, over the creditors who were to advance their money under the Act of 1872.

And so in the next Act of 1880 there is a similar priority clause.

While therefore the creditors under the Act of 1842 rank *primo loco*, the creditors under the Act of 1866 rank *secundo loco*, the creditors under the Act of 1872 rank *tertio loco*, and lastly come the creditors under the Act of 1880, who are a different set of creditors—that is to say, creditors not under the operation of the earlier Acts, but who also necessarily rank *pari passu* with one another, because it must be observed that the securities which are granted for the money advanced under this Act are not real securities in any proper sense of the term. There is nothing done by that Act to confer or make a real security. To do so in the case of ordinary securities in our law we know that in the case of heritable securities there must be infeftment or its equivalent, in the case of moveables there must be delivery, and in the case of incorporeal moveables there must be an intimated assignation. But none of these things was done, or could be done, in the case of the statutory assignments with which we are here dealing, and therefore it follows of necessity that for one thing there was no priority of time under this Act of Parliament, and for another there was under it no priority in point of preference.

As regards the cases which have occurred under the Act of 1842 and the Act of 1866, I do not think any difficulty occurs at all. The assignments under these Acts of Parliament specify no times of payment, and they just assign the revenues of the harbour in security, and fix a rate of interest. The debtor has the option, if he chooses, to put an end to the assignments by giving notice of payment as provided in the statutes, and of course the creditor is entitled to demand payment of his money when he pleases.

In some of the cases which we have before us under the Act of 1866, there is a form of renewal gone through, but it is perfectly obvious from the language of the assignments under that Act that nothing of the kind was necessary. The assignments remained in force until the money was paid up by the debtor, or until the creditor called up his money and got payment of it, and I suppose the form of renewal which was gone through in some of these cases was suggested by the circumstance that when these renewals took place the Act of 1872 had been passed, which required renewals of the assignments given under its authority, and that seems to have suggested to the parties that probably it was intended that there must be similar renewals under the provisions of the former statutes. But that, obviously, is an entire mistake. Nothing of the kind was necessary, and therefore we are not at all required to consider whether, if renewals had been necessary under the Act of 1866, they were rightly given in the form we have before us. The creditors therefore under the Act of 1842, as I have said before, come to rank, in the first place, on the revenues of the harbour; and the creditors under the Act of 1866 rank in the second place.

But the Act of 1872 introduced a new form of assignment; and there is a clause in that statute relating to the form of assignments which it is necessary to keep in view. The 38th section provides that in relation to the borrowing of money by the trustees the following further provisions shall have effect, and the first of these provisions is, that "every assignment in security made by the trustees after the passing of this Act by virtue of their borrowing powers under their former Acts or this Act, and interest warrants or coupons to be delivered with such assignments, and minutes of renewals, and discharges of such assignments, may be in the respective forms given in the fifth schedule to this Act, or to the like effect. . . ." Then, in the 3d subsection of the same section, it is provided that "section 67 of the Harbour Act of 1866" (relating to forms of assignment) "shall not apply to any assignment made by the trustees after the passing of this Act." Now, I think the effect of that clause, taking this subsection into account, is, that an assignment made after the passing of the Act of 1872 required to be in the form prescribed in the fifth schedule of that statute, because the previous forms are forbidden to be used, and that new form is substituted.

That brings us therefore to a consideration of the form contained in that fifth schedule, which differs very materially from the form in the previous statutes. The trustees here bind themselves to pay to the lender, and his executors, at the principal office of the trustees, on a certain date to be specified, the principal sum borrowed by them, together with interest upon it at the rate of so much per centum per annum, payable half-yearly, as per coupons or interest warrants delivered herewith, or in the option of the creditor, "the said principal sum shall thereafter, in virtue hereof, remain as a loan to the said trustees until the expiry of a further term of years, to be afterwards agreed on, or the said principal sum shall be payable at the dates and subject to the provisions contained in the said Acts, in the same manner as if the said sum had been advanced on the day of payment first above specified, without any period being fixed for the repayment thereof; and, subject to the provisions of the said Acts, the trustees do hereby assign and make over" to the creditor "the rates, duties, and other revenues of the trust, and the works and property of the trust, payable or belonging to the trust," in security of the advance.

Now, that form differs from the form in the previous statutes in this respect, that there was no day of payment specified in the previous form. The money remained until it should be called up or paid, and the creditor's security subsisted until the money was fully paid, with the specified amount of interest; but in the schedule now before us there is a day of payment specified, and it is plain that it is not intended that the security shall subsist in the same form or to the same effect after that day of payment is past, because there are delivered with the assignments coupons or interest warrants which come down only to the date of payment, and as soon as these coupons or interest warrants are exhausted (which is the same time as the date of payment of the principal), there are no further means of recovering interest and no provision for the payment of interest.

Now the object of all this plainly is to give parties an opportunity of altering the rate of interest after a certain period has elapsed. Suppose that the period prescribed for payment is five years after the date of the assignment; the effect of that is that the interest warrants or coupons being exhausted, the rate of interest may be altered by agreement. It is to be observed that it is not altered by the statute at all, but it must be arranged between the parties when the date of payment of the principal arrives. The rate of interest falls to be fixed then if the loan is to be continued, and accordingly the alternative is for the creditor to say that the principal sum is to be paid, or that it may thereafter be allowed to remain as a loan to the trustees until the expiry of a further term of years to be afterwards agreed on.

Now there is a form provided for such an agreement in this same schedule. It is called "form of minute of renewal," and it bears that "it has been mutually stipulated and agreed upon that "the repayment of the principal sum contained in the within assignment shall be postponed, and the same shall not be due and exigible until" another specified date, "and that interest shall become due on the said principal sum to the date last mentioned" at a certain rate, which is specified also in the minute of renewal. Therefore when the term arrives for payment of the principal in the original assignment, the parties may, if they think fit, come to this kind of agreement. If they do not, the money must be paid. These are the two alternatives presented.

It seems to me that there are just two cases before us in which this procedure has been regularly gone about. One is the second security held by the sixth party, and the other is the security held by the ninth party.

The security held by the sixth party, which is distinguished by the letter B, is an assignment which is dated in 1878, and the term of payment is 1888, so it is not yet due. I am perhaps wrong in the form of expression I applied to this case, for there is no minute of renewal. So it is not yet due, and accordingly no question is raised as to this. But what I meant was, that it is undoubtedly a well made assignment, and a subsisting assignment under the provisions of the Act of 1872, because it is an assignment made in the terms prescribed by the schedule. But the day of payment of the principal has not yet arrived, so no minute of renewal was necessary.

In the case of the ninth party the assignment fell due before the passing of the Act of 1880, but there was a renewal by minute, dated 23d April 1880, which was before the arrival of the term of payment of the assignment. It was again renewed on the 24th of March 1885, and that renewal was also within the term of payment specified within the first renewal, and in that second renewal the term of payment is there postponed until the 15th May 1893. It appears to me, therefore, that, in so far as regards the B security belonging to the sixth party, and the security belonging to the ninth party, these are both perfectly good under the Act of 1872, and precisely conform to the forms of that Act and its schedule.

But there are three other securities constituted under the Act of 1872, which stand in a different position. These are (1) the security A belonging to the sixth party; (2) the seventh party's security; and (3) the eighth party's security.

As regards the security belonging to the sixth party, the term of payment arrived before the passing of the Act of 1880, and that assignment never was renewed at all.

As regards the seventh party's assignment, it fell due after the passing of the Act of 1880, and it was renewed, but it was renewed too late, because the term of payment precedes the date of renewal by some months.

The eighth party is in that respect in the same position. The renewal there was too late also.

Accordingly, the condition of these three parties is this, that they have not complied with that part of the schedule of the Act of 1872, which, of course, gave them as creditors under the assignment which they received the option of postponing the term of payment for an additional period, and fixing the rate of interest for that additional period. The schedule—I shall refer to it again—gives this alternative,—"The said principal sum shall thereafter, in virtue hereof, remain as a loan to the said trustees until the expiry of a farther term of years to be afterwards agreed on." Now, no term of years was agreed on in the case of the sixth party's A security; and although a term of years was agreed on in the case of the seventh and eighth parties, it was not agreed on till after the assignment had lapsed altogether by the arrival of the term of payment. But I have placed these three parties all in the same position. They have all availed themselves of that option which is given by the terms of their assignments.

But, then, there is another point. The schedule of the Act of 1872, which is also embraced in the assignments of all these three parties, is thus expressed, "or the said principal sum"—that is the principal sum in the original assignment—"shall be payable at the dates, and subject to the provisions contained in the said Acts in the same manner as if the said sum had been advanced on the day of payment first above specified without any period being fixed for the repayment thereof." Then follows the form of security, without any period being fixed for the repayment thereof.

No agreement having been come to for a renewal until after the postponed period of payment, the statute says the principal sum shall be held as advanced

of new upon the date of payment originally fixed in the assignment, ar
any date of payment being fixed, and it shall be subject to the rules
ditions prescribed by the Acts. Now what does that mean? It i
happily expressed, because it leaves room for a good deal of argumen
meaning. But it appears to me that, keeping in view that the whol
or at least the main, if not the only object—of this new form of assig
scribed by the Act of 1872, is to provide for fixed periods of paymen
give an opportunity of dealing with the rate of interest if the loa
further continued. It seems to me the most simple meaning, that if
before the term of payment arrives provide for another fixed term
with a fixed rate of interest, then you shall be held to continue the l
the date of payment in the original assignment upon no fixed term of
and without any fixed rate of interest.

I think that answers all the expressions contained in this alternat
would be very difficult to find any other reasonable construction o
ticular schedule, because if it were to be held that the assignment
end altogether, and lost its whole operation and effect, by allowing t
payment to pass without any renewal, these assignments, under the A
would be liable to lose their force altogether in regard to the order o
They would lose the benefit of the priority clause in the Act of 1
would be a very strong thing to imply from the use of such terms a
here. It is not so expressed, and I do not think it can be implied,
place, because I think that would be a most unreasonable constructi
the second place, because the assignment in security stands just as
was from the beginning. The lapse of the period of payment prescri
assignment does not put an end to the effect of the assignment i
Nothing of the kind is said, and surely that cannot be implied, and
being an assignment, it is to stand good. The assignment bears th
subsist, and be held by the assignee until the principal sum, wit
thereon, shall be fully satisfied and paid. Now, it would be enti
sistent with that to hold that when there is an assignment contai
original instrument granted to the creditor under the Act of 1872, it s
all its force and efficacy as an assignment in security, having a certai
attached to it. I therefore come to the conclusion that these three p
sixth party, for the security A, and the seventh and eighth parties
entitled to preferences as coming under the Act of 1872, and secu
72d section of the Act of 1880.

The priority clause of the Act of 1880 is very like the one which I
the Act of 1842, but there are certain slight variances of expression,
fore it may be as well to advert to it. It provides that "all assign
money borrowed by the trustees before the passing of this Act, in fo
passing of this Act, shall, during their respective continuance, and
the provisions of the Acts under which the same were respectively gra
priority over any assignments for money borrowed by them after the
this Act, and the several holders of assignments in force at the passi
Act shall have the same priority among themselves in respect there
would have had if this Act had not been passed." I think the secur
which I have been dealing are fairly within the words of this clause.
"assignments for money borrowed by the trustees before the passin
Act." There can be no doubt they are the governing words of the

the subject of the sentence is "all assignments." These assignments, whatever may have happened to them afterwards, are undoubtedly assignments for money which was borrowed by the trustees before the passing of the Act of 1880. They are also assignments which were in force at the passing of the Act of 1880, and are still continuing. They have not fallen. They are admittedly still subsisting obligations of these harbour trustees, and subsisting securities, and therefore they answer to all the conditions of the 72d section.

The result, therefore, is that these three securities which I have already mentioned are entitled to rank *pari passu* with the security B of the sixth party and the security of the ninth party. They were all ranked *pari passu* under the Act of 1872, and therefore *tertio loco* in this competition.

We then come to the tenth party, and there the money was borrowed under the Act of 1872. But then it was borrowed after the passing of the Act of 1880, and it therefore does not answer to the language of the 72d section of the Act of 1880, because it is not "money borrowed before the passing of this Act," and it was not a security in force at the passing of that Act, and if it does not get the benefit of the preferences conferred by the 72d section of the Act of 1880, I know of no other kind of preference it has, and that being so, it must fall down in the scale, and rank with the securities which are given in the Act of 1880 itself.

Then comes the eleventh party, and the money there was borrowed under the Act of 1880; and, of course, the eleventh party does not contend that he can rank with securities under the Act of 1872, and indeed he does not maintain anything, except that the sixth, seventh, eighth, ninth, and tenth parties should be reduced to that level. That is said to be the sole contention of the eleventh party. From what I have said upon the previous cases—that is to say, upon those of the sixth, seventh, eighth, ninth, and tenth parties, it will be obvious that the conclusion I come to upon the assignment of the eleventh party, is that he has not succeeded in bringing down any of these previous parties except the tenth. He has brought No. 10 down to his own level, but nobody else.

There is in the case of No. 11 also the funded debt, or share of the funded debt, but that does not seem to give rise to any difficulty so far as I can see, because by section 77 of the Act of 1880 it is obvious that his share of the funded debt ranks *pari passu* with the other mortgages and assignations under the Act of 1880.

Then comes the twelfth party, and he is in the unfortunate position of not having any assignment at all, and thereby stands in a very unfavourable position of contrast to the other parties before us. There are in this twelfth category three cases presented. One of the securities, if it may be so called, which is held by the twelfth party, is entitled an interim receipt. It bears date 28th December 1867, and it is in these terms:—"I have this day received from William M'Clure, Esquire, . . . as a loan to the Greenock Harbour Trust, the sum of £300 sterling, for which I will procure an assignment by the trustees in exchange for this receipt.—JOHN ADAM, treasurer, p. WILLIAM SMITH." The second is rather longer in point of expression, and it is dated the 7th January 1870. That document sets out the Act of Parliament, being the Act of 1866, under which the money is advanced, and it proceeds,—"I have this day received from" so and so "as a loan to the Greenock Harbour Trust the sum of £200, which has been placed to their credit in the books of the trust, and for which interest, at the rate of 4½ per cent per annum, or at such other

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rate as may be fixed by the finance committee of the said trust on six notice given, will be paid half-yearly from this date, at the terms of Wh and Martinmas.—JOHN ADAM, treasurer." And then the third doc dated 19th January 1887, and bears to be,—"By virtue of the b powers contained in the above-named Acts, I acknowledge to have received from" so and so "the sum of £600 sterling as a loan to the Harbour Trustees till Martinmas 1889 at 4 per cent. An assignm warrants for the interest thereon will be prepared forthwith, and deli exchange for this receipt.—WILLIAM HUTCHESON, treasurer."

Now it will be observed that the first and second of these receipts wer before the passing of the Act of 1872, while the third is granted after th of the Act of 1880, and therefore they stand in a somewhat different But the great objection to them is that they are in the form of a securi the Greenock Harbour Trustees have no authority to grant. Whether entitle the holders to demand delivery of assignments in security for th mentioned in these receipts is a different question. But there is no su tion put to us in this special case. The question put to us in regard receipts is the thirteenth, and it is this—"Have the twelfth partie and which of them, the same rights and preferences as if formal ass had been delivered to them of the dates of their respective interim re are they, or any and which of them, now entitled to demand such ass from the first parties to that effect?" That is the question we have to and as there is no question put to us as to the right of the parties to delivery of assignments now, I say nothing about that question, or ab the effect of these assignments might be if they were granted, but I prepared to answer the thirteenth question in the negative, upon both of it.

The first part of the particular question appears to suggest to us th receipts shall be in this competition equivalent to assignments grante same dates; that is to say, that the receipt No. 1, which is dated in 18 rank along with the parties who are here preferred *secundo loco*, v creditors advancing their money under the Act of 1866; and so also second, while of course the third cannot obtain any preference under t but would only rank in the last grade with the creditors under the Act But it is quite obvious, I think, that as the statutes prescribe the particu in which the securities are to be given, and state distinctly what is to effect of these forms, if different forms are adopted, they cannot po allowed to have the same effect as those prescribed by the statute, and the form which has been adopted here is no obligation by the Greenock Trustees at all. These documents are no doubt receipts granted by their t But there are clauses in these Acts of Parliament which expressly provid manner in which the Trustees can bind themselves, and the only m which they can bind themselves to any effect at all, and that is by number of the trustees signing documents of debt along with the clerk other officer, and therefore, even in that point of view, these receipts for nothing at all. I therefore come to the conclusion, without any he that the holders of these receipts are not in a condition to ask anything nature of a preference here, because they have not got statutory docume in the second place, as regards the one granted in 1887, the course whic bably open to the holder of that document is to ask that an assignment given to him in terms of the obligation, but as to what the effect of that assignment might be I give no opinion, because it is not raised in this special case.

Now, it appears to me that that disposes of the whole case, with the exception of one question, and that is, What is to be the effect of the insertion in some of the statutory securities of the words "the works and property" in addition to the words "rates and revenues of the trust"?

Now, that matter stands in a very curious position as regards the dates of the statutes, as was pointed out by the Dean of Faculty. In the statute of 1842 the advances are made on the credit of the rates and duties and other property vested in the trustees, and it is provided that the trustees may assign their "rates, duties, and property, or any part thereof," but oddly enough the form in the schedule does not correspond with that provision in the clause of the statute, because the form in the schedule does not assign the property, but only the rates and duties. Under the Act of 1866 there is no mention of anything either in the clauses or in the schedules except rates, duties, and revenues. There is no assignment of the property or works. In the Act of 1872 it is provided that the trustees may borrow on the "rates, duties, and other revenues of the trust, and of the works and property of the trust," and in this case the schedule is in harmony with the clauses, which it is not in the Act of 1842, so that the Act of 1872 is the most complete in the way of assigning "works and property" in addition to "rates, duties, and other revenues."

In the Act of 1880 there is no form of assignment given in any schedule, but clause 71, which is important in this connection, provides that "all moneys to be borrowed under the authority of this Act may be borrowed in the several ways and manners by the Acts of 1866 and 1872 provided, and may be secured, and the security thereof be transferred in such manner and form as directed by the said Acts with respect to the money borrowed or to be borrowed under the authority thereof, and all the provisions of the said Acts with respect to the borrowing and to the security, and to the transfer or assignment, shall extend and apply to the moneys by this Act authorised to be borrowed as if the same had been borrowed under the said Acts."

Now, that gives power in dealing under the Act of 1880 to adopt any of the forms of the previous Acts, and therefore creditors lending money under the Act of 1880, if they can agree with the trustees, may take their security in the terms provided in the Act of 1866, in which case they will have no assignment of the works and property, or they may take under the Act of 1872, under which they will have an assignment of the works and property of the trust.

I think this only leads one to the conclusion that the insertion of these words, "works and property of the trust," was really not meant to have any practical effect at all. The meaning of inserting these words at all was just to give a little more intensity to the conveyance. The works and property of the trust are revenue-producing subjects, and it is quite obvious that in no event under these Acts of Parliament was it ever contemplated that a security should be created over the property and works of any efficacy, which could not be made effectual without doing real diligence against the property and works; and it is almost needless to say that there is not the smallest appearance of any such intention in any of the statutes. I do not suppose any of your Lordships would have the slightest hesitation in saying that an adjudication led by one of the creditors under the Act of 1872, to carry off the harbour works from the statutory trustees would be an utterly absurd and ineffectual proceeding, and yet

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unless this is to be the effect of this assignment of the property and works, I do not see very well what the creditors can get by it except the revenue derived from the works and property. They must either be content with the revenue derived from the property and works or carry off the property itself, and it is certainly obvious that the latter was not intended, and if so, then the only thing remaining is the revenues produced by the use of the harbour and works. The difficulty of giving any other construction to these words under the different statutes may be further illustrated by this, that by section 40 of the Act of 1872 it is provided that all assignments given under the provisions of the earlier statutes, and particularly under the Act of 1866, are to have a priority over the assignments given in the Act of 1872. But if assignments given under the Act of 1872 are to have a more comprehensive security than those given under the Act of 1866, then that section 40 would be to a considerable extent defeated altogether, and the priority thereby created would not be an effectual priority. And it must be observed that the language of these two priority clauses is very distinct and very complete. Assignments, that is to say, assignments in security of certain sums of money, if they be in operation and effect at the date of passing of the new Act, are to have priority in all respects over assignments granted after them. Now, that would be wholly inconsistent with the terms of the assignments granted under the Act of 1872, on the assumption that the assignment of the works and property enlarged the security, and therefore I think a preference over the property and works in competition with assignments granted under the Act of 1866 would plainly be just a contradiction in terms of the 40th section of the Act of 1872.

I think these remarks go over the whole points we are asked to consider, and it will not be difficult, I imagine, to apply the observations which I have made, if your Lordships agree with me, to answering the various questions which are appended to this case, and I do not go into them in detail at present.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

THE COURT pronounced the following interlocutor:—"In answer to the first question in the case, find and declare that the second parties rank on the rates and revenues of the trust *pari passu* with the third parties, and preferably to the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth parties: In answer to the second question, find and declare that the third parties are in the same position as the second parties, and answer the second branch of the question in the negative: In answer to the third question find and declare that the fourth parties rank on the rates and revenues of the trust *pari passu* with the fifth parties, and preferably to the sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth parties: In answer to the fourth question, find and declare that the fifth parties are in the same position as the fourth parties, and answer the second branch of the question in the negative: In answer to the fifth question, find and declare that the sixth parties rank on the rates and revenues of the trust *pari passu* with the seventh, eighth, and ninth parties, and preferably to the tenth, eleventh, and twelfth parties: In answer to the seventh question, find and declare that the seventh party ranks on the rates and revenues of the trust *pari passu* with the sixth parties: In answer to the ninth question, find and declare that the eighth and ninth parties rank on the rates and revenues of the trust *pari passu* with the sixth and seventh parties, and preferably to the tenth, eleventh, and twelfth parties: Answer the first branch of the eleventh question in the negative, and in answer to the second branch, find and declare that the tenth party ranks *pari passu* with the eleventh parties, and preferably to the twelfth parties: Answer the thirteenth question in the negative: Answer the sixth, eighth, tenth, twelfth, and fourteenth questions in the negative: Further, answer the fifteenth question in the negative: Of consent find the whole parties entitled to expenses as between agent and client out of the revenues of the trust," &c.

R. BRUCE COWAN, W.S.—GRAHAM, JOHNSTON, & FLEMING, W.S.—GILLESPIE & PATERSON, W.S.—COWAN & DALMAHOY, W.S.—J. & J. ROSS, W.S.—Agents.

No. 67.

Feb. 1, 1888.
Walls' Trustees v. Drynan.

HENRY WALLS AND ANOTHER (Walls' Trustees), Pursuers and Real Raisers.
JOHN DRYNAN AND MANDATORY, Claimants (Reclaimers).—*Sir Charles Pearson—Sym.*
WILLIAM FIRTH, SONS, & COMPANY, Claimants (Respondents).—*Gloag.*
PETER RYAN, Claimant (Respondent).—*Gloag.*

Jurisdiction—Process—Arrestment jurisdictionis fundandæ causa—Signeting of summons—Where jurisdiction is to be founded against a foreigner by letters of arrestment *jurisdictionis fundandæ causa*, it is not necessary to execute them before the summons is signeted.

Opinions that it is enough that they be executed before defences are lodged.

Observations (*per* the Lord President) on the legal significance of the signeting of a summons.

1ST DIVISION.
Lord M'Laren.
M.

JOHN DRYNAN, merchant in Toronto, a creditor of Thomas Walls, residing in America, in September 1886 arrested the latter's share of his father (John Walls') estate in Scotland in the hands of the testamentary trustees *jurisdictionis fundandæ causa.* The letters of arrestment passed Her Majesty's signet on 20th September. A summons at the instance of Drynan and his mandatory against Thomas Walls, containing warrant to arrest, and concluding for payment of a sum of about £2870, was signeted on the 21st September. On the 23d September the letters of arrestment were executed, and on the same day an arrestment was used on the dependence of the action. On the 24th September the summons was served personally upon Thomas Walls, and decree in absence followed.

William Firth, Sons, & Company, and Peter Ryan, who were also creditors of Thomas Walls, used separate arrestments against his share of his father's succession in the hands of the trustees.

The trustees having subsequently brought a multiplepoinding in order to the distribution of the estate, claims were lodged, *inter alios,* by (1) John Drynan; (2) William Firth, Sons, & Company; and (3) Peter Ryan.

In regard to Drynan's claim, each of the other two claimants stated,—"With reference to the claim for John Drynan, it is averred that the arrestments to found jurisdiction alleged to have been used by that claimant were not executed until 23d September 1886, whereas the action founding upon said arrestments was raised upon 21st September. The alleged arrestments on the dependence were executed of the same date as the arrestments to found jurisdiction." They pleaded;—(4) The action and diligence at the instance of John Drynan being inept, the claimants are, in respect of the arrestments used by them, entitled to a preferable ranking upon Thomas' share of the trust-estate.

The Lord Ordinary (M'Laren), on 15th June 1887, pronounced an interlocutor dealing with this and other questions raised in the multiple-

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poinding. So far as relating to the present question, he found,-
reference to the claim of John Drynan and mandatory, finds tl
the summons at their instance, containing a warrant for ar
passed the signet, jurisdiction had not been founded against
Walls, and consequently that the said warrant of arrestment,
execution of arrestment following thereon, are null and ineffectu

Drynan reclaimed, and argued;—The Lord Ordinary had founc
signeting of the summons required that jurisdiction be first founde
the defender whom it was proposed to call. But jurisdiction at the
of signeting was immaterial, jurisdiction at the moment of executi
essential. All the cases in which questions of jurisdiction had be
turned on the point whether there was jurisdiction when the sumn
executed.[1] The respondents' own averment was that the reclaime
ments to found jurisdiction "were not executed till 23d Septem
whereas the action founding upon said arrestments was raise
September." But it was settled that an action was not "raised
summons was served.[2] It was then a "begun action."[3] Rai
beginning an action were synonymous, what was meant being
cise of an act of jurisdiction against the defender. It was that
matter which the law regarded. A signeted summons never se
of no avail to anyone or against anyone. The Writer to tl

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* "NOTE.— . . III.—The third and only remaining question i
the arrestment which was used by the creditor Drynan to found juris
well laid on, in view of the fact that the letters of arrestment wer
before the signeting of the summons, but were not executed until
signeting of the summons. The letters of arrestment were signeted
tember, the summons was signeted 21st September, and the letters of a
were executed on the 23d September. These are the material dates.

"In the argument before me, it was not contended that this Court
diction over the debtor otherwise than as was constituted by the a
And it is evident that an arrestment which is to be used for the p
founding jurisdiction must be executed before any act of jurisdictio
done; because a mere issue of letters of arrestment attaching noth
ground of jurisdiction against anyone. Now, in the present case, t
ment had not been executed at the time when the summons passed th
and the question is, whether jurisdiction is necessary in order to su
issue of a summons by a Writer to the Signet against a foreigne
summons were no more than a statement of the pursuer's case, togetl
warrant for summoning the defender to enter appearance and to plead,
I should have no great difficulty in holding that it might be writte
and sealed before the arrestments were laid on. I think, for examp
petition or a note of suspension and interdict might be prepared and
the petitioner or complainer in anticipation of jurisdiction being c
against the defender by arrestment. In such a case jurisdiction o
when an order of service is pronounced by the officiating Judge. But
of a summons is different. It is not only a warrant for service, bu
form and substance a warrant for decree against the defender, unles
shew a 'reasonable cause to the contrary.' The issue of a summons
ingly an act of jurisdiction, as indeed appears from the consideratio
our older practice, the summons was preceded by a bill, and bore to b
ex deliberatione dominorum. I am therefore of opinion that the
question (that of John Drynan and mandatory) is defective on the
want of jurisdiction, and that the arrestments used in the action ca
pete with those of the other opposing creditors. . . ."

[1] Dickson, De Wolfe, & Co. v. Wilkin, June 25, 1859, 31 Scot. Ju

[2] Aitken v. Dick, July 7, 1863, 1 Macph. 1038, 35 Scot. Jur. 596;
Macdougall, Nov. 18, 1887, *ante*, p. 78.

[3] Ersk. Inst. iii. 6, 3; Stair, iv. 3, 20.

having put his name to it, the Keeper of the Signet must affix the signet, but the proceeding was ineffectual if no defender were cited. It might be against a dead man, or a mere name. It would fall, too, in a year and day, unless executed. After execution, however, the action being "begun," the summons would last for forty years.[1]

The Lord Ordinary sought to shew that a summons differed from another writ, because it was "in form and substance a warrant for decree." But without execution on the defender it was no warrant for decree. The signeting of it was an authority to serve it, but not because it had been considered by a Judge at all, as in the case of a petition presented to the Court and considered, and which the Court might refuse to order to be served.[2] A summons got its name "*a summonendo*," because "the execution thereof advertises the defender to appear."[3] Its certification, which Stair called its "sting," and regarded as its important feature, required execution.

The Lord Ordinary thought that all summonses formerly required to proceed *ex deliberatione dominorum concilii*, but this was an historical error. Only privileged summonses so proceeded, and for the reason that the bill was presented to obtain for them the privilege of a short *induciæ* upon some specialty.[4] An ordinary summons would pass the signet as of course. This misapprehension had misled the Lord Ordinary and formed an erroneous ground of judgment. But further, it was impossible to say that for every writ which passed the signet *ex deliberatione dominorum concilii* jurisdiction was required. A bill to obtain letters of arrestment to found jurisdiction passed the signet *ex deliberatione dominorum concilii*, and yet *ex hypothesi* there was then no jurisdiction founded. To see this it was only necessary to look at the bill for letters of arrestment in this case.

Argued for the respondents;—The practice was that the signeting of the summons proceeding on a warrant of arrestment should follow the execution of the letters of arrestment. No instance to the contrary could be cited by the reclaimer. In this particular case, as in all others, the summons when signeted bore to be against a defender "against whom arrestments have been used *jurisdictionis fundandæ causa*," shewing both the practice and the general opinion of its necessity. The style books made the practice quite clear.[5] It was always stated in such a summons that the arrestment had already been used. A signeted summons was a warrant for letters of arrestment as on a depending action "upon production of the libelled summons."[6] Erskine's doctrine was that "no action can be brought against" a foreigner actually abroad "till his effects be attached by arrestment."[7] A summons was an order of the Sovereign, the fountain of jurisdiction, that the alleged debtor should appear and plead. It was thus an act of jurisdiction. It was an order to come into the Court that claimed jurisdiction to judge the defender, and there could be no order, even for service, on a foreigner without jurisdiction.[8]

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[1] Aitken v. Dick, *supra* (Lord Deas), 1 Macph. 1041.

[2] Macdonell's Trustees v. Oregonian Railway Company, June 12, 1884, 11 R. 912.

[3] Stair, iv. 3, 27; Shand's Practice, i. 209; W.S. Society v. S.S.C. Society, Feb. 25, 1880, M. App. College of Justice, I.

[4] Beveridge's Forms of Process, 234; Shand's Practice, i. 264; Stair, iv. 3, 32 and 33.

[5] Juridical Styles, 2d ed. (1828), p. 4 and pp. 550, 553.

[6] Act 33 Geo. III. cap. 74, sec. 3, and see Act 54 Geo. III. c. 137, sec. 3.

[7] Ersk. i. 2, 19; iii. 6, 5 (Ivory's note); iv. 1, 4.

[8] Kames' Law Tracts, vol. i., No. 7, History of Courts, p. 374.

No. 67.

Feb. 1, 1888.
Walls' Trustees v. Drynan.

At advising,—

Lord President.—This is a process of multiplepoinding brought for the purpose of distributing the estate of the deceased John Walls. One portion of the estate belongs under his settlement to his son Thomas Walls, and his share has been attached by Mr Drynan, an arresting creditor, who has preferred a claim in the present process. The Lord Ordinary has found in reference to his claim, —"With reference to the claim of John Drynan and mandatory, finds that when the summons at their instance, containing a warrant for arrestment, passed the signet, jurisdiction had not been founded against Thomas Walls, and consequently that the said warrant of arrestment, and the execution of arrestment following thereon, are null and ineffectual."

It is not disputed in point of fact that when the summons at the instance of Mr Drynan and his mandatory passed the signet jurisdiction had not been founded against Thomas Walls; and the question we have now to determine is whether the consequence of that is that the proceedings which followed are null and void.

The state of the fact, as I understand it, is that on the 21st September 1886, the summons at the instance of Mr Drynan against Mr Thomas Walls was signeted, but that at that date although Drynan had obtained letters of arrestment *ad fundandam jurisdictionem*, they had not been executed. They were executed on the 23d September following, and on the same day an arrestment was executed on the dependence of the action. On the 24th September the summons was served personally on Thomas Walls.

I am not able to agree with the opinion of the Lord Ordinary as to the effect of these proceedings. I do not think that the circumstance of there being no jurisdiction against the defender at the time when the summons passed the signet was of any consequence. The Lord Ordinary seems to think that the presenting of a summons to the signet to be signeted is in some sense an application to a Court or a Judge. But to my mind it does not at all partake of that nature. The Keeper of the Signet is not a Judge, neither is he the deputy of a Judge, and still less are any of the Clerks or Writers to the Signet such deputies. The whole effect of obtaining a summons to be signeted is that in the Queen's name a warrant is issued by the Keeper of the Signet or his deputy for serving a summons. That is not in any sense a judicial act.

The Lord Ordinary has, I think, been misled in coming to that conclusion by a mistake which he has made in the history of summonses. He seems to think that all summonses were formerly preceded by bills. But this is not the case. No summons ever required a bill. No doubt there was a class of summonses which were called "privileged summonses," in which the pursuer could apply to the Court for leave to serve upon a shorter *induciæ*, but the bill in such cases was required not as an authority for serving the summons but for shortening the *induciæ*. Otherwise there was no occasion for a bill, and accordingly I think the proposition is universal and incontestable that no summons ever required a bill.

That being so, the question comes to be, when is it necessary that the Court should have jurisdiction over a defender personally in order to make a judgment against him effectual? Certainly it is not necessary that it should have that jurisdiction before the action commences, and it has been very recently determined in this Court that an action commences when a summons is served, and not sooner (*Alston* v. *Macdougall*, 15 R. 78). Accordingly on that ground alone, it is enough to say that jurisdiction is founded in perfectly good time if it is founded when the summons is served, because until the summons is served there is no action.

But I am not sure that even that is the true view, because the first and only time that the defender has an opportunity of objecting to the jurisdiction of the Court before which he is brought is when he lodges his defences. He cannot possibly do so sooner, and he cannot do it later. That is his only opportunity; *primus actus judicii est judicis approbatorius.* And if he comes into Court and does not object to the jurisdiction, it will be too late to do so afterwards, and the judgment pronounced against him will be perfectly effectual, even although jurisdiction has not been created against him.

No doubt there are cases where it is the interest of the Court itself to raise the question of jurisdiction. If the Court is asked to entertain a question which is outwith its jurisdiction, it is *pars judicis* to take exception in such a case. For instance, in a question regarding the claim to a peerage, we should not sustain our jurisdiction even if none of the parties were to raise the objection. So in cases of privative jurisdiction, it is *pars judicis* to interfere to prevent the jurisdiction of the only Court which may be entitled to adjudicate in the cause from being ousted even by the agreement of parties.

But where an individual is made subject to the jurisdiction of a Court by the possession of heritable estate or in any other way, such as by arrestment, the Court has no interest to interfere. The defender alone has an interest, and is entitled to do so, and if he does not state the objection, then no one else has an interest to do so, and the objection falls. On the other hand, if he does state it, the question which is raised is not whether the Court had jurisdiction over the defender at any antecedent time, but whether it has jurisdiction *de præsenti* at the time when the objection is stated, and if it has, I do not see how the objection can be sustained.

I am of opinion that the finding of the Lord Ordinary is not well founded, that the arrestment and decree were competently and validly obtained, and that the reclaimer is entitled to be ranked according to the priority of his decree in point of time.

LORD MURE.—I think the broad ground on which your Lordship has rested your opinion is the right ground to decide the case on; and that upon that footing the Lord Ordinary should have refused to give effect to the plea of want of jurisdiction. If, however, it had been necessary to shew that before the raising of the summons an arrestment *ad fundandam jurisdictionem* had been validly executed, it appears to me that in the present case the facts are sufficient to support that result. The letters of arrestment were signeted on the 20th of September, and the summons on the 21st, and although the letters of arrestment were not executed until the 23d, the summons on the other hand was not served until the 24th, so that the arrestment was completed before the summons was served; and even upon the strictest view of the law I think that the jurisdiction was good, because it was created before the summons was executed. I cannot adopt the view that the signeting of the summons was an act of jurisdiction. I think that the passage from Erskine (III. 6, 3) which was cited by Sir Charles Pearson states the law correctly, and that an action cannot be held to be begun until after the execution of the summons.

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Walls' Trustees v. Drynan.

Lord Adam.—I am of opinion that the signeting of a summons
volve any assertion or exercise of judicial authority. It is a warran
the Queen's name to cite a defender before the Court. The quest
diction only arises when the person who is so cited appears before
that question being not whether at any antecedent time a person
not subject to that jurisdiction, but whether he is at that time su
being so, I think the arrestments in the present case are valid, a
Lord Ordinary's interlocutor in this matter should be recalled.

Lord Shand was absent.

The Court pronounced this interlocutor:—"Recall the
locutor so far as it finds with reference to the claim
John Drynan and mandatory, 'that when the summo
instance containing a warrant of arrestment passed the
diction had not been founded against Thomas Walls,
quently that the said warrants of arrestment following
null and ineffectual': Find that the decree and arrestm
on by the said claimants are not open to any objecti
ground that the Court had no jurisdiction to pronoun
decree: Also recall the interlocutor so far as it finds t
John Drynan and mandatory liable to the other clain
penses: Find the said John Drynan and mandatory
expenses since the date of the said interlocutor against
ants William Firth, Sons, & Company, and Peter Ryan

Campbell & Smith, S.S.C.—Scott Moncrieff & Trail, W.S.—
J. & J. Galletly, S.S.C.—Agents.

No. 68.

Feb. 1, 1888.
Earl of Strathmore v. Heritors of Rescobie.

Earl of Strathmore, First Party.—*Sol.-Gen. Robertson*—
Heritors of Rescobie, Second Parties.—*Sir Charles Pearson*

Church—Church Patronage (Scotland) Act, 1874 (37 *and* 38 *V*
secs. 4 *and* 5—*Patron's compensation.*—A patron obtained in 1875
the Church Patronage Act, 1874, an interlocutor by the Sheriff dete
amount of compensation to which he was entitled under the Act fo
the patronage of a parish, and finding and declaring that on the c
a vacancy he should be entitled to receive from the heritors pay
amount by four equal yearly instalments out of the first four years'
vacancy occurred in the parish in 1880, and a new minister was ap
the patron did not intimate the Sheriff's interlocutor to the heritors
payment of his compensation till 1887—the whole stipend having
meantime paid in each year to the minister. *Held* that as the heri
bona fide in paying away the whole stipends for the four years ove
deduction in respect of the compensation would have spread, the pat
his claim against them by neglecting to apply for his compensation
period.

1st Division.
B.

Prior to the passing of the Church Patronage Act, 1874
Vict. cap. 82), the Earl of Strathmore and Kinghorn was pat
parish of Rescobie, in the county of Forfar.

Within six months after the passing of the Act, viz., on 26
1875, a petition was presented to the Sheriff of Forfarshire for
to have the sum of compensation to which he was entitled
in terms of the 4th and 5th sections of the statute.*

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* The 4th section of the Act 37 and 38 Vict. c. 82, enacte
cases in which the patronage of a parish is held, either solely
by a private patron, or any guardian or trustee on his behalf,

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On 18th March 1875 the Sheriff-substitute (Robertson) pronounced this interlocutor:—" . . . Further found and determined, and hereby finds and determines, that the compensation to be paid to the said petitioner, . . . or those in his right, in respect of the operation of e foresaid Act, for the parish of Rescobie, is £233, 1s. sterling, being e sum which, on an average of the three years 1871, 1872, and 1873, minister has received in name of stipend out of the teinds of the said ish of Rescobie: Therefore found and declared, and hereby finds and clares, that on the occurrence of a vacancy in the said parish of scobie the petitioner, . . . or those in his right, shall be entitled nless the sum shall be otherwise provided) to receive from the heritors the said parish of Rescobie payment of the foresaid sum of £233, 1s. rling, and that by four equal yearly instalments out of the first four ars' stipend which, but for the passing of the foresaid Act, would have en wholly payable by them to the minister to be appointed on the currence of said vacancy, or his successors, in said parish . . . ."

The petition was not served on the heritors, nor was any intimation of e Sheriff's interlocutor made to them.

In 1880, a vacancy having occurred in the parish, a new minister was pointed. Lord Strathmore made no application to the heritors for payment of the compensation to which he had been found entitled until 887, and they had paid to the minister the whole of the stipend for

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wful for him, or for such guardian or trustee, at any time within six onths after the passing of this Act, to present a petition to the Sheriff f the county praying him to determine the compensation to be paid to ch patron in respect of the operation of this Act; but it shall not be cumbent on any such patron, or upon any guardian or trustee for such tron, whether the patronage is held upon a fee-simple title or under a deed of tail or other limited title, to present such petition; and if no such petition hall be presented within the said period, it shall be held and taken that the claim for such compensation has been renounced, and no claim therefor shall afterwards be competent in any manner of way. . . ."

The 5th section provided,—"Upon any petition for the determination of the compensation payable under this Act being presented, the Sheriff shall order it to be intimated to the minister of the parish to which the petition relates, and to the clerk of the presbytery of the bounds, and, after the expiry of the *induciæ* of twenty-one days, whether with or without answers, shall first inquire as to the title of the petitioner, and, if he shall be satisfied thereof, he shall proceed to determine the amount of such compensation, which shall be equal to one year's stipend of the parish to which the petition relates when the petitioner is sole patron, and such proportion thereof as to the Sheriff shall seem just when the petitioner is a joint patron; and the Sheriff shall pronounce an interlocutor finding and declaring that, on the occurrence of a vacancy in the parish, the petitioner, or those in his right, shall be entitled, unless the sum shall be otherwise provided, to receive from the heritors payment of the amount of compensation found due, by four equal yearly instalments out of the first four years' stipend, which, but for the passing of this Act, would have been wholly payable by them to the minister to be appointed on the occurrence of said vacancy, or his successor in such parish, or in the case of the appointment of an assistant and successor, out of the first four years' stipend which, but for the passing of this Act, would have been wholly payable after the date of such appointment to the minister of such parish; and the petitioner, or those in his right, shall have the same or the like remedy for recovery of said compensation which a minister has for the recovery of his stipend: Provided that where the patron is himself an heritor of the parish he shall be entitled to retain and appropriate the sum or sums of stipend which, had he not been himself the patron, would, under the operation of this Act, have been payable by him to the patron of the parish."

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crops and years 1881, 1882, 1883, and 1884 without making
tion for that compensation.

A dispute having arisen between Lord Strathmore and the
to whether the latter were liable in compensation in these circ
they presented a special case to the Court in which they aske
tion, "Is the first party" (Lord Strathmore) "entitled to deman
from the second parties of the said sum of £233, 1s.?"

The case bore,—Lord Strathmore "maintains that he is now
demand payment from the second parties of the said sum of £
respect that the said Act 37 and 38 Vict. c. 82, being a publi
were bound to know that the legal obligation of paying comp
provided by said Act rested upon them, and that, not having f
obligation, they are now, as in a question with the first part
pay him the sum to which he was found entitled by the Sh
second parties decline to pay the first party any part of the s
the ground that no intimation of the decree was made to th
first party until after the expiry of four years from the appo
the new minister, and that they have *bona fide* paid the whole
the present incumbent. They maintain that it was the duty
party to intimate that he had availed himself of the option wh
under the Act of applying for compensation, and so interpel
paying the whole stipend to the minister."

Argued for the first party;—The second parties must shew
had probable ground for believing that the minister was the
creditor before they could be held to have paid to him *in bona*
first party's right to compensation might be illustrated by the ca
intimated assignation, but there was this difference, that the d
were aware, or ought to have been aware, of their obligation, w
on a public statute. It was not stated that the heritors were i
of the first party's rights, and, according to the words of th
was only if no petition were presented within six months from
of the Act that it was to be held that the claim to compe
renounced.

Argued for the second parties;—There was no duty put upo
the Act to inquire whether the first party intended to enforc
for compensation. The 4th section of the Act was directly adv
such view. The second parties having paid away the stipend
ister *in bona fide*, the patron had lost all claim to compensatio
ting to apply for payment within the four years after the
appointment.[2]

Lord President.—The answer to the question put in this case d
the construction to be placed upon the two clauses of the statute
Vict. cap. 82) which have been brought before us. In the first p
section enacts that "in all cases in which the patronage of a pa
either solely or jointly, by a private patron, or any guardian or tr
behalf, it shall be lawful for him, or for such guardian or trustee,
within six months after the passing of this Act, to present a pet
Sheriff of the county praying him to determine the compensation
such patron in respect of the operation of this Act"; and then foll
sion, which throws light upon the general tone of the statute, to th

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[1] Erskine's Inst. iii. 4, 3.

[2] Collector of Vacant Stipends v. Parishioners of Maybole, 166
Stair's Inst. i. 18, 3; College of Aberdeen v. Lord Aboyne, 1679, M

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"it shall not be incumbent on any such patron, or upon any guardian or trustee for such patron, whether the patronage is held upon a fee-simple title or under a deed of entail or other limited title, to present such petition." The right given by the statute is accordingly a right which it is left entirely in the discretion of the patron to exercise, and although he be an heir of entail, or a guardian, or a trustee, he is not to be under any obligation to present a petition. He is to exercise his judgment whether he will present a petition or not, and if he does not present a petition within six months, he is to have no claim for compensation. Such is the import of the 4th section of the statute.

The 5th section makes provision for working out the right given by the 4th section. It provides that "upon any petition for the determination of the compensation payable under this Act being presented, the Sheriff shall order it to be intimated to the minister of the parish to which the petition relates, and to the clerk of the presbytery of the bounds." There is no provision for intimation to anyone but the minister. There is to be no intimation to the heritors, and the reason for that is the clear one, that no new obligation is created against them, and no decree is to be pronounced. If they were to be subjected to a new obligation in favour of a new creditor, I cannot doubt that the statute would have appointed that intimation should be made to them. But the section goes on further to enact that the Sheriff must satisfy himself about the title of the petitioner, and thereafter "he shall proceed to determine the amount of such compensation, which shall be equal to one year's stipend of the parish to which the petition relates when the petitioner is sole patron, and such proportion thereof as to the Sheriff shall seem just when the petitioner is a joint patron." Then the very terms are given in which the Legislature enacts that the interlocutor is to be pronounced,—"And the Sheriff shall pronounce an interlocutor finding and declaring that, on the occurrence of a vacancy in the parish, the petitioner, or those in his right, shall be entitled, unless the sum shall be otherwise provided, to receive from the heritors payment of the amount of compensation found due, by four equal yearly instalments out of the first four years' stipend, which, but for the passing of this Act, would have been wholly payable by them to the minister to be appointed on the occurrence of said vacancy, or his successor in such parish, or in the case of the appointment of an assistant and successor, out of the first four years' stipend which, but for the passing of this Act, would have been wholly payable after the date of such appointment to the minister of such parish; and the petitioner, or those in his right, shall have the same or the like remedy for recovery of said compensation which a minister has for the recovery of his stipend: Provided that where the patron is himself an heritor of the parish he shall be entitled to retain and appropriate the sum or sums of stipend which, had he not been himself the patron, would, under the operation of this Act, have been payable by him to the patron of the parish."

In the first place, there is no authority given to the Sheriff to pronounce decree of payment against the heritors. All the Sheriff is given authority to do is to grant decree to the effect that there is a right or privilege belonging to the patron to intervene between the heritor and the minister, and to ask that a certain portion of the stipend shall be assigned for the purpose of paying off the compensation to which he has been found entitled. The way in which the money is to be recovered is "by four equal yearly instalments out of the first four years' stipend," meaning that the first instalment is to be paid out of the first year's stipend after the presentation of the new minister, and so on for

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four years, so that the patron's right attaches immediately on the first year's stipend becoming payable, and to that year's stipend. The patron is entitled then to come forward. If he does not choose to ask payment out of the first year's stipend, he is simply neglecting his own interests very seriously, and is not observing the statute. He is to come to the heritors and to ask for payment of his instalment. The heritors are not his debtors, because there is no decree against them. If there had been, it would have been their duty to go to the creditor and make payment to him, and they could not have expected him to come to them to ask for payment. The debtor's duty is to go to his creditor. But here the patron's duty was to go to the heritors and intimate to them that he intended to ask payment of an instalment. He might have got his first instalment out of the stipend for the year 1881,—and so on for the next three years,—but he failed to do so. It is an ascertained fact that he made no intimation of his intention to claim compensation until March 1887.

While such was the state of matters in regard to the patron, what were the heritors doing? The determination of the Sheriff was dated as far back as 1875—there had been no intimation to them of the petition to the Sheriff or of the determination of the Sheriff thereon—and there was further no intimation in 1880, when the vacancy occurred, that it gave rise to such a claim on the part of the patron. The heritors never heard of the claim until 1887. I do not say that there was any statutory obligation upon the patron to make intimation to the heritors,—but the question is whether the patron has not debarred himself from now challenging payments which were made in good faith by parties who had no reason to suppose that the claim would be enforced. I think it is clear that the payments were made in good faith. I do not say that the heritors were not bound to know of the provisions of the Act of Parliament, and of the possibility that such a claim might exist. But they were not in any case bound to know what the determination of the Sheriff was—nor that the patron had made up his mind to exercise the discretion which was vested in him by the statute—because even after the interlocutor of the Sheriff is pronounced, it is a mere matter of will whether the patron proceeds further or not.

Seeing, therefore, that there was no movement on the part of the patron for so many years, I can have no doubt of the good faith of the heritors in paying the stipend in full to the minister. There was very serious neglect on the part of the patron, and good faith on the other side, and that, I think, is enough for the decision of the question.

Lord Mure.—The decision of this question depends upon the provisions of the statute founded upon in the case, under the 5th section of which a patron "on the occurrence of a vacancy in the parish . . . shall be entitled . . . to receive from the heritors payment of the amount of compensation found due." It is provided by the preceding section that the amount of that compensation must be fixed within six months of the passing of the Act, and in the present case that appears to have been done by petition to the Sheriff as required by the statute. But no service of that petition was made upon the second parties; and it is admitted that no intimation of the decree, or of the patron's intention to claim compensation, was made to them till seven years after the appointment of the new minister. In these circumstances, the heritors were, I think, in perfect *bona fides* in continuing to pay the stipend to the minister as they had previously done. The heritors are not in this matter debtors to the patron in the ordinary

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ense—they are holders of a fund belonging to the minister and payable to him s stipend, unless some portion of it is demanded from them by the patron, as n competition with the minister to whom the heritor is in the ordinary case ound to pay. I have no difficulty, therefore, in holding with your Lordship hat the heritors are not now bound to pay over again to the patron the sum hich they have already paid to the clergyman.

Lord Adam.—I think, in the first place, that the heritors have, *bona fide*, aid the whole stipend to the present incumbent, and in the second place, that hey had probable ground for believing that they were making payment to the rue creditor. If that is so, there is no foundation for the contention of the irst party.

I do not think the presentation of a petition by a patron to have a sum of ompensation fixed in the least indicates that he intends to insist upon claiming compensation when his right to do so emerges. The object of the statute was that the whole amount of compensation claimed by the patron should be settled at once—*i.e.*, within six months from the passing of the Act—and accordingly these petitions were in many cases brought—although, as I have said, I do not think it was intended to indicate thereby that compensation would be claimed.

The fund from which the first party maintains a deduction should have been made came into existence in each year and disappeared in each year. It is not an ordinary case of debt. The stipend was paid out of a particular fund, and if it was all paid away by the heritors there is no other fund out of which the compensation can be paid. There was a clear duty upon the patron to make his demand timeously—and not having done so, I think the heritors were bound to pay the minister his stipend in the usual way.

Lord Shand was absent.

The Court pronounced this interlocutor:—"Find and declare that in the circumstances the first party is not entitled to demand payment from the second party of the sum of £233, 1s. mentioned in the case, and decern."

Dundas & Wilson, C.S.—Mackenzie & Black, W.S.—Agents.

No. 69.

Feb. 2, 1888.
Montgomery's Trustees v. Montgomery.

Sir W. S. Walker, K.C.B., and Another (Montgomery's Trustees), First Parties.—*Gloag*—*H. Johnston.*
James Montgomery, Second Party.—*Mackay*—*Martin.*

Trust—Denuding—Renunciation of alimentary liferent—Marriage-contract.—By antenuptial marriage-contract trustees were directed to pay the income of the trust-estate (which amounted to £18,500, £16,000 being contributed by the husband's father, and £2500 by the wife) to the spouses during the subsistence of the marriage, and to the husband in the event of his wife's death. The income was declared to be "strictly alimentary." After the death of both spouses, if one child survived, he or she was to get £10,000 of the capital; if two survived, they were to get £12,000; if more, they were to get the whole. It was further provided that in the event of only one or two children surviving, "the residue of said trust-capital shall be at the disposal of" the husband "or his heirs, executors, or assignees." Failing surviving children, the whole capital was to be paid over to the representatives of the spouses in the proportions advanced by or for them.

After the death of the wife, and there being only two children of the marriage surviving, the husband called upon the trustees to denude of the trust-funds, in so far as they exceeded £12,000, upon his renouncing and discharging his life-

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B.

rent of the surplus. In a special case, *held* that the trustees were
or bound to denude.

Question, whether if the children had consented to take immedi
of their provisions the trustees could have refused to denude.

In an antenuptial marriage-contract, dated 10th and 16th
between James Montgomery and Miss Eleanora Anstruthe
Mr Montgomery's father bound himself to pay to the trustees
£16,000, and the said Eleanora Anstruther Thomson bound hers
the trustees the sum of £2500. Both payments were made.

The trustees under the contract were appointed to hold the
and to pay the free income during the subsistence of the mar
spouses, and in the event of the dissolution of the marriage b
of Mrs Montgomery, to pay the free income to Mr Montgon
the remainder of his life. It was further declared "that the f
or annual proceeds aforesaid so to be paid over to the said Ja
gomery and Eleanora Anstruther Thomson, or the survivor of
be strictly alimentary, and shall not be arrestable or affect
debts or deeds of the said James Montgomery and Eleanora
Thomson, or either of them, or of the survivor, or by the diliger
his, or her creditors."

It was further provided :—" *Quarto*, with regard to the disp
capital or principal of the said trust-funds after the decease of
liver of the said James Montgomery and Eleanora Anstruthe
and of the free interest or annual proceeds to accrue thereon
event till the arrival of the terms of payment after specified, th
trustees or trustee acting for the time may hold and retain the
for behoof of the child or children who may be procreated of
tended marriage, and the issue of such child or children, whon
hereinafter written, for behoof of the persons or person to who
failure, the same is likewise hereinafter provided, and shall
and pay over the said capital to the said child or children,
issue, at the times and in the manner following, viz. :—If onl
shall be procreated of the said intended marriage, and shall attai
or being a daughter, shall be married, and if such child shall
longest liver of the said James Montgomery and Eleanora
Thomson, or shall die leaving lawful issue, to account for an
to the said child or issue the sum of £10,000 of the said trust-
if two children shall be procreated of the said intended ma
shall attain to majority, or being daughters, shall be married,
children shall survive the longest liver of the said James M
and Eleanora Anstruther Thomson, or if either of them shall
lawful issue, to account for and pay over to the said children
sum of £12,000 of the said trust-capital, and that equally be
two children, or in case of the death of one or both of them, t
have right to the share of the parent equally amongst them; an
of the above events of there being only one or two children, t
of said trust-capital shall be at the disposal of the said James M
or his heirs, executors, or assignees; and if three or more chil
be procreated of the said intended marriage, and shall attain to
being daughters, shall be married, and if such children shall s
longest liver of the said James Montgomery and Eleanora
Thomson, or if any of them shall die leaving lawful issue, to a
and pay over to the said children or issue the whole of the
capital . . . And in the event that there shall be no child
of the said intended marriage, or issue of the bodies of such
children, surviving at the death of the longest liver of the s

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Montgomery and Eleanora Anstruther Thomson, or that such as may survive the longest liver and their issue shall die before majority, or being daughters, before marriage, that the said trustees, or trustee acting for the time, shall pay over, assign, and convey to and in favour of the assignees, executors, or nearest of kin of the said James Montgomery and Eleanora Anstruther Thomson respectively, the whole of the said trust-capital, and that in the proportions respectively advanced by or for them as herein specified."

Mrs Montgomery died on 8th January 1878, and was survived by her husband and by three children, one of whom died unmarried and intestate in 1885.

The marriage-contract trustees and the husband now presented this special case, to which they were respectively the first and second parties, to have the following question which had arisen between them determined,—"Whether on the second party renouncing and discharging his right to the liferent of the marriage-contract funds, so far as they exceed £12,000, the first parties are bound to denude of the surplus in his favour?"

The marriage-contract funds in the hands of the trustees amounted at the date of the case to £18,966, 0s. 10d.

The case further bore:—"The second party maintains that in consequence of the children of the marriage being reduced to two in number, the first parties are bound, on his renouncing and discharging *pro tanto* his liferent, to denude in his favour of the trust-estate in so far as the same exceeds the principal sum of £12,000, being the provision made in the marriage-contract in the event of there being only two children of the marriage or issue of such children. The first parties maintain that as the provision of the liferent in favour of the second party is declared to be strictly alimentary, and not arrestable or affectable for the debts or deeds of the first party, or the diligence of his creditors, the second party is not *in titulo* to renounce or discharge his liferent in any part of the trust-estate, but that the first parties are bound to hold the whole capital of the trust-funds so long as the second party survives. The first parties also maintain that they hold the whole trust-funds as fiduciary fiars, and in security of the provision to the children of the marriage, whatever their number."

Argued for the first parties;—The bulk of the marriage-contract funds was provided by the husband's father for the purposes of the marriage. As a condition of the marriage, it was stipulated that the income of the fund should be alimentary, and it must continue so. So long also as there were children's interests to protect, the fund must be retained by the trustees, and the marriage-contract must subsist. The present case was *a fortiori* of that of *Corbet*,[1] because there was no need here, as there, to have recourse to extraneous evidence to explain the contract, and there were here no directions to pay over the residue to the husband. The husband had a power of testing, and nothing else. The case of *Martin*[2] relied upon on the other side was very different from the present. There was no reason there for keeping up the protecting trust, as one of the spouses had died, and there were no children of the marriage.

Argued for the second party;—The radical right to the surplus fund which he claimed was in him, and there were no trust purposes remaining

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[1] Corbet, &c. v. Waddell, &c., Nov. 13, 1879, 7 R. 200; *cf.* also Smith v. Campbell, May 30, 1873, 11 Macph. 639, 45 Scot. Jur. 403; White's Trustees v. White, June 1, 1877, 4 R. 786; Duthie's Trustees v. Kinloch, &c., June 5, 1878, 5 R. 858; Barron v. Barron's Trustees, July 7, 1887, 24 S. L. R. 735.

[2] Martin v. Bannatyne, &c., March 8, 1861, 23 D. 705, 33 Scot. Jur. 347.

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unfulfilled, the £12,000 being retained by the trustees for the This was not the case of a third party providing the marriage fund subject to conditions, as in *Corbet's* case.[1] The footing upc the £16,000 was provided by the husband's father was rather gave his son his legitim antecedently. The present case was on with that of *Martin*.[2] *Corbet's* case was very different, because marriage was still subsisting, and there were children alive.

Lord President.—In this case, in the arguments of the two partie was placed upon the one side on the case of *Corbet, &c.* v. *Wa* (7 R. 200), and upon the other side on the case of *Martin* v. *Bannaty* 705). It humbly appears to me that neither of these cases has any a to the present case.

In *Corbet's* case there was a subsisting marriage-contract trust,— husband and wife were alive, and there were children of the mar accordingly there were interests of all kinds which fell to be prote which were protected by the marriage-contract. The liferent intere parents, and the ultimate interests of the children were dealt with in and the only question raised by the case was whether there was an a liferent settled on the husband, and whether a contingent right to a the fee was attached by the diligence of creditors of the husband, become bankrupt. In *Martin's* case, the whole trust purposes had been —there were no longer any interests to protect, and in short the mar tract was no longer operative, and was at an end.

Such are not the conditions of the present case. There is here a contract still in subsistence. Although the marriage has been dissolv death of the wife, there are children whose interests are provided f marriage-contract, and the husband, who is still alive, has a liferent of fund. It therefore appears to me that the decision of the present case not upon authority, but upon the construction of the marriage-contrac

By the marriage-contract the husband's father provided a sum of and the lady herself a sum of £2500,—both of which were convey trustees. One of the purposes of the trust was to provide a strictly a annuity of the whole trust-fund to the spouses jointly and to the That was the leading purpose of the deed, and then follows a clause w to the disposal of the capital. After the decease of the longest liv spouses, it is provided that the trustees "may hold and retain the sa for behoof of the child or children who may be procreated of the said marriage, and the issue of such child or children, whom failing, as h written, for behoof of the persons or person to whom, on their failure, is likewise hereinafter provided." Then the provisions in various eve children are very clearly specified,—if there be only one child of the who attains majority, or being a daughter, is married, and survives th liver of the spouses, or dies leaving lawful issue, he or she is to have of the capital of the trust-fund paid over to her. If there be two children who live to attain majority, or being daughters, to marry, and survive both parents, then the two are to have £12,000 equally between them. If there be three or more children who attain majority, or being daughters, are married, and survive both parents, then the entire trust-capital is to be divided among them in such shares as shall be prescribed by the father in a deed of appointment and failing such deed, equally among them. Such is the scheme of the trust, and it is provided that in either of the two first events,—that is, if there is either only one or two children of the marriage,—then "the residue of the trust-capital shall be at the disposal of the said James Montgomery, or his heirs, executors, or assignees." Then follows a provision for the case of there being no child or children, or issue of any child or children surviving at the death of the longest liver of the spouses, or of such as may survive the longest liver and their issue dying before majority, or being daughters, before marriage,—in that event "the said trustees or trustee acting for the time shall pay over, assign, and convey to and in favour of the assignees, executors, or nearest of kin of the said James Montgomery and Eleanora Anstruther Thomson respectively, the whole of the said trust-capital, and that in the proportions respectively advanced by or for them as herein specified."

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[1] 7 R. 200.

[2] Martin v. Bannatyne, &c., March 8, 1861, 23 D. 705, 33 Scot. *cf.* also Urquhart's Trustees v. Urquhart, Nov. 23, 1886, 14 R. 112; M &c. v. Mackenzie's Trustees, July 10, 1878, 5 R. 1027; Hamilton's T Hamilton, July 9, 1879, 6 R. 1216; M'Lean's Trustees v. M'Lean, 1878, 5 R. 679.

I do not think that the deed is one difficult to construe. I think that the different events which are contemplated in it are very clearly dealt with, and that the provisions are set forth in very plain language. The part of the deed which requires construction is that which deals with the disposal of the residue in the event of there being only one or two children. The capital as originally provided amounted to £18,500, and it now amounts to something more by reason of favourable investment; so that in the event of there being only one child, under the provisions of the deed the residue would be the difference between £10,000 and the amount of the capital as it then stood, and in the event of there being two children it would be the difference between £12,000 and the amount of that capital. It is to be observed that there is no direction to the trustees in any event to convey or pay over what is called the residue. In the event of there being no child at all surviving the spouses, then there is a direction to pay over and convey the whole of the trust-capital to the assignees, executors, or nearest of kin of the two spouses in the proportions contributed by each spouse, viz., £16,000 to the representatives of the husband and £2500 to the wife's representatives. In regard to the residue, as I have said, there is no direction to pay at all. What is directed is that it "shall be at the disposal of the said James Montgomery or his heirs, executors, or assignees." That means nothing more than that he can dispose of the residue by a deed to take effect after his death. That is clearly a power of testamentary disposition, and the use of the word "assignees" does not seem to me to create any difficulty. If that be so, then it is plain to my mind that it was not intended by the marriage-contract that the so-called residue should, in the event which has happened, ever be paid over to the husband during his lifetime.

If it had happened that it was not necessary to keep up the marriage-contract trust for the protection of any of the interests involved in it, it might have followed on the authority of many cases that the residue might have come into the husband's hands during his lifetime. If the two children consented to put an end to the trust, it would make a very different case. If they gave their father their consent now, I do not know that anyone would have an interest to inter-

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fere. But they are not here. It is said that it is a sufficient securit
if the trustees retain £12,000 for their behoof, but I cannot say th
that is the meaning of the marriage-contract. I think the meaning i
trust is to subsist in the events which have happened, and is to be k
the benefit of the two children. The whole estate is to remain in
of the trustees for the benefit of that security. If the trustees are t
£12,000 only, it might be that when payment came to be demanded
rities would have fallen in value or might be lost, and so the beneficia
not have the protection which the marriage-contract intended.

But if the intention was that the trust should be kept up until th
are in a position to demand payment,—what about the husband's posi
the deed? All that is provided for him is an alimentary liferent of
funds. I do not know that he has any interest to have that convert
alimentary to a non-alimentary fund. But the thing to which he i
and the only thing, is an alimentary liferent. And that being so,
answer the question put to us to the effect that the first parties are n
or bound, in the event stated in the question, to denude of any surp
marriage-contract funds over and above the £12,000.

Lord Mure.—I am of the same opinion. I think this deed has
carefully framed with regard to the disposal of the liferent intere
spouses in the capital-fund, and also of the fee of that fund; and I
to read its provisions in any such sense as can on sound construction
conclusion that any portion of the capital-fund was intended to be p
either of the surviving spouses during the subsistence of the trust.
no words in the deed to warrant that result; while the clauses, on
hand, which regulate the disposal of the liferent are express tha
income of the fund conveyed to the trustees is to be paid over to the
spouse, and is to be strictly alimentary. Why that clause should
inserted, I do not know,—unless it was to prevent such a question as
from being raised. It would, I conceive, be altogether inconsistent
terms of these clauses to assent to the proposal here made.

Lord Adam.—We are not here dealing with a marriage-contract
which has failed, or one in which the purposes have been imple
become inoperative. Here the marriage-contract rules a subsisting
that being so, the question is, what construction are we to put on i
to carry out the intention of the parties to it? The husband is now
an alimentary liferent of the whole trust-funds. The fourth purpo
for the disposal of the fee, and it will be observed that directions a
to what is to be done after the death of the longest liver of the two
that is, on the death of the husband, he being the survivor. At
of the longest liver the trustees are directed to pay £10,000 if th
child, and £12,000 if there are two children. I agree with your
that the absence of any direction to pay the balance of residue t
viving spouse is significant, and like all the other directions poin
that the disposal thereof is to take place at the death of the lon
What is not said is that Mr Montgomery shall have the disposal o
of the residue during his life. It is evident he is not to be allowed
the money; he is to dispose of it by *mortis causa* settlement, and if n

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goes to his heirs. This was evidently what was in the mind of the parties when the marriage-contract was made.

LORD SHAND was absent.

THE COURT pronounced this interlocutor:—"Find and declare that the first parties are not entitled or bound to denude in favour of the second party of any surplus or residue of the marriage-contract funds in their hands beyond the sum of £12,000 upon his renouncing his right of liferent of the trust-funds in so far as they exceed the said sum," &c.

HENDERSON & CLARK, W.S.—F. J. MARTIN, W.S.—Agents.

No. 70.

Feb. 4, 1888.
M'Murchy v. Emslie & Guthrie.

DONALD M'MURCHY, Petitioner.—*Lyell.*
EMSLIE & GUTHRIE, Respondents.—*Forsyth.*

Arrestment—Recall—Burgh lamplighter—Wages Arrestment Limitation Act, 1870 (33 *and* 34 *Vict. cap.* 63), *secs.* 1 *and* 2.—*Held* that the wages of a burgh lamplighter who had contracted with the Police Commissioners to look after the burgh lamps for £2, 4s. a-week during winter, when he was taken bound to employ two assistants at 10s. and 15s. respectively, and for 18s. in summer, were exempted from arrestment by the Wages Arrestment Limitation Act, 1870.

1ST DIVISION.
M.

DONALD M'MURCHY was employed as lamplighter at Oban under a contract with the Police Commissioners of the burgh to light, extinguish, and keep clean all their public lamps for a year from 18th August 1887. For the period to 20th April 1888 he was to get £2, 4s. per week. Out of that sum he was bound by the contract to employ and pay two men at wages of 10s. and 15s. respectively. From 20th April to 18th August 1888 he was to do the work himself at a wage of 18s. per week.

On 11th and 26th November 1887 arrestments were used in the hands of the Police Commissioners, attaching M'Murchy's wages for a debt incurred by him to Messrs Emslie & Guthrie, S.S.C., in connection with a litigation in which he had been unsuccessful. The Commissioners had accordingly since these dates declined to pay him the £2, 4s.

He now brought a petition for recall of these arrestments, stating that these weekly payments were his only source of income, and that he had a wife and children to maintain, and further that he was now unable to employ the two assistants.

Emslie & Guthrie answered that the proceeds of his contract did not constitute his sole income,—as he had the whole day at his disposal for other employment. Further under an arrangement the whole of his wages had not been withheld from him, and they were willing that one-half of them should continue to be paid to him.

Argued for the petitioner;—Under the Wages Arrestment Limitation Act (33 and 34 Vict. cap. 63)* the arrestments were not competent.[1]

Argued for the respondents;—The payments to the petitioner under the contract were not "wages." There was no obligation on the petitioner

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* The 1st section of that Act enacted,—"That from and after the 1st January 1871 the wages of all labourers, farm-servants, manufacturers, artificers, and workpeople shall cease to be liable to arrestment for debts contracted subsequent to the passing of this Act, save as hereinafter excepted."

The 2d section enacted that—"If the amount of wages earned exceeds 20s. per week, any surplus above that amount shall still be liable to arrestment as before the passing of this Act," &c.

[1] *Cf.* Vincent v. Chalmers & Co.'s Trustee, Nov. 2, 1877, 5 R. 43; Dick v. Russell, Dec. 24, 1887, *ante*, p. 261.

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to do any work himself. Further this was an arrestment in executio following on a decree, and there was no authority for the interference o the Court in a case of that kind.[1]

Lord President.—The question is whether the petitioner is within the word of the 1st section of the Wages Arrestment Limitation Act,—and to bring him within that section he must be either a labourer or a workman. The othe words of the section do not apply to him. The only other question is whethe the payments which he receives are "wages," and if so whether these are unde 20s. per week.

It is clear that so far as regards the summer months from April to Augus the petitioner is a labourer in the service of the Police Commissioners, and receives a wage of 18s. a-week. Can it be said that for the rest of the yea he changes his character from that of a labourer receiving wages to that of a contractor? I think there is not enough in the agreement to effect this change. No doubt during the latter period he is allowed £2, 4s. a-week, but out of that he has to provide for two assistants,—and in practice it comes to this, that he makes during these months 19s. instead of 18s. I do not think that is a sufficient distinction to take the case out of the statute.

Lord Mure and Lord Adam concurred.

Lord Shand was absent.

The Court granted the prayer of the petition, and recalled the arrestments.

Smith & Mason, S.S.C.—Emslie & Guthrie, S.S.C.—Agents.

No. 71.

Feb. 7, 1888.
Spence v.
Boyd.

Mary Munro or Spence, Pursuer (Reclaimer).—*Kennedy—M'Lennan.*
J. L. Boyd and Others, Defenders (Respondents).—*Jameson—Salvesen.*

Marriage-contract—Acquiescence—Trust.—By antenuptial contract of marriage the wife conveyed to trustees certain funds for behoof of herself in liferent, exclusive of her husband's rights, and of the children in fee. The husband conveyed nothing to the trustees, but he bound himself, *inter alia*, to insure his life in the trustees' names for a certain sum, and to pay the annual premium, and in the event of the trustees finding it necessary at any time "to pay to the company any sum or sums on account of the premium" he bound himself to repay them. He failed to pay the premium, and the trustees for many years, with the wife's knowledge, paid the premium out of the liferent of the wife, both they and she being in the belief that they were entitled to do so. Thereafter the wife being desirous that her income should be free of the burden of keeping up the policy, and a doubt having been raised as to the power of the trustees to keep it up out of her income, the two spouses and the trustees entered into an agreement for the sale of the policy, on the footing that the proceeds should be added to the trust-funds. Nine years afterwards the spouses raised an action against the trustees for repayment, with interest, of the sums expended in paying the premiums, on the ground that the payments were *ultra vires* of the trustees. *Held* that, even assuming the payments to have been *ultra vires* of the trustees, the action was barred by the fact that the wife had been a party to the agreement which embodied a settlement of the whole transaction.

Opinion (*per* the Lord Justice-Clerk) that the question was one not between beneficiary and trustee, but between truster and trustee, and that the wife being in the position of a truster, and having been in the knowledge of the action of the trustees, was not entitled to dispute it afterwards.

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[1] Erskine's Inst. iii. 6, 12.

No. 71.

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Spence v. Boyd.

2D DIVISION.
Lord M'Laren.
I.

BY antenuptial contract between Andrew Spence, merchant, Leith, and Miss Mary Munro, dated 20th October 1862, the husband bound himself to pay an annuity of £100 to his widow, and further, within three months from the date of the contract, to insure his life for £600, and to pay the annual premium. The policy was to be taken in names of certain trustees, one of whom was Mr J. L. Boyd, S.S.C., Leith, and it was provided that "in the event of the said trustees finding it necessary at any time to advance and pay to the said Life Assurance Company any sum or sums on account of the said premium, the said A. Spence binds and obliges himself and his foresaids to make payment to them or their foresaids of each sum as the same may be instructed by the company's receipts therefor, with interest of such sum or sums at the rate of five per centum from the time at which the same falls due, and till payment."

The policy and the proceeds thereof were to be held by the trustees "in trust for behoof of the said Mary Munro in liferent, for her liferent use allenarly, free of all rights of every description competent to her said intended husband, or any husband she may marry, and unaffectable by his debts and deeds," and the annual proceeds of the sum realised were to be received by her *pro tanto* of her annuity. On her death the fee was to be held for the issue of the marriage, and failing issue, for the heirs and assignees of the husband.

The wife on her part conveyed to the trustees the whole estate then belonging to her, or which she might acquire *stante matrimonio*, to be held by them for her liferent allenarly, excluding the *jus mariti*, and on her death, for the husband in liferent allenarly, if the survivor, and for the issue of the marriage, if any, in fee, and failing issue, for her nearest heirs and assignees. "And it is hereby declared that full power and authority is hereby given to the said trustees or trustee acting in both or either of the trusts hereinbefore created," to make up titles to the policy and the other estate conveyed by the contract, and "exercise the whole rights of owners thereof." The trustees were further empowered to advance to the husband out of the trust-estate a sum not exceeding £600 on his own personal security if they were of opinion that he could use it advantageously in his business or otherwise.

The capital of the estate conveyed by Mrs Spence was about £1600. Mr Spence obtained the advance of £600 contemplated by the contract. He failed shortly after the marriage, and paid neither the principal nor any interest. The policy of insurance was taken out by Mr Spence in the trustees' names. He could not pay the annual premium, and down to 1877 the trustees paid the annual premium out of the income of the funds conveyed to them by Mrs Spence before paying it over to her. The sums so paid amounted to £185, 8s. 9d.

On 12th January 1887 Mrs Spence, with consent of her husband, and he for his interest, raised an action against Mr Boyd, as sole surviving original trustee, and against two other trustees who had been recently assumed into the trust, for payment of £306, as the amount, with interest, of the premiums thus paid. The representatives of the other original trustees were subsequently called for their interest in a supplementary action, which contained no conclusion against them except for expenses in the event of their appearance. The pursuer alleged that Mr Boyd and the other trustees had no power to pay the premium out of her liferent, and had done so notwithstanding her repeated remonstrances.

The defenders stated that both spouses were well aware that the payments were being made, and entirely approved thereof, and had docqueted as correct statements shewing the application of the funds.

They pleaded, *inter alia* ;—(3) The defender Mr Boyd being only one of a number of trustees, is not in any event liable *in solidum*. (5) The trustees having acted within their powers in paying the said premiums of insurance out of revenue, for the purpose of keeping the said policy in force, should be assoilzied, with expenses. (6) The pursuers are barred from maintaining this action, in respect that the payments in question are embraced in the settled accounts between them and the defenders. (7) The pursuers having authorised, or at least homologated, the payment of the said premiums out of the said revenue, the defenders are entitled to absolvitor, with expenses.

On 15th December 1887 a proof was led. It appeared from letters which had passed between Mrs Spence and Mr Boyd at various dates between 1865 and 1878 that she was well aware of the fact that the insurance was being kept up out of her income. She and her husband had likewise examined various accounts in the sederunt-book of the trust, which shewed the payments now objected to, and had docqueted them as correct. She deponed, however, that on her complaining to Mr Boyd in 1875 that it was a hardship to her to lose the portion of her income, which was used to keep up the policy, she was informed that the trustees had power to keep it up as they were doing, and it was admitted that this was the view on which the trustees acted.

It appeared that Mr and Mrs Spence had for many years been in the practice of borrowing money on the security of the liferent and of the policy, and that they had been in communication with various agents acting for the lenders. In 1878 they consulted Mr M'Intosh, S.S.C., one of whose clients had lent them money, as to the deduction from the income of the premium on the policy, and learned from him that in his opinion there was a question as to the trustees' power to deduct it. Mrs Spence wrote on 7th February 1878 to Mr Boyd, as follows:—"You are aware that for a considerable number of years (twelve or thirteen I am sure) the premiums of the insurance on Mr Spence's life have been paid out of my income, and as there are now additions amounting to upwards of £100, added to the policy, I think I am not unreasonable in requesting that some arrangement should now be come to, either to pay the premium or part of it (out) of these profits, or as it is not at all probable I shall ever derive any benefit from it during my lifetime, that these profits should be given to me now. I am most unwilling that the insurance should lapse, but under present circumstances I cannot sanction that any further payments of the premium shall be paid out of my income." Mr Boyd replied that the children of the marriage, of whom there were several, and the creditor in the loan, in security of which she had assigned her liferent, were also now interested in the policy, and expressed the view that the proposal could not be acceded to. Mr M'Intosh and Mr Boyd had a correspondence as to the policy, the result of which was an agreement that the policy should be sold. In order to effect this the following letter was sent by Mrs Spence to Mr Boyd:—"I hereby request and authorise you, as the sole surviving and acting trustee under my antenuptial contract of marriage, to dispose either by public sale or private bargain of the policy of insurance effected by the marriage trustees on the life of my husband for £600, with the Standard Life Assurance Company, and to retain the proceeds (after deduction of all necessary expenses) as forming part of the trust-funds under your management, of which I am entitled to enjoy a mere liferent, and I undertake if and when required by you to grant a deed of exoneration in your favour in respect of the sale now authorised by me." Mr Spence and the creditor signed docquets, concurring in the

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letter. The policy was then sold, and the price, £113, about £15 above the surrender value, was added to the capital of the trust.

The Lord Ordinary (M'Laren) conjoined the actions, and in the conjoined actions pronounced this interlocutor:—"Having considered the conjoined actions, for the reasons stated in his opinion, sustains the defenders' seventh plea in law in the original action, and assoilzies the defender James Lawrence Boyd from the conclusions of both actions as against him, and decerns: *Quoad ultra*, in respect there are no conclusions against the other defenders unless they appear and oppose, dismisses both actions as against them, and decerns: Finds the defenders who have appeared entitled to expenses so far as regards their outlay out of the trust-fund." *

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* "OPINION.—I have no doubt as to what my decision should be in this case, and never had, although I was anxious to hear argument upon it in case there might be more in the case than at first appeared to me.

"It is a claim by a married lady against trustees to repay money which, strictly speaking, ought to be paid to her, but which was applied to her benefit in a somewhat different way,—that is to say, the lady's husband's life being insured for her benefit, the trustees, instead of paying over to her the whole life interest in terms of the marriage-contract, paid out of her income the premiums due on the husband's policy of assurance from which she was eventually to derive benefit.

"Now, it is clear enough that Mr Boyd, who took the chief management of the trust, explained this from the very beginning to Mrs Spence, and that she was throughout perfectly aware that a part of her income was applied towards keeping up the policy. And I am not sure that if she had been told that this application of the money depended on her assent she would have refused her assent, because it was obviously an arrangement for her interest and that of her children. But it certainly was not explained to Mrs Spence that her assent was needed. I think that Mr Boyd was himself under the belief that the trustees had the power of making this application of the money, and being in that belief it was not likely that he should convey any different impression to Mrs Spence than was in his own mind. One argument submitted to me was that it was the duty of every beneficiary to know his rights under the trust-settlement. That view can only be received with very large qualifications. It is certainly held to be the business of every man to possess such knowledge of the civil law as is necessary to regulate his conduct in any business in which he may be engaged. A merchant must understand the law of contracts and bills. A shipowner must understand maritime law; and if either makes a mistake he must suffer for it. He cannot throw the loss upon any other party. But in matters between trustees and beneficiaries, where trustees have no interest distinct from that of the beneficiary, I should not hold that the beneficiary is barred from having the mistake in law—if there has been such—put right. It would obviously depend to some extent upon the consideration whether matters could be put right without detriment to other interests. But, in the view I take of this case, it is not necessary to consider such questions, because when Mrs Spence came to borrow money upon the security of her beneficiary interest she employed an independent agent, Mr M'Intosh, a gentleman of ability and experience in his profession. He, going into the whole question of her rights under the settlement, clearly raised the point whether the trustees were entitled to appropriate his client's money to paying premiums, and the trustees were informed that Mrs Spence would not consent to a further appropriation of her money towards such purposes. It is, however, clear to my mind that if Mrs Spence was entitled to prevent the trustees from further payments she must be entitled to hold them responsible for former payments. That was the time to raise the question as to their appropriation of the estate. But this was not done. On the contrary, there being naturally some demur on the part of the trustees to the course of administration, it was eventually agreed, as a fair

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The pursuers reclaimed, and argued;—(1) It was *ultra vires* of the trustees to pay the premium on the policy. These premiums were the husband's debt and nothing else, and the contract under which the trust itself was created provided that the wife's income was to be free of the husband's debts. On a sound construction of the marriage-contract, there were two trusts, not one trust, of two funds with different destinations. Indeed this was expressed in the contract, for it spoke of "both or either of the trusts hereinbefore created." Each of these trusts ought to bear its own expenses.[1] It was not in point of fact for the benefit of the wife to keep up the policy; on the contrary, it proved a loss to her of £70. (2) The defenders maintained that assuming the conduct of Mr Boyd in the trust to be *ultra vires*, the action was barred, because Mrs Spence knew that her income was being used to keep up the policy. But that mere fact was no bar to her unless she had assented to it in the knowledge that she had a right to prevent it. She did not object, because she was informed by Mr Boyd that the trustees had power to apply the income as they had done, and she did not know to the contrary. That was not acquiescence. The case was in this respect a contrast to that of *Kippen.*[2] In that case the lady who ultimately challenged a discharge given by her co-trustees did not do so till eighteen years after the discharge, and fifteen years after the trust had been wound up on the footing of the discharge being good. There was there no error of fact. The error was an error in law. This case more resembled the cases of *Sanders*[3] and *Douglas.*[4] The Lord President's opinion (7 R. 163) in the former case precisely applied to the pursuers' case. It was the case of a female beneficiary who was alleged to have homologated an act of trustees which was *ultra vires*, and his Lordship pointed out that it must be shewn that she knew that the trustees were exceeding their powers, and assented to their doing so, and went on to say that it was difficult for trustees to maintain

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arrangement between the parties, recognising that they were dealing with a point of some difficulty, that the policy should be sold so as to relieve Mrs Spence from the burden of paying the premiums. But with the view of protecting the children, the proceeds were to be invested and held to be part of the trust-estate. Now, I hold that this was an arrangement entered into on behalf of Mrs Spence by an agent duly authorised, and certainly not exceeding the powers of an agent in family matters. Under that arrangement Mrs Spence brought forward all the claims that she intended to make against the trustees. They assented to her wishes so far as they thought it their duty, and that was an end of the matter. It is quite contrary to sound policy and legal principle that a party who, in full knowledge of her rights, has come to an arrangement with trustees should be allowed to re-open that question.

"In that view I have no hesitation in dismissing the personal conclusions against the trustees.

"With regard to the claim to be repaid the policy money out of the trust-estate, I think it must be held that Mrs Spence has irrevocably appropriated that money to the purposes of the trust. Even if the children were represented in the action, I have great doubt whether the Court could hold that that money could be taken from them. Most certainly not in an action where the children were not represented. Therefore, on the other view of the case, I must come to the conclusion that the claim is not supported. I shall therefore assoilzie from the conclusions of the action generally."

[1] Gibb v. Pitcairn, June 8, 1839, 1 D. 189, 11 Scot. Jur. 511; Rennie v. Ritchie, Dec. 8, 1840, 13 Scot. Jur. 73, rev. April 25, 1845, 4 Bell's Appeals, 221, 17 Scot. Jur. 332.

[2] Kippen v. Kippen's Trustees, July 10, 1874, 1 R. 1171.

[3] Sanders v. Sanders' Trustees, Nov. 6, 1879, 7 R. 157.

[4] Douglas v. Douglas' Trustees, June 30, 1859, 21 D. 1066, 31 Scot. Jur. 598.

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such a plea when their case otherwise was that no such illegality existed. All these considerations were here applicable. (3) Mr Boyd was liable *in solidum* if the acts of trustees were *ultra vires*, and also because, in any view, he was the agent of the trust as well as a trustee.

Argued for the respondents;—(1) The trustees had acted within their powers. There was really one trust, which contemplated that the trustees might use the wife's funds to pay the premium on the policy. This was clear, simply because there was a power to keep up the policy if necessary, and there were no funds conveyed to them except by the wife. (2) The pursuer had in any view homologated the acts of the trustees in paying the premium. From 1865 to 1878 she never objected, and in the latter year she wrote a letter speaking of her "sanction" of the arrangement. The trustees were entitled to hold her as consenting to what was done. The pursuer's error, if any, was not in fact but in law, and that gave no ground for redress.[1] Nor was she in legal matters at all dependent on Mr Boyd for advice. She consulted Mr M'Intosh, and, as the proof shewed, other lawyers also. (3) What occurred at the time of the sale of the policy was, as in *Kippen's* case, a transaction in full knowledge of the facts which barred the pursuer from now going back upon what was then closed.

At advising,—

Lord Justice-Clerk.—In this case several pleas have been maintained on the part of the pursuers, Mrs Spence and her husband. The action is brought against the only surviving trustee under Mrs Spence's marriage-contract, and it seeks repetition of certain payments which were made by the trustees under that contract out of the accruing interest or liferent to which she was entitled under the contract. These payments were made for the purpose of keeping up a policy of insurance by paying the premiums which Mr Spence, the husband, was bound to maintain on his own account, and which still remain apparently as debts against him.

The grounds upon which the challenge is made are, first, that the trustees were not entitled under the marriage-settlement to make these payments; in the second place, that although the pursuer consented or acquiesced in their being made, she was not aware at that time of her legal rights; and thirdly, it is contended that notwithstanding a certain agreement which took place between the spouses and the trustee she is entitled to recover these payments from the trustee.

I think the case is one of considerable importance in some aspects of it; but the result at which I have arrived is that under the third head—viz., the agreement that was come to in 1878 to sell the policy and add the proceeds to the capital sum under the trust—there is no longer any ground for going back to consider the propriety of the former payments, and that the pursuers are substantially foreclosed from raising that question. I wish, however, just to say a word or two upon each of the views, because I rather think that the case stands in a different position from that in which it was substantially presented at the bar.

This is not a case between trustee and beneficiary. It is a case between truster and trustee,—between the author of the trust and the trustees who act under the authority so conferred. That is a material distinction as regards one

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[1] Graham v. Jolly, June 29, 1831, 5 W. & S. 280, Lord Wynford, at p. 297.

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part of the argument presented to us. Now, without going into the facts, my views upon the three heads are simply these. In regard to the question of authority under the trust-deed, I think it a more difficult question than it struck me as being at first. I am not prepared to say that the trust-deed does authorise these payments, but I do not think it is a question free from doubt, and on this ground,—there was a provision in the trust-deed that the husband should receive a payment of £600 out of the wife's fortune, and the insurance in question was intended to provide for that sum coming back to the trust, when the insurance should take effect and the sum become due by the death of the husband. It was intended as a security and counterpart of this payment which was to be made simply on the husband's own credit out of the trust-funds. No property was conveyed to the trustees belonging to the husband. The whole property conveyed to the trustees, as was known at the time, was the property of the wife. Now, in those circumstances, the trustees are authorised, in the event of the husband not paying the premiums, to advance the money,—keeping it up as a debt against the husband. It is not said out of what fund that advance is to be made; but the fact remains that there were no funds of any kind or description handed over to the trustees out of which it could be made except the property of the wife. The wife herself, by being a party to this deed, authorises the trustees to pay the premiums, in the event of their thinking it desirable to do so, and the question is—I do not say the thing is clear—but the question is, whether that does not amount substantially to a mandate from the proprietrix who was setting up this trust, and describing the conditions under which power was given and exercised, to the trustees to pay the money out of the only fund they had. I think there is more weight due to that view than I was at first inclined to give it.

But, in the second place, even irrespective of the ultimate agreement, I do not think I could have found the trustees liable for these payments. It is not like a case of election or repudiation of conventional provisions. It is a series of acts on the part of the truster herself about her own estate going over two-and-twenty years during which these payments were made by the trustees, as far as I see, without any objection whatever, in satisfaction of the premiums of insurance. Mrs Spence was entitled to make them if she chose to use her liferent in that way, and she was entitled, I think, also to direct her trustees to do it, or to approve of what her trustees did; I do not think there can be much doubt about that. It is said she did not know her rights. She was herself a party. The rights were conferred upon herself and no one else, for no one else had the property to which they applied; and although, no doubt, it is desirable in many cases under trust-deeds in questions with trustees to consider how far the party who is said to have acquiesced or homologated was aware of his or her rights, still, in the case of the truster himself or herself, and when the act relates to payments made year by year, or rather half year by half year on nearly forty different occasions without any representation to the contrary, I think it cannot be said that the pursuer was not aware of her rights. I think she was quite aware of her rights, and she deliberately and intentionally gave her sanction to payments in which she had a deep interest, because it is quite certain that if they had not been made the policy must have fallen, and the £600 must have been ultimately lost to the estate.

I have indicated the views which have occurred to me on these matters, and looking to the termination of this long course of dealing,—I mean the agreement

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to which both husband and wife were parties, and under which the trustees undertook to sell the policy and to add the proceeds to the trust-estate,—I do not think the pursuers can now go back and raise any question either on the byegone use of the liferent right or the byegone payments of premium; I think all matters were merged into that agreement, and on that ground I am prepared to affirm the judgment of the Lord Ordinary.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG and LORD CRAIGHILL were absent.

THE COURT adhered.

J. D. MACAULAY, S.S.C.—BOYD, JAMESON, & KELLY, W.S.—Agents.

No. 72. — Feb. 8, 1888. Stewart v. Forbes.

MALCOLM STEWART, Pursuer (Respondent).—*R. V. Campbell.*
MRS ELIZABETH WEST OR FORBES AND ALEXANDER FORBES, Defenders (Reclaimers).—*Rhind—Salvesen.*

Adjudication—Trust—Diligence against trust-estate for expenses of litigation.—*Held* competent to adjudge a trust-estate for expenses decerned for against the trustees in a litigation in which the trust-estate was alone concerned.

Process—Adjudication—Decree.—Where a Lord Ordinary pronounced decree of adjudication, and on a reclaiming note the Court adhered, decree of adjudication was pronounced of new in the Inner-House.

1st Division. Lord Fraser. M.

IN 1886 Mr Malcolm Stewart, the superior of certain subjects in Grange Place, Edinburgh, brought an action of declarator of irritancy *ob non solutum canonem* and of removing against Mrs Elizabeth West or Forbes, William Moncur, and John Howie, the proprietors of the subjects in question, as trustees under a trust-disposition and deed of settlement by Mrs Forbes and her husband. Mrs Forbes, as an individual and as liferenter of the subjects, and her husband and children, the latter of whom were entitled to the subjects in fee, were also called for any interest they might have. The summons set forth that the feu-duty had been unpaid for the two years prior to Martinmas 1886.

Defences were lodged by the trustees, and by Mrs Forbes as an individual, and thereafter, on 3d February 1887, the Lord Ordinary (Fraser) pronounced an interlocutor holding the irritancy to be purged, in respect the feu-duties had then been paid, and finding the compearing defenders liable in expenses. On a reclaiming note against the finding for expenses the First Division adhered, and found the pursuer entitled to additional expenses. The amount of these expenses, as decerned for, was £43, 7s.

A charge was given by Stewart upon the extract-decree, but he failed to recover the sum due to him, and he thereupon brought an action concluding that the heritable subjects belonging to the trust-estate should be adjudged from the defenders and all others having or pretending right thereto, and declared to belong to the pursuer, his heirs and assignees, for payment and satisfaction to them of the principal sum of £43, 7s., and interest in respect of it, calling the trustees, Mrs Forbes as an individual, and her husband for his interest and as administrator-in-law for his wife.

Defences were lodged for Moncur and Howie, a majority and quorum of the trustees. On 26th November 1887 the Lord Ordinary (Fraser), in respect of no appearance for the compearing defenders, pronounced decree of adjudication against them with expenses.

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On 30th November following decree in absence was pronounced against Mrs Forbes and her husband by the Lord Ordinary.

On 3d December a reclaiming note by Moncur and Howie against the interlocutor of 26th November was refused after a hearing in the Single Bills.

Mrs Forbes as a trustee and as an individual, and her husband, thereafter tendered defences, and applied to be reponed. After a discussion the Lord Ordinary, on 14th December, recalled the decree in absence of 30th November, and allowed defences to be received. Their defence was that the trust-estate, the fee of which belonged to the defenders' children, could not be carried off by an illegal diligence to meet a debt incurred by the trustees as individuals, in an action in which no defences had been lodged for the children. It was further stated that neither the trustees, nor Mrs Forbes as an individual, had any power to pledge the trust-estate for the expenses of process, and that the only persons liable for these were the trustees and Mrs Forbes as individuals, who had all along been willing to pay the debt out of the rents of the property.

The defenders pleaded, *inter alia;*—(5) The subjects mentioned in the summons not being in any way subject to or liable for the said sum of £43, 7s., decree of adjudication should not be pronounced.

The Lord Ordinary, on 14th January 1888, repelled the defences, and adjudged, decerned, and declared against Mrs Forbes and her husband conform to the conclusions of the summons.*

The defenders reclaimed, and argued that it was not competent to adjudge a trust-estate for a debt constituted against the trustees personally.[1]

Counsel for the respondent was not called upon.

Lord President.—I do not think there can be any doubt that the Lord Ordinary has taken the right course in this case. The question of importance in such a case is, whether the trustees were really representing the trust-estate in the litigation or not. The fact that they were representing the trust-estate cannot certainly exempt them from personal liability, but that is a different ques-

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* "Opinion.—The trustees acting under a trust-conveyance and deed of settlement by Mrs Elizabeth West or Forbes, and relative deed of assumption and conveyance, did, in their character as trustees, with the view as they thought of defending the trust-estate, enter into a litigation in which they were unsuccessful, and were found liable in expenses. The question then simply is, whether the creditor for those expenses, who cannot obtain payment of them from the impecunious trustees, is entitled to adjudge the trust-estate which they defended. That estate is held by the trustees in trust for the defender Mrs Elizabeth Forbes in liferent and for her children in fee. The Lord Ordinary was moved to sist the children as defenders in this action, which motion he has not seen any reason for granting. Decree has already been pronounced against the defenders William Moncur and John Howie, who appeared and defended the action. The present compearing defenders Mrs Forbes and her husband did not lodge defences, but after decree was pronounced against her co-trustees she appeared and obtained right to lodge defences as having been decerned against in absence, which the Lord Ordinary allowed; and now that the defences have been seen they come to nothing. There is no averment to the effect that the trustees committed any breach of trust in litigating the case in which they were unsuccessful, and therefore no ground for saying that the debt incurred was a debt for which the trust-estate was not responsible. If the trust-estate instead of consisting of heritage had consisted of furniture held by them, it could surely have been poinded for a debt incurred by the trustees in the administration of the trust, and the case is in no way differentiated when the diligence is not poinding but adjudication."

[1] M'Laren on Wills and Succession, ii. 555; Graham v. Marshall, Nov. 22, 1860, 23 D. 41, 33 Scot. Jur. 21.

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tion, and falls to be settled between the trustees and the beneficiaries. In the present case the trustees were bound to come into Court for the purpose of saving the trust-estate from forfeiture. It may no doubt be the fact that the risk of forfeiture was brought about by the previous misconduct of the trustees, but as I have said we have nothing to do with that question here.

Where a pursuer obtains a decree for expenses in an action in which the trust-estate is alone concerned, I apprehend he is quite entitled to recover these expenses from the trust-estate. The remedy of adjudication is no doubt a formidable one, still, if the debt remains unpaid, the pursuer is entitled to adjudge the trust-estate. I think there is no flaw in the Lord Ordinary's interlocutor.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

R. V. Campbell, for the pursuer, moved the Court, with the view of obviating any question as to the non-recording of an abbreviate within sixty days of the decree of 26th November 1887, of new to pronounce decree of adjudication against all the trustees, and referred to the case of *Cathcart* v. *Maclaine*, Dec. 18, 1846, 9 D. 305.

THE COURT declined to adjudge of new against Moncur and Howie, who were not parties to the reclaiming note, and against whom, as a majority of the trustees, a final decree had been pronounced, but pronounced this interlocutor:—"Adhere to the interlocutor complained of: Of new adjudge, decern, and declare against the defenders Mrs Elizabeth West or Forbes and Alexander Forbes, conform to the conclusions of the summons," &c.

DAVID COOK, S.S.C.—D. HOWARD SMITH, Solicitor—Agents.

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Guthrie, Craig, Peter, & Co. v. Magistrates of Brechin.

GUTHRIE, CRAIG, PETER, & COMPANY, Pursuers (Respondents).—
D.-F. Mackintosh—C. J. Guthrie.
MAGISTRATES OF BRECHIN, Defenders (Appellants).—*Sol.-Gen. Robertson —C. S. Dickson.*

Burgh—Drainage—Public Health (Scotland) Act, 1867 (30 *and* 31 *Vict. cap.* 101), *secs.* 77 *and* 108—*Rivers Pollution Prevention Act*, 1876 (39 *and* 40 *Vict. cap.* 75), *sec.* 7.—A paper manufacturer, whose works were within a burgh and who was liable for drainage assessment, presented a petition in the Sheriff Court, founding on the 77th section of the Public Health Act, 1867, and the 7th section of the Rivers Pollution Prevention Act, 1876, to have the local authority ordained to allow him to empty the drains containing the discharge from his works into the burgh sewers. The defenders, founding on the latter section,[†] stated that the discharge in question would "prejudicially affect"

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[*] Decided Feb. 3, 1888.

[†] The 7th section of the Rivers Pollution Prevention Act, 1876, enacts,—"Any sanitary or other authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would, from its temperature or otherwise, be injurious in a sanitary point of view: Provided also that no sanitary authority shall be required to give such facilities

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of the total discharge in its application to their sewage farm.

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Held, upon a report by men of skill, that the defenders had faile
that the quality of the discharge was such as would "prejudicially a
sewers or the sewage in any of the particulars of the section founde
the term "application to land" was used in a general and not in a spe
and that the defenders were bound to receive the discharge into thei
provided that their sewage pipes were large enough to carry it.

1st Division. Sheriff of Forfarshire. M.

(Vide *ante*, Jan. 9, 1885, 12 R. 469.)

Messrs Guthrie, Craig, Peter, & Company were tenants and
of the Brechin Paper Mill Manufacturing Works within the
Brechin, and as such were liable for sewerage or drainage asses
the magistrates and town-council of the burgh, the local autho
the Public Health Acts, 1867 and 1871.

In 1884 they presented a petition to the Sheriff, praying him
the magistrates to "allow the pursuers to cause the drains of
taining the liquid flow from the Brechin Paper Mill Man
Works . . . to empty into the sewers of the defenders
and to find that the pursuers are entitled to make all proper co
tions" between their drains and the sewers belonging to the
"for the purpose aforesaid, on condition of the pursuers compl
the defenders' regulations in respect of the mode in which the
cations between such drains and sewers are to be made, an
to the control of any person who may be appointed by the
to superintend the making of such communication." They fo
sec. 77 of the Public Health Act, 1867, and sec. 7 of the Riv
tion Prevention Act, 1876 (quoted p. 385, note).

The defenders stated in answer that the sewage runnin
their drains was now conveyed to a farm before it entered
Southesk, and they averred that the discharge from the pursu
would prejudicially affect the sewers and the quality of the se
would also, they said, unduly increase the volume of the total d

The Sheriff-substitute (Robertson), after proof, on 18th
1884, pronounced this interlocutor:—" . . . Finds in fact,
liquids issuing from the pursuers' paper-works at Brechin,
chemically objectionable and likely to injure sewage or veget
three in number, namely, 'black boil,' 'spent bleach,' and 'w
Finds that when these three liquids are mixed together and e
the action of the air in settling ponds the resultant fluid is harm
such as the defenders may safely allow to be introduced into t
sewer of Brechin: Finds, that since the raising of the present a
pursuers have produced and brought under the notice of the de
plan, which forms No. 36 of process, shewing how they are now
to form a series of settling ponds in which these three liqui
thoroughly mixed and settled before the defenders will be ca
to receive the resultant fluid into their sewer: Finds in law, an
sound construction of section 7 of the Rivers Pollution Act, an
77 of the Public Health Act, that the defenders are bound to re
resultant fluid issuing from said settling ponds into the public
Brechin: Remits to Thomas Stevenson, civil engineer, Edinbur
failing to Henry D. Littlejohn, M.D., Edinburgh, to see the plan,

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as aforesaid, where the sewers of such authority are only sufficient
quirements of their district, nor where such facilities would interfer
order of any Court of competent jurisdiction respecting the sewag
authority."

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process, carried out by the pursuers; and thereafter, and on the completion of said plan to the satisfaction of the reporter, ordains the defenders to allow the pursuers to discharge the resultant fluid issuing from the said settling ponds into the public sewer of Brechin, on condition of the pursuers complying with the defenders' regulations as to the mode in which the communication between the pursuers' premises and the public sewer is to be made: Finds the defenders entitled to expenses up to and including the first diet of proof in the case: Finds the defenders liable in expenses from and after that date," &c.*

The defenders appealed to the First Division of the Court of Session, and after repelling an objection to the competency of the appeal (*ante*, Jan. 9, 1885, 12 R. 469), the Court, on 20th May 1885, pronounced this interlocutor:—" Supersede consideration of the judgment appealed against, and in the meantime (1) allow the pursuers to construct the works delineated and described on the plan No. 36 of process at the sight of Professor Alexander Crum Brown, and Robert Carstairs Reid, civil engineer; and (2) on the completion of the said works to the satisfaction of the reporters, ordain the appellants, at the sight of the reporters, to allow the pursuers, for the purposes of experiment, to discharge the resultant fluid issuing from the said works into the public sewers of Brechin, for such time and under such conditions as the reporters may consider necessary to enable them to report on the effect of such discharge; and appoint the reporters to report *quam primum* as to the character of the said resultant fluid, and its effect upon the respondents' sewer-pipes and sewage farm."

On 28th January 1888 the reporters submitted their report.†

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* "NOTE.—The pursuers are ratepayers in the town of Brechin, and are as much entitled to the use of the public sewer as any other members of that community, always provided they are not seeking to introduce 'any liquid which would prejudicially affect such sewer, or sewage matter conveyed along such sewer.' In resisting the pursuers' demand that the liquids from their paper-works be introduced into the public sewer, the defenders must take their stand upon the 7th section of the Rivers Pollution Act, and must shew that their sewer and sewage will be prejudicially affected by such liquids. The question becomes one for chemical experts. With one exception, the eminent chemists who have been examined in the case certify that if certain precautionary measures are taken the fluids from the pursuers' works become innocuous, and may safely be introduced into the public sewer. Their unanimity on this point renders any detailed analysis of the evidence unnecessary. Dr Wallace of Glasgow, who is one of the defenders' own witnesses, explains how the caustic soda contained in the 'black boil,' the lime contained in the 'spent bleach,' and the acid contained in the 'washings,' neutralise each other when they are mixed together and exposed to atmospheric influences. This can readily be done, and a harmless liquid obtained by a series of mixing and settling ponds; and the plan proposed to be carried out by the pursuers Dr Wallace considers to be quite satisfactory. The fact that the objectionable liquids must first pass into these settling ponds and there be neutralised by their chemical action on each other, and by the action of the air on them, is a sufficient safeguard to the defenders. The safety of the sewer is not made to depend on the negligence or carefulness of the pursuers' work people. There is no danger of that sort. It is put out of the power of any careless workman to flood the sewer with a poisonous liquid. The only access to the sewer will be after these settling ponds have done their work. And when Dr Wallace was under examination I was very careful to bring this out. I think Dr Wallace's evidence is conclusive, backed up as he is by all the pursuers' own chemical witnesses. These include the public analyst for the City of Edinburgh, and the professor of chemistry in Dundee University College. . . ."

† The report bore, *inter alia*;—" . . . The tanks having been completed and receiving the discharges from the pursuers' mill, the resultant liquid or effluent

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The appellants argued;—The sewage of the mill would on the
of the reporters double the amount of sewage passing through th

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from them was admitted to the sewer on 22d April 1886. There are f
which are filled alternately, in sets of two at a time, and emptied into a
having a capacity of 24,000 gallons, from which the discharge is draw
the surface by a floating pipe. The sludge deposited in the bottom of th
once a-week, lifted out by chain pumps worked by gearing from the mil
on to a prepared bed of ashes, where it is dried sufficiently to admit
carted away. We visited the work on the 30th of April, and again o
and 28th October 1886, and examined the sewer, when we found, in a
the deposit of sand previously noticed, a brownish incrustation in th
the water edge. This incrustation was not very firmly adherent, but
to be always growing, and it was sufficiently hard to enable it to resist
flushing with water. The same incrustation was seen in the tanks at
mill and in the pipe leading from them to the public sewer, and al
channels for distributing the sewage over the sewage farm. Analysi
this incrustation to be nearly pure carbonate of lime, and its presence
doubtedly due to the addition of the pursuers' discharges. We have
that if matters had gone on in the same way a serious incrustation w
been produced in the sewer, which would have prejudicially affected
unless removed from time to time by mechanical means.

"In our report to the Lord Ordinary, already referred to, we pointe
the discharges from the paper mill as then worked would, when
together, be somewhat alkaline, and recommended that acid should be
neutralise them. At our various meetings on the ground we explai
pursuers or their representatives then present that the incrustation i
was due to the alkalinity of the effluent from their tanks, and that
only be prevented by adding more acid so as to render it neutral or
The pursuers have always used a certain proportion of acid in the
manufacturing the paper, but since our inspection in October 1886
used more acid in the paper mill, with the result that the effluent h
practically neutral. Since this change in the way of working, by
effluent is rendered practically neutral, we examined the sewer on 1
and 6th December 1887, and found that not only was there no increa
incrustation but the former incrustation was disappearing and had
soft as to be removeable by ordinary flushing. There is no reason t
the effluent from the pursuers' work will ever be sensibly acid, as t
imply a needless expenditure on their part, and there is thus no risk o
being injured by excess of acid.

"The sewer pipe is of sufficient capacity to carry the whole disch
the pursuers' works in addition to the ordinary sewage coming from
and, indeed, the additional flow will induce greater velocity, and thu
scouring the pipe and keeping it clear of ordinary deposit. We are th
opinion that the effluent from the pursuers' tanks may be admitted to
sewers of Brechin without injury to the sewer pipes by incrustation
wise, so long as it remains in its present condition of practical
If the incrustation appears to grow again in the pipes it must
to this condition of practical neutrality not having been sufficien
tained, and in such circumstances the defenders should have th
call upon the pursuers to restore this condition of practical neutra
effluent.

"The main sewer discharges at the sewage farm into a settling po
the grosser particles subside, and the overflow from this pond is th
open carriers to various parts of the farm. The sewage farm has a
of 16 acres, of which $1\frac{1}{3}$ acres are occupied by roads, settling pond, &
$14\frac{2}{3}$ acres available for receiving sewage. Of the whole available area,
acres of the farm are laid off in beds for growing cabbages and man
an area of about 6 acres is laid out for irrigation, and on this area It

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and it was very hard that the town should be charged with the disposal of that sewage, while the assessment of the defenders only amounted to £8. The 7th section of the Rivers Pollution Prevention Act only applied if no other system could be devised which would obviate the destructive effect of the liquids. All that was affirmed by the reporters

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grass is grown; the remainder of the farm is alternately cropped with turnips and cereals, but it is not properly laid out for irrigation.

"According to gaugings which have been regularly taken by the superintendent of the farm, at 8 A.M., 12 noon, and 5 P.M., it would appear that the dry-weather flow of sewage during the daytime varies from 5000 to 9000 gallons per hour, but it may be estimated to average about 150,000 gallons per day of twenty-four hours in dry weather, and in wet weather the flow is very much greater. When the paper-mill discharges were let into the sewer, the average dry-weather flow as gauged amounted to from 12,500 to 20,000 gallons per hour during the daytime, but reckoning by the time taken to fill the pursuers' tanks, it would seem that their discharge during a working day of twenty-two hours is about 140,000 gallons, so that the addition of the pursuers' discharges practically doubles the volume coming from the sewer in dry weather. Taking these figures as a fair approximation, we find that the flow of sewage in dry weather is equal to 20,000 gallons per day for each acre that has been properly prepared for irrigation, and fully 10,000 gallons per day for each acre of the whole farm, and when the paper-mill discharges are added the above figures will be nearly doubled.

"In the best types of sewage irrigation farms laid off similarly to that portion of this farm which has been properly prepared for sewage, not more than 8000 gallons per day are allowed for each acre on an average throughout the year; so that even if the whole farm of nearly 15 acres were properly laid out for irrigation, it would barely be sufficient to purify the dry-weather sewage of Brechin, not to speak of the much greater volume during wet weather.

"With only 7½ acres properly prepared for irrigation, as at present, it is not to be expected, therefore, that complete purification can be effected; and indeed we found that the effluent from the farm was not completely purified even before the paper-mill discharges were let into the sewer.

"The effluent coming from the pursuers' tanks is much freer from polluting matter than the town sewage, and its addition therefore dilutes the sewage, but owing to the larger volume to be dealt with, the purification effected by the sewage farm cannot be so complete as when the polluting matter is concentrated in the smaller volume of dry-weather sewage.

"By the method of 'downward intermittent filtration' a much larger volume of sewage can be dealt with on a given area of land, and probably if a part of the farm were laid out on this system, it would be possible to deal satisfactorily with the storm water as well as with the increased volume due to the paper-mill discharges. It must be understood, however, that the adoption of this system would involve additional outlay in works, and that the profits derived from the farm would be diminished.

"We found it necessary to continue the experiment over two seasons in order to judge of the effect of the addition of the effluent from the pursuers' tanks on the crops generally grown on the farm, and after careful examination we have come to the conclusion that it exercises no prejudicial effect upon them unless the ground is overcharged, in which case the excess of water of itself would do mischief.

"We have therefore to report our opinion that the resultant fluid or effluent issuing from the pursuers' tanks into the public sewers of Brechin is not of such a character, so long as it is maintained in its present condition of practical neutrality, as to produce any injurious effect on the sewer pipes, or on the crops or soil of the sewage farm, but that the larger volume of liquid to be dealt with necessitates a different mode of working the sewage farm to effect proper purification of the combined discharges from the sewer before they reach the river South Esk."

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was that there was a probability of a possibility that they would not be prejudicial. Here the sewage was certainly prejudicial in its "application to land," because the present sewage farm was too small for the extra amount which would now be discharged.

Argued for the respondents;—The only question under the Act was the capacity of the sewer pipes to carry off the additional sewage, and that had been amply tested. The quality, also, of the sewage had been shewn to be not prejudicial in any of the senses of the Act. The words "application to land" must be held to have a general meaning, and not as referable to any particular subject. The ultimate disposal of the sewage was a matter for the defenders themselves; they were bound to get rid of it.

Lord President.—I think if I had been called upon to dispose of this case on the proof as the Sheriff-substitute did, I should have been very much inclined to take the same view as he did. The result of the evidence is that the town of Brechin is under an obligation in virtue of the statute to dispose of the whole sewage of the district, including that of the mill in question. There is nothing in the evidence to shew the impossibility of their discharging that duty. But when the case came here it was suggested that an experiment might be made for the purpose of seeing how far the sewers were adequate for the reception of the sewage of the mill, and how far it could be disposed of by the town under the present sewage arrangements. Accordingly a remit was made to Professor Crum Brown and Mr Reid, C.E., and the pursuers were allowed to construct works proper for the purpose at the sight of these two persons, and on completion of the works to the satisfaction of the reporters, the defenders were ordained, "at the sight of the reporters, to allow the pursuers, for the purposes of experiment, to discharge the resultant fluid issuing from the said works into the public sewers of Brechin, for such time and under such conditions as the reporters may consider necessary to enable them to report on the effect of such discharge"; and the reporters were appointed to report *quam primum* as to the character of the said resultant fluid, and its effect upon the respondents' sewer-pipes and sewage-farm.

All that has now been done. The connection between the paper-works and the sewers has been made, and the discharge of the resultant fluids has been going on for a considerable time. So that there has now been enough of experiment to shew how far the discharge from the paper-works may be allowed to proceed without affecting the existing scheme of sewage for the town.

We have now to dispose of the question whether the petitioners are entitled to have the order which is asked in the original petition presented in the Sheriff Court, which was, "To ordain the defenders to allow the pursuers to cause the drains of and containing the liquid flow from the Brechin Paper Mill Manufacturing Works . . . to empty into the sewers of the defenders . . . and to find that the pursuers are entitled to make all proper communications" between their drains and the sewers belonging to the defenders.

That claim is founded on the 77th section of the Public Health Act, and the 7th section of the Rivers Pollution Act. It is necessary in the first place to observe that the town of Brechin, like every other town and burgh in Scotland, is under an obligation to drain itself. And apart even from any common law obligation on this point the Commissioners are under a direct obligation by the 186th section of the General Police and Improvement Act of 1862, which, among other things, provides that commissioners acting under the Act "shall from time to time," "subject to the restrictions herein contained, . . . cause to be made under the streets, public or private, or elsewhere, such main or other sewers as shall be necessary for the effectual draining of the burgh, and shall also, if necessary for such drainage, deepen, divert, or cover over any burn or any ditch made use of as a common sewer, or any ditch into which sewage flows, and shall also cause to be made all such reservoirs, sluices, engines, and other works as shall be necessary for cleansing such sewers, and if needful they may carry such sewers through and across all underground cellars and vaults," &c.

Thus there is a statutory obligation on the defenders to drain the town of Brechin, and the paper-mills are situated within the town of Brechin, and therefore the obligation comprehends the sewage discharge of the paper-mills, unless some reason can be shewn why it should not be admitted into the pipes.

But by section 77 of the Public Health (Scotland) Act, 1867, it is enacted that "any owner or occupier of premises within the district of a local authority, liable for general or special sewerage or drainage assessment, shall be entitled to cause his drains to empty into the sewers of such local authority on condition of his giving twenty days' previous notice of his intention so to do to the local authority, and of complying with their regulations in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by the local authority to superintend the making of such communications." Now, this confers an absolute right on any owner or occupier of premises in the district to use the sewers, provided he be liable to assessment for sewage.

Again, the 7th section of the Rivers Pollution Act of 1876, provides that "every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers." Now, unless some reason can be shewn to the contrary, the Public Health Act is made more directly imperative by the Rivers Pollution Act in the case of premises occupied for manufacturing purposes, and comprehends such a manufactory as we are here dealing with. Certain provisoes are, however, appended to the 7th section of the Rivers Pollution Act, and the object of the defenders has been to shew that some of these apply to this case, and that therefore they are entitled to say they are not obliged to receive the sewage from the paper-mills into their pipes.

The first proviso is, that "this section shall not extend to compel any sanitary or local authority to admit into their sewers any liquid which would prejudicially affect such sewers." This was one of the matters on which the reporters specially reported, and they have taken particular pains about it, but they are satisfied that the sewers will not be prejudicially affected by the discharge from the mill. But to prevent a prejudicial effect, means must be taken to see that a due admixture be made in the ponds so as to make the resultant fluids neutral, *i.e.*, to allow the acids and alkalies to neutralise each other, as otherwise if one or other of them remained, damage might follow to the pipes. It has been rightly suggested that in our judgment we ought to make it a condition that due attention must be paid to this matter.

The next proviso is, that the liquid shall not prejudicially affect "the disposal by sale, application to land, or otherwise of the sewage matter conveyed along such sewers." The meaning of this is that the sewage matter conveyed into the sewers must not be destroyed as a subject of sale or as manure for land. That

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is not meant as applicable to any particular case, but merely generall
sewage shall not be so poisoned as to be unfit for sale or for use as m
do not think it can be said here that the resultant fluid by passing
sewers will bring about this result, and therefore this proviso does no

The third proviso is, that the local authority shall not be required
into their sewers anything "which would from its temperature or oth
injurious in a sanitary point of view." This was not here alleged,
therefore be passed over.

The fourth proviso is, "that no sanitary authority shall be requir
such facilities as aforesaid where the sewers of such authority are only
for the requirements of their district." Now, if the sewers were
enough to admit the fluid from the settling ponds in addition to th
sewage of Brechin, then the defenders would not be under an obligat
ceive it. But the measurement of capacity referred to in the Act
ability of the town to dispose of the sewage after it has passed through
but the capacity of the pipes to receive it. Now, it was not prove
pipes were not large enough, and the only point is that they mus
enough to receive the fluid in addition to the ordinary sewage of the

The last proviso is, that "no sanitary authority shall be required to
facilities as aforesaid . . . where such facilities would interfere
order of any Court of competent jurisdiction respecting the sewage of s
rity." This again is not alleged, and may be passed over.

Hence it appears that the defenders have no proviso upon which th
to interfere with the unquestioned right of the pursuers to have th
carried away from their works in the sewage pipes of the defender
fore, I think, we must give judgment in favour of the pursuers, and m
the town to allow the pursuers to use the sewers for their fluid.

The defenders seem to have difficulty as to the disposal of the sew
is not a question under the statute; they are bound by law to dispose
they can empty it into the river so much the better for them, but th
in a position to do this, for the proprietors of the salmon-fishing o
have objected. They are, however, under an obligation to dispose of
way or other, and they have been doing so by means of a sewage far
say that their only difficulty is that the farm is not large enough to
the sewage augmented by the discharge from the paper-mill. Then
find some other way of disposing of it, for they are bound by law to
it. If I thought there was any great hardship or difficulty from th
they were undertaking this for the first time, we might have allowed
to improve or amend their scheme. But we see from the report th
charge from the paper-mill has gone on for two years, and no harm
done by it. The defenders may be right in saying the farm is not lar
but then they must enlarge it, or adopt some new method. But for t
there is no difficulty, for there have been no evil results up to now.

Therefore I think our judgment should be the same as that of t
with this addition—that the discharge from the mill shall be so
treated that the resultant fluid shall be neutral in the sense of the rep

Lord Mure concurred.

Lord Adam.—The pursuers are proprietors of property situated
district of the defenders, who are the local authority for the burgh o

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They pay drainage and sewage assessment, and they are entitled to have their drains connected with the sewers of the defenders. The obligation upon the defenders to receive the sewage, provided it be innocuous, is only limited by the carrying capacity of the sewage pipes. There is no other limitation as to the amount of the sewage they are to be entitled to discharge into the defenders' pipes. But the liquid must be innocuous. The 7th section of the Rivers Pollution Act makes provision regarding this. No local authority is to be compelled to admit into their sewers "any liquid which would prejudicially affect such sewers, or the disposal by sale, application to land, or otherwise, of the sewage matter." No objection is stated to the effect that the sale of the sewage would be prejudiced. But it has been argued that it "would prejudicially affect" its application to the land. The question is whether the term "land" refers to "any land" generally, or whether it refers to "a particular piece of land." If it means "prejudicial to land in general," then it is the character of the sewage which must be considered. If it means "prejudicial to a particular piece of land" that involves the consideration not only of the quality but also of the quantity of the sewage. I think we must read the words of the Act as applicable to land generally. The sewage must be noxious in its character, and not merely objectionable because the quantity is too great for the limited space on which it is to be put. As I think the liquid in the present case is innocuous, I think no other course is open to us than to hold that the defenders must receive it and dispose of it as they best can.

LORD SHAND was absent.

THE COURT pronounced the following interlocutor, which was signed on 28th February:—"Having resumed consideration of the cause, with the joint report by Professor Crum Brown and Robert Carstairs Reid, C.E., No. 58 of process, and heard counsel thereon, recall the interlocutor of the Sheriff-substitute of 18th December 1884 appealed against: Find, in point of fact, that the liquids now proceeding from the Brechin Paper Manufacturing Works, belonging to the respondents, will not prejudicially affect the sewers within and for the burgh of Brechin, or the disposal by sale, application to land, or otherwise, of the sewage matters conveyed along such sewers: Find further, that the said sewers will be sufficient for the requirements of the appellants' district after receiving the said liquids: Find further, that the communications between the drains conveying the said liquids from the respondents' works and the appellants' sewers have been already made, and that the mode in which such communications have been made is not objected to; therefore find and declare that the appellants are bound to receive the resultant liquid issuing from the respondents' settling ponds into the public sewers of Brechin, so long as the said liquid is such that it will not prejudicially affect such sewers, or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or is not injurious from its temperature or otherwise in a sanitary point of view: Decern and ordain the appellants to allow the respondents to discharge the resultant liquid issuing from foresaid settling ponds into the public sewers of Brechin so long as aforesaid: Reserving to the appellants their right to apply to any competent Court in the event of any change in circumstances," &c.

W. & J. BURNESS, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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Lyon v. Lyon.

DAVID LYON, First Party.—*James Reid.*
ROBERT LYON, Second Party.—*John Wilson.*

Succession—Condition—Substitution—Protected substitution.—A testator, in 1841, disponed his whole estates, including heritage, to his two sisters, Ann and Margaret. In 1842 he, by codicil, on the narrative that his sister Ann was at present provided for, in so far altered his disposition as to dispone his whole property to his sister Margaret should Ann be still provided for at his death, but under condition that if Margaret should "marry or predecease my sister Ann, then, in the first case, she, Ann Lyon, shall receive the half, and in the second, the whole property, &c.; provided always that if both die without marrying, the property shall go in equal shares to my two brothers, George and David, or their heirs and successors." Both sisters survived the testator but died unmarried, Ann being the predeceaser, and Margaret leaving a settlement disposing, *inter alia*, of the whole heritable property of which she might die possessed. In a competition between the heirs under Margaret's settlement and the representatives of the testator's brothers, George and David, *held* that an absolute and indefeasible fee in the heritable properties left by the testator was conferred on Margaret, with a simple destination in favour of the testator's brothers, George and David, their heirs and successors, which had been evacuated by Margaret's settlement.

2D DIVISION.
I.

JOHN LYON, classical master in the High School of Leith, died on 18th March 1847, leaving a settlement, dated 13th November 1841, with codicil thereto, dated 19th August 1842. By the settlement he disponed to his sisters, Ann Lyon and Margaret Lyon, and the survivor of them, and the heirs and assignees of the survivor, his whole estate, heritable and moveable, and particularly a dwelling-house in Vanburgh Place, Leith, and a dwelling-house at 45 Lothian Street, Edinburgh, as therein described, and he also thereby nominated his said disponees his sole executors. No trustees were appointed under said settlement, and no legacies or directions were mentioned therein.

The codicil was in these terms:—"Whereas upon the 13th November 1841 I disponed all my property to my two sisters Ann and Margaret Lyon, yet upon considering that my sister Ann is at present provided for, and that my aunt Margaret Brown is entirely dependent, I so far alter my foresaid disposition as to grant, assign, and dispone the whole which I may possess at my death to my sister Margaret if my sister Ann is still provided for as she is at present, or otherwise by marriage, under the condition that she, Margaret, shall support her aunt, Margaret Brown, all the days of her natural life, and if she, Margaret Lyon, do marry or predecease my sister Ann, then in the first case she, Ann Lyon, shall receive the half, and in the second, the whole property, &c.; provided always that if both die without marrying, the property shall go in equal shares to my two brothers, George and David, or their heirs and successors. This codicil I write on the 19th day of August 1842 years. (Signed) JOHN LYON."

On 18th January 1849 an instrument of sasine was expede and recorded in the New Particular Register of Sasines, &c., for the sheriffdom of Edinburgh, on behalf of Ann and Margaret Lyon, as regards the Vanburgh Place property, and on 12th August 1850 an instrument of sasine was expede and recorded in the said register as regards the property in Lothian Street. In both instruments of sasine the settlement and codicil were narrated, and sasine was given in the following terms:—"In virtue of which precept I hereby give sasine to the said Ann Lyon and Margaret Lyon, and the survivor of them, of the subjects and others above described, but always under burden of the codicil and addition and

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alteration and provisions and declarations and conditions thereof before specified"; those being the conditions mentioned in the codicil.

Ann Lyon died unmarried on 24th February 1886. The two sisters had executed a mutual settlement on or about 29th June 1874, by which they conveyed their moveable estate to the survivor, but no disposition was made of heritage. Margaret Lyon died on 14th February 1887 unmarried, leaving a settlement dated 5th May 1886, by which she left to her nephew, David Lyon, son of her late brother David Lyon, whom failing, his issue equally, *inter alia*, the whole heritable property of which she might die possessed.

After the death of Margaret Lyon a special case was presented, to which the parties were (1) David Lyon, who was the eldest son and heir-at-law of the deceased David Lyon mentioned in the codicil, and (2) Robert Lyon, the eldest son and heir-at-law of the deceased George Lyon, also mentioned in the codicil, to whom and their heirs the testator directed that his heritable properties should go in the event of his sisters both dying without being married. David Lyon the elder and George Lyon both predeceased Ann Lyon and Margaret Lyon.

The foregoing facts were stated in the case.

It was maintained by the first party that his aunt, the said Margaret Lyon, was fiar of the heritable properties, and as such entitled to dispose of the same by deed *inter vivos* or *mortis causa*, and that having by her settlement conveyed the same to him solely, he was entitled thereto to the exclusion of his cousin the second party; while the latter maintained that the codicil validly imposed a limitation on the absolute fee conferred by the prior settlement on Ann and Margaret Lyon, which limitation was duly engrossed in the sasines expede by them; that Margaret Lyon was therefore not entitled to, and could not, defeat his right of succession, and that he was entitled to an equal *pro indiviso* share of both properties with the first party, in terms of the codicil.

The questions of law were, first, Do said heritable properties belong equally to the first and second parties to this case? Or, second, do they belong solely to the first party?

Argued for the first party;—Margaret Lyon, under the codicil, had an absolute right of fee subject only to two conditions,—that she should not marry, and that she should not predecease her sister Ann, and she had neither married nor predeceased her sister. The clause beginning "provided always," fairly read, only applied in the event of Margaret predeceasing Ann, and did not import a third independent condition. If George and David Lyon, their heirs and successors, were to be taken as conditional institutes, then Margaret by succeeding had evacuated the institution; if they were substitutes then her settlement had evacuated the substitution, the substitutes' right being unprotected.

Argued for the second party;—(1) This was a case of protected substitution, which was good in law against the voluntary acts of the institute.[1] Such a restricted right in the institute was, looking to the words of the codicil, expressed therein, but in any case such a restriction might be implied,[2] and was here implied. (2) The alternative view which the second party maintained was, that this was a case of a fee in Margaret Lyon, but subject to defeasance in the event which happened of her death unmarried.[3]

LORD JUSTICE-CLERK.—I have had little difficulty in this case. I think there

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[1] Ersk. iii. 8, 22.

[2] Dyer v. Carruthers, May 27, 1874, 1 R. 943.

[3] M'Lay v. Borland, July 19, 1876, 3 R. 1124.

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is here an unfenced destination merely, in favour of the substitutes,
David Lyon, their heirs and successors, and that the institute Mar
was free to dispose of the heritable property if she chose and as s
She did dispose of it in favour of the first party, who is consequen
opinion, entitled to prevail.

LORD CRAIGHILL.—I concur. I think that the intention of the
to give Margaret Lyon a fee in the whole heritable property, which
to dispose of it if she chose, though if she did not dispose of it it wen
and David Lyon as substitutes.

LORD RUTHERFURD CLARK.—This is about as plain a case as
imagine. It is nothing else than a case of simple substitution i
George and David Lyon, and it is quite clear that Margaret Lyon, th
has evacuated that substitution.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Ha
counsel for the parties on the special case, answer the f
questions therein stated in the negative, and the secon
in the affirmative: Find and declare accordingly, and de

MACPHERSON & MACKAY, W.S.—JAMES AYTON, Solicitor—Agents

No. 75.
Feb. 9, 1888.
Magistrates of Irvine v. Muir.

PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF THE ROYAL B
IRVINE, First Parties.—*Macfarlane.*
JAMES MUIR, Second Party.—*Ure.*

Succession—Charitable Bequest—Uncertainty.—A person born i
burgh of Irvine died in 1859 leaving a testament dated in the sa
which he bequeathed a sum "to the Magistrates and Town-Council
to be applied toward the support of aged poor persons "natives
Held that the bequest was not limited to persons born in the roy
Irvine, but extended to those born within the parliamentary burgh a
in 1859.

1ST DIVISION.
B.

ROBERT RANKINE HOLMES, writer in Glasgow, died on 17th
By his testament dated the previous day he left £1100 to his f
for their liferent alimentary use, and directed his executors on
of the longest liver of them to pay £500 thereof "to the Magis
Town-Council of Irvine, to be applied by them in such way a
as they shall deem proper towards the maintenance and suppo
poor persons, natives of Irvine, not receiving parochial aid, a
adequately to support themselves."

The last survivor of the testator's sisters died on 6th October
thereafter the £500 was paid over to the Provost, Magistrates, a
Council of Irvine.

This special case was presented by the Provost, Magistrates, a
Council of Irvine, and by James Muir residing in and a nativ
way, a suburb of Irvine, for the opinion and judgment of the Co
following questions:—"1. Is the term 'natives of Irvine' to be
as at the date of the testator's death, or as at the date of the las
of the testator's sisters, when the bequest became operative ?
the persons entitled to the benefits of the bequest falling to b
stered by the first parties be natives of the old royal burgh of
at most of the parish of Irvine ? or Are the terms of the bequ
construed so as to include either (1) natives of the parliament

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of Irvine, as defined by the Act 2 and 3 William IV. chapter 65; or (2) natives of the burgh of Irvine, as defined by the Irvine Burgh Act, 1881?"

The following facts were stated:—The testator was born in 1807 in the old royal burgh, and brought up there. The royal burgh of Irvine, as defined by its old crown charters, lay within the parish of Irvine on the east side of the river Irvine, except that part of it, containing a number of dwelling-houses, and called the Harbour of Irvine, which lay on the other or west side of the Irvine, and within the parish of Dundonald.

A large suburb known as the Halfway or Fullarton lay between the royal burgh and the harbour on the west side of the river Irvine, and in the parish of Dundonald. It was connected with the old royal burgh by a bridge.

By the Representation of the People (Scotland) Act, 1832, the parliamentary burgh of Irvine was so defined as to include both the old royal burgh and the Halfway or Fullarton.

By the Irvine Burgh Act, 1881, the boundaries of the burgh were further extended so as to include territory beyond the limits of the parliamentary burgh, both in the parish of Irvine and the parish of Dundonald, and by that Act the jurisdiction of the Magistrates, till then confined to the old royal burgh, was extended so as to include the whole of the extended burgh, and thus for the first time was made to include the Halfway or Fullarton.

The Magistrates of Irvine (first parties) contended that in the construction of the testament of Mr Holmes the expression "natives of Irvine" meant natives of the old royal burgh as it existed at the testator's death in 1859, or at most of the parish of Irvine.

James Muir, the second party, who resided in and was a native of Halfway or Fullarton, and was otherwise a suitable object for the benefit of the gift if he could be described as a "native of Irvine" in the sense of the testament, contended that the expression fell to be construed as in 1859, the date of Mr Holmes' death, and that "natives of Irvine" meant natives of the parliamentary burgh as defined by the Act of 1832; or alternatively, that if the expression fell to be construed as at the death of the surviving sister of Mr Holmes in 1886, it meant natives of Irvine as extended and defined by the Irvine Burgh Act, 1881.

Argued for the first parties;—It was not necessary to go outside the testament itself for the meaning of "Irvine," for the bequest was to the Magistrates and Town-Council of "Irvine," and for behoof of natives of "Irvine." Since therefore the old royal burgh was the only "Irvine" having Magistrates and Town-Council when the testator died, the charity must be confined to the royal burgh. It was impossible to give effect to the contention that the burgh as affected by the Act of 1881 could be included in the charity, as the testator could not be supposed to have contemplated that extension. With regard to the cases quoted on the other side, that of the "*Afton*"[1] turned on a construction of the Greenock Harbour Act, while in *Bogie's Trustees*[2] the decision that the "Mars" training-ship came under the category of ragged schools in Dundee was arrived at because the ship lay in Dundee Harbour.

Argued for the second party;—The testament must be construed as at the testator's death in 1859. By that time the parliamentary burgh had

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[1] Owners of "Afton" v. Northern Marine Insurance Co., March 4, 1887, 14 R. 545.

[2] Bogie's Trustees v. Swanston, Feb. 5, 1878, 5 R. 634.

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long been formed, and the expression "natives of Irvine" meant natives of that burgh. The Magistrates and Town-Council of Irvine had been appointed managers of the charity not with any regard to the limits of their jurisdiction, but as a continuing local body fitted to manage the fund. There was therefore nothing in the objection that the second party's reading would give "Irvine" two meanings in the same sentence. The cases of the "*Afton*"[1] and *Bogie's Trustees* v. *Swanston*[2] were analogous instances of the way in which such expressions defining a place were interpreted. In the former the meaning of the expression "Port of Greenock" was considered. In the latter a training-ship moored in the Tay and on the Fifeshire side of it and outside the burgh, though within the harbour of Dundee, was held to come within the expression in a bequest "ragged schools in Dundee."

LORD PRESIDENT.—The direction in the will is "to the Magistrates and Town-Council of Irvine, to be applied by them in such way and manner as they shall deem proper towards the maintenance and support of aged poor persons, natives of Irvine, not receiving parochial aid, and unable adequately to support themselves."

The ambiguous term in this direction is the term "natives of Irvine."

The testator was born in the year 1807 in the old burgh of Irvine, within the ancient royalty of the burgh, and was brought up there. He seems to have been a writer in Glasgow, and to have had property there; but he had no connection in the way of property with the town of Irvine.

The question raised is this—in using the term "natives of Irvine," did he mean natives of Irvine in terms of the old charter, or in the more popular sense of natives of the town as defined for the purpose of parliamentary elections by the Act of 1832?

There is nothing technical in the use of the term natives of Irvine, one man might use it in one sense, and another man in another, and it comes to be just a balance of probabilities as to which he meant.

As was observed by Lord Adam during the argument the name "Irvine" is used twice, once as applied to "the Magistrates and Town-Council of Irvine" and once to "the natives of Irvine," and there may be some difficulty in construing the two meanings differently.

I am not much moved in my own opinion by the testator's using the expression "Magistrates and Town-Council," for he could use no other term as applied to that body. He had no choice in the matter, as he was but giving to them their legal name, and in giving it to them he was not referring to the purpose of his trust, but merely to the agents for carrying out that trust. But when he goes on to speak of the natives of Irvine he is then speaking of the object of the trust.

If one puts one's self in the position of a man who is making a will in the year 1859, and who has only a general idea as to the boundaries of the town, it seems to me that he would naturally mean the town of Irvine in its larger sense,—Irvine as it then existed,—that is to say, Irvine as defined for the purposes of parliamentary elections, and therefore I prefer this rendering of the term.

No effect can be given to the widening of the parliamentary boundaries by the

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[1] Owners of "Afton" v. Northern Marine Insurance Co., March 4, 1887, 14 R. 545.

[2] Bogie's Trustees v. Swanston, Feb. 5, 1878, 5 R. 634.

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Act of 1881, for it could not have been foreseen by the testator that such boundaries were likely to be adopted.

Therefore I hold that the meaning of the term "Irvine" as used by the testator is the town of Irvine as defined by the Act of 1832 for the purpose of parliamentary elections.

LORD MURE concurred.

LORD ADAM.—The question before us is what the testator meant by the expression "natives of Irvine." Apparently there are four explanations. The first is limited to natives of the royal burgh. The second includes natives of the parliamentary burgh, as defined by the Act of 1832. The third is extended to include the area defined by the Act of 1881; and the fourth includes natives of the parish of Irvine.

Very little can be said in favour of the fourth view. The next question is whether it was intended to include the area mapped out in 1881. This was done subsequently to the death of the testator, and therefore does not apply, and there are no physical features owing to which it is to be presumed the testator intended that it should be included. The testator cannot be supposed to have foreseen this change.

I have no doubt that, there being no words in the settlement to confine the term "natives of Irvine" to the royal burgh, the testator must have meant the natives residing within the parliamentary limits.

There is nothing to distinguish that part of the town of Irvine within the royal burgh from that within the parliamentary burgh. The houses and streets are continuous, and the testator probably did not know where the boundaries between the two lay. I think, therefore, it must be taken that he meant by the expression "natives of Irvine" all within the parliamentary boundaries.

As to the use of the words "Magistrates and Town-Council of Irvine" as the trustees of the gift, I take them to be only descriptive of the persons who were to administer the gift, and not restrictive of the persons who were to be the beneficiaries.

LORD SHAND was absent.

THIS interlocutor was pronounced:—"Find and declare that the term 'natives of Irvine' in the settlement of the testator must be construed to mean natives of the parliamentary burgh of Irvine, as existing at the dates of the testator's settlement and of his death as fixed by the Act 2 and 3 William IV. cap. 65, and decern."

MORTON, NEILSON, & SMART, W.S.—DOVE & LOCKHART, S.S.C.—Agents.

No. 76.

Feb. 9, 1888.
Hunter's Trustees v. Hunter.

WILLIAM HUGH HUNTER AND OTHERS (Trustees of Thomas Oliphant Hunter), Pursuers.
MARY BELL HUNTER AND OTHERS (Trustees of Thomas Oliphant Hunter *secundus*), Claimants (Reclaimers).—*Gloag—Strachan.*
ISABELLA HUNTER OR DOWNIE, Claimant (Respondent).—*Ure.*
WILLIAM HUGH HUNTER AND OTHERS, Claimants (Respondents).—*D.-F. Mackintosh—A. G. Murray.*

Succession—Vesting—Term of payment.—A truster directed his trustees to divide the residue of his estate into two equal portions, and to hold one of these

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for behoof of his sister, whom failing, of four nephews "absolutely," and of tw nieces and their issue "in liferent and fee," and to divide the other half int sixteen equal parts, and "to hold three of the sixteenth parts for each of th four nephews absolutely, and two of the sixteenth parts for each of the tw nieces in liferent, and of their issue, *per stirpes*, in fee." The said shares o residue were to be payable as follows, viz.:—"The one half falling to my said siste if she survive me, also the three-sixteenth parts falling to each of my sai nephews (as well those shares destined to them, failing my said sister, if sh shall fail, as those shares directly destined to themselves), at the first term o Whitsunday or Martinmas that shall occur after the expiry of six months afte my death; and my trustees shall retain and invest" the shares falling to each o the two nieces in liferent and their issue in fee, and make payment of the in terest or annual produce half-yearly at Whitsunday and Martinmas, "beginnin the first payment at the first of these terms that shall occur after the expiry o six months after my death," the fee of these shares to be paid to the issue of th nieces at the first term after the death of their respective parents, "and if any o my said nephews . . . shall die without leaving lawful issue, the share of residue effeiring to such predeceasers shall go, descend, and belong to thei surviving brothers and sisters, and the issue of sisters absolutely, or in liferen and fee, according to the provisions before written . . . but if an of my said nephews shall so predecease leaving lawful issue, then such issue, equally among them, shall come in place of, and receive the share o their predeceasing parent." Then followed similar provisions applicab to the cases of nieces dying without or with issue, "and the interest i the said residue, whether in fee or liferent, of my said nephews and nieces and their issue, shall not vest in them till the term of payment shall have arrived; further, declaring that in case any of my said nephews or nieces, or their issue, shall be pupils, or minors and unmarried, at the time of my death, or when their interest in my means falls to be paid under the provisions of these presents, then the share of such pupils or unmarried minors shall be retained by my trustees till they shall successively become major or be married, whichever event shall first happen, the annual proceeds being, in the meantime, in the exclusive discretion of my trustees, either added to the principal and accumulated, or such interest, or a part, or even the whole of the fee or principal effeiring to such pupils or unmarried minors shall, in the exclusive discretion of my trustees, be applied as my trustees shall in their judgment deem best for the support and education of such pupils or unmarried minors, and that although the said fee or principal should not then have vested in such pupils or unmarried minors." The trustees were directed to exercise their discretion as to the time of realising the estate.

Held (1) that the declaration by the truster that the shares of residue destined to nephews should not vest till the time of payment should have arrived implied a declaration that vesting should then take place; (2) that by the time of payment the testator meant the time when the residue fell to be divided, viz., the first term of Whitsunday or Martinmas six months after his death; and (3) that the direction that the shares of pupils and of unmarried minors should be retained till their marriage or majority did not suspend vesting.

1st Division.
Lord Fraser.
M.

THOMAS OLIPHANT HUNTER died on 10th September 1877, leaving a trust-disposition and settlement dated 31st October 1876, by which he conveyed his whole estate, heritable and moveable, to trustees for certain purposes. The deed bore:—"In the eighth place, I direct my trustees to divide the rest, residue, and remainder of my estate, heritable and moveable, into two equal portions, and to hold the first of these halves or portions for behoof of my sister, the said Ann Hunter, whom failing, of my said nephews, William Hugh Hunter, Alexander Deas Hunter, Francis Hunter, and Thomas Oliphant Hunter (second), absolutely, and of my said nieces, Emma Hay Hunter and Isabella Hunter, and their issue, in liferent and fee, and in the proportions and otherwise subject to the conditions as to the succession of nephews or nieces dying with or without issue, and as to nephews and nieces, or their issue, being pupils or minors, and unmarried, and to the other conditions hereinafter written applicable to nephews and nieces, and their issue; and my trustees shall divide the second of the said halves or portions of said residue into sixteen equal parts, and they shall hold three of the said sixteenth parts of residue for behoof of each of my nephews, the said William Hugh Hunter, Alexander Deas Hunter, Francis Hunter, and Thomas Oliphant Hunter (second), absolutely; and my trustees shall hold two of the said sixteenth parts of residue for behoof of each of my nieces, the said Emma Hay Hunter, and Isabella Hunter, in liferent for the liferent alimentary use allenarly of them respectively, exclusive of the *jus mariti* and right of administration of their respective husbands, and declaring that the same shall not be assignable by my said nieces, or liable to or attachable for the debts or deeds of them or their husbands, and for behoof of the lawful issue of my said two nieces, equally among them, *per stirpes*, in fee, and the said shares of residue shall be payable as follows, viz.:—The one half falling to my said sister if she shall survive me, also the three-sixteenth parts falling to each of my said nephews (as well those shares destined to them failing my said sister, if she shall fail, as those shares directly destined to themselves), at the first term of Whitsunday or Martinmas that shall occur after the expiry of six months after my death; and my trustees shall retain and invest, in the way hereinafter provided, the said two-sixteenth parts falling to each of my said two nieces, in liferent, and their issue in fee (as well those shares destined to them failing my said sister, if she shall fail, as those shares directly destined to themselves), and my trustees shall make payment to my said two nieces of the interest or annual produce of the parts or shares effeiring to them respectively, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment at the first of these terms that shall occur after the expiry of six months after my death, and the next payment at the following term, and so termly during their lives respectively, and the fee of the said shares of residue last mentioned shall be paid to the lawful issue of my said two nieces, equally among them, *per stirpes*, at the first of said terms that shall occur after the deaths of their respective parents . . . and if any of my said nephews, sons of my said brother William, shall die without leaving lawful issue, the shares of residue effeiring to such predeceasers shall go, descend, and belong to their surviving brothers and sisters, and the issue of sisters, absolutely, or in liferent and fee, according to the provisions before written, and in the proportions as respects the shares effeiring to males and females, and otherwise, in the terms before specified; but if any of my said nephews shall so predecease leaving lawful issue, then such issue, equally among them, shall come in place of and receive the share of their predeceasing parent, and if my said two nieces, Emma Hay Hunter and Isabella Hunter, or either of them, shall die without leaving lawful issue, then the fee of the share of residue effeiring to them in liferent shall go, descend, and belong to their surviving brothers and sisters absolutely, or in liferent and fee, according to the provisions before written, and in the proportions as respects the shares effeiring to males and females before specified, and, if any of the issue of my said two nieces last mentioned, interested in the fee of the residue of my estate, shall die before the term of payment of the fee, without leaving lawful issue, then the share or shares effeiring to such predeceasers shall go, descend, and be paid to their surviving brothers and sisters, if any, equally among them, if more than one, *per stirpes*, and, failing brothers or sisters of such predeceasers, then the share or shares

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effeiring to such predeceasers shall go, descend, and belong to my surviving nephews and nieces before named in this article, children of my said brother William, and their issue *per stirpes* in fee absolutely or in liferent or fee, according to the provisions before written, and in the proportions as respects the shares effeiring to males and females before specified; but if any of the issue of my said nieces shall so predecease, leaving lawful issue, then such last-mentioned issue, equally among them, *per stirpes,* shall come in place of and receive the shares of their predeceasing parents, and the interest in the said residue, whether in fee or liferent of my said nephews and nieces, and their issue shall not vest in them till the term of payment shall have arrived; further declaring that in case any of my said nephews or nieces, or their issue, shall be pupils or minors and unmarried at the time of my death, or when their interest in my means falls to be paid under the provisions of these presents, then the share of such pupils or unmarried minors shall be retained by my trustees till they shall successively become major or be married, whichever event shall first happen, the annual proceeds being in the meantime in the exclusive discretion of my trustees, either added to the principal and accumulated, or such interest, or a part, or even the whole of the fee or principal effeiring to such pupils or unmarried minors shall, in the exclusive discretion of my trustees, be applied as my trustees shall in their judgment deem best for the support and education of such pupils or unmarried minors, and that although the said fee or principal should not then have vested in such pupils or unmarried minors; and, subject to the powers of postponement after conferred, my trustees shall proceed after my death to realise my estate with all convenient speed, but in so doing they shall have regard to the state or position of the same, and they shall be the sole judges of the mode and time of realising the same, and shall not be bound to do so more quickly than may in their judgment be advantageous, keeping in view the complete and satisfactory recovery of the same, and if necessary with this view, they shall be entitled to postpone the periods of laying aside and of payment of the said various interests or shares in my estate, both for liferent and fee, and no interest shall be chargeable upon such shares till my trustees shall find themselves in a position to lay aside or make payment of the same, but declaring that my trustees shall be entitled to make partial payments or distribution of realised funds from time to time as they may see fit."

The testator was survived by his sister Miss Ann Hunter and by all his nephews and nieces.

Thomas Oliphant Hunter *secundus,* one of the nephews, died in minority on 26th February 1887. The trustees had in virtue of their powers to that effect made payments on his account, but at the time of his death they held three-sixteenths of the residue for him subject to deduction of these payments. He left a trust-disposition and settlement, dated 12th February 1887, conveying his whole estate to trustees for certain purposes.

In a multiplepoinding brought by the trustees of Mr Thomas Oliphant Hunter *primus,* the trustees of Mr Thomas Oliphant Hunter *secundus* claimed the three-sixteenths of the share of residue on the ground that it had vested in him and had passed to them under his settlement.

The surviving nephews and nieces (his brothers and sisters) claimed his three-sixteenths on the ground that they had never vested in him, and fell to them under the survivorship clause.

The Lord Ordinary (Fraser) pronounced this interlocutor:—"Finds that the share of the succession destined to Thomas Oliphant Hunter *secundus* did not vest in him, and therefore repels the claim of his trustees: Sustains the whole other claims," &c.*

The trustees of Thomas Oliphant Hunter *secundus* reclaimed, and argued;—There were here all the elements of vesting. In the first place, there was a gift to the nephews "absolutely." In the next place, a time was fixed at which the shares were to be payable, viz., "the first term of Whitsunday or Martinmas that shall occur after the expiry of six months after my death." Further, the power to make advances to a beneficiary which was here given was always an element favourable to vesting. The clause of survivorship did not apply to the case that had occurred of a nephew surviving the period of payment. The deed did not shew it to have been in the truster's mind that no right should be enjoyed till the shares were actually in the hands of the beneficiaries. Their shares might be divided from the others and held for them. Every presumption was in favour of vesting as early as possible. There was no authority exactly in point, but Lord Young's opinion in the case of *Peacock,*[1] quoted on the other side, was really favourable to vesting; also the case of *Byars' Trustees.*[2]

Argued for respondents;—The deed spoke of more than one term of payment. Thus the term of payment of the shares for nieces' children was not the first term after the truster's death, but the first term "that shall occur after the deaths of their respective parents." There being thus various terms of payment, the term in the case of minors was their attaining majority or being married. The absolute gift to the nephews and nieces was qualified by the clause of survivorship. It was a clause of survivorship which related to a term different from the *mors testatoris* as the term of distribution, and the vesting must be in those who were alive at that period of distribution.[3]

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* "OPINION.—The testator intended the shares of the residue of his nephews to vest as at the date of payment; but there is a marked distinction drawn as to what is the term of payment when the legatee has attained majority and when he is still a minor. In the former case the term of payment is the first term of Whitsunday or Martinmas happening six months after the testator's death, and the vesting does not take place till that term, simply because there is a clause of survivorship which prevents it vesting as at the death of the testator.

"In regard to legatees in minority there is a special and distinct clause in the following terms:—'Further declaring that in case any of my said nephews or nieces, or their issue, shall be pupils or minors and unmarried at the time of my death,' &c. This clause fixes the day of payment of the children who are minors. It says that the share of such minors 'shall be retained by my trustees till they shall successively become major or be married,'—the words are implied after this sentence, 'and it shall then be paid.' Now, it is quite clear that the testator had it in his mind that nothing should vest in these minor children until their term of payment had arrived, because he has allowed the trustees in their discretion to deal with the 'annual' proceeds of the estate in the interim, 'although the said fee or principal should not then have vested in such pupils or unmarried minors'; or, to put it in other words, 'notwithstanding that the said fee or principal has not vested in such minors.' Moreover, when he speaks of annual proceeds, he cannot mean the number of months up to the first term of Whitsunday after the testator's death, which was the term of vesting for the adult nephews. He applies the same rule to the case of minors as he does to adults in fixing the term of payment as the term of vesting; but the terms of payment are different. The result is that the claim for the trustees of Thomas Oliphant Hunter *secundus* must be refused."

[1] Peacock's Trustees v. Peacock, March 20, 1885, 12 R. 878.

[2] Byars' Trustees v. Hay, July 19, 1887, 14 R. 1034.

[3] Donaldson's Trustees v. Richardson, July 20, 1860, 22 D. 1527, rev. 24 D. (H. L.) 1; Peacock's Trustees, *supra.*

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Hunter.

If the fee vested in a minor nephew at the term of payment s
the other side, there was no meaning in the clause providing th
might be made to the nephews for maintenance and education,
the said fee or principal should not then have vested in suc
unmarried minors."

At advising,—

Lord President.—The Lord Ordinary has found that the shar
cession destined to Thomas Oliphant Hunter *secundus* in his uncle
did not vest in him, and has therefore repelled the claim of his trus
reason which the Lord Ordinary assigns in support of this interlo
Thomas Oliphant Hunter died in minority, and therefore, according
of the settlement, the share destined to him had not vested in hin
of his death.

In considering this question it is necessary, I think, in the f
attend to the terms of the gift. It is a gift of the residue of th
occurs in the 8th head of the trust-deed. The deceased truste
trustees "to divide the rest, residue, and remainder of my estate, h
moveable, into two equal portions, and to hold the first of these h
tions for behoof of my sister the said Ann Hunter, whom failing,
nephews, of whom this Thomas Oliphant Hunter *secundus* is one,
and of my said nieces, Emma Hay Hunter and Isabella Hunter, an
in liferent and fee, and in the proportions, and otherwise subject
ditions as to the succession of nephews or nieces dying with or w
and as to nephews or nieces or their issue being pupils or minors an
and to the other conditions hereinafter written applicable to nephew
and their issue, and my trustees shall divide the second of the said h
tions of said residue into sixteen equal parts, and they shall hold
said sixteenth parts of residue for behoof of each of" his four neph
Oliphant Hunter *secundus* again being one, "absolutely, and my t
hold two of the said sixteenth parts of residue for behoof of each of his
in liferent for the liferent alimentary use allenarly of them respective
of the *jus mariti* and right of administration of their respective h
"declaring that the same shall not be assignable by my said nieces,
or attachable for the debts or deeds of them or their husbands, and
of the lawful issue of my said two nieces equally among them *p*
fee."

Now, there is no difficulty of construction there in so far as the r
concerned. It is a gift in fee absolutely, and what they take is,
place, an additional right, failing the testator's sister, to one-half o
fee of the estate, and independently of that, to 12-16th parts of the
the estate, the other 4-16th parts of that half being given to the nie

Now, in this clause of gift we have one expression which I think
to construe in passing. The first half of the estate is given to th
sister, whom failing, to the nephews. Now, by that expression I un
testator to mean that in the event of his sister failing before the
estate has vested in her it is to go to his nephews and nieces in
sister.

There is also another clause in the deed in which a similar expressi
the clause of survivorship as among the nephews, which is thus e
"And if any of my said nephews, sons of my brother William, shall

leaving lawful issue, the share of residue effeiring to such predeceasers shall go, descend, and belong to their surviving brothers and sisters." Now, here in like manner I construe the words "shall die" as meaning "shall die before their shares have vested," and I apprehend that there can be no question that that is the meaning of such an expression in a deed like the present.

It therefore becomes of the greatest possible importance to ascertain what is the term of vesting in this deed. And we have an express declaration upon that subject by the testator himself, which, I think, leads to a very clear and obvious conclusion. He says,—"The interest in the said residue, whether in fee or liferent of my said nephews and nieces, and their issue, shall not vest in them till the term of payment shall have arrived." That, I apprehend, implies quite clearly that these interests shall vest when the term of payment arrives. Therefore the next question to be considered is, what does the testator mean by the term of payment?

Now, we have to go back to another part of the deed in order to ascertain that, and I think he expresses himself very clearly here also. He says,—"The shares of residue shall be payable as follows, viz., the one half falling to my said sister if she shall survive me, also the three-sixteenth parts falling to each of my said nephews (as well those shares destined to them failing my said sister, if she shall fail, as those shares directly destined to themselves) at the first term of Whitsunday or Martinmas that shall occur after the expiry of six months after my death, and my trustees shall retain and invest in the way hereinafter provided the said two-sixteenth parts falling to each of my said two nieces in liferent and their issue in fee . . . And my trustees shall make payment to my said two nieces of the interest or annual produce of the parts or shares effeiring to them respectively," and on their death shall pay the fee to their children.

Now, I think it must be quite apparent that when the testator says that the shares of the residue shall be payable at a certain time after his death he means that this residue shall then be divisible. He could not effectually, at all events, provide that the residue should be in whole payable at that particular time, because the residue of his estate is of such a nature that it really does not become payable all at once, and certainly not within such a short time as he has here prescribed after his death. There is heritable estate to realise, there are debts to be recovered, there are various contingencies that may make the realisation and payment of the residue a thing to be done by instalments, and therefore the word "payable" here occurring must, I apprehend, be construed to mean the term of division of the residue of the estate, and taking it in that sense I think the testator has made it very clear that he intends the term of division to be the first "term of Whitsunday or Martinmas that shall occur after the expiry of six months after my death."

What is to be done then? In the first place, the absolute gifts are to be at once paid, in so far as they can be paid, and in so far as they cannot be paid, actual payment must be postponed. But the division must be made, and it must be made to this effect, among others, that the shares of the nieces have to be separated and set apart from the shares of the nephews, and are to be held by the trustees after the period of division for the benefit of the nieces in liferent and of their children in fee. These shares are to be cut off and separately held from the rest of the residue of the estate, and are to be held by the trustees according to the directions of the truster for the nieces in liferent and their issue

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in fee. And in like manner the shares or portions of the residue of
which belong to the nephews are to be held by the trustees, so far as t
be actually paid, from and after that date for behoof of the nephews t
These trustees from that date become trustees for them, holding a c
tion of the residue for each of these nephews. This will be further
I think, when we come to consider the particular clauses of whic
heard so much in argument. But up to this point I think the exa
the deed has made out pretty clearly that vesting is not to take pl
term of division, and that that term of division is the first term of
or Martinmas that shall happen six months after the death of the te

Now we come to the words which I am about to read. They fo
diately after the clause bearing that the interests shall not vest till
payment has arrived, meaning also and implying that they shall ve
term of payment has arrived. The words are these—“Declaring t
any of my said nephews or nieces, or their issue, shall be pupils
and unmarried at the time of my death, or when their interest in
falls to be paid under the provisions of these presents, then t
such pupils or unmarried minors shall be retained . . . .”
is the meaning of these words so far as we have gone? One alterna
the period contemplated has arrived when “their interest in my m
be paid.” And what is to be done then? Well, it is not to be paid
which, again, shews conclusively what the testator meant when
term of payment before as being really the term of division, becau
prescribes here is division although not payment,—the shares are to
They are to be retained as separated shares set apart for the nephe
who are unmarried minors or pupils, and from that time forth, I app
trustees hold these shares, not as part of the undistributed estate
shares set apart for the particular nephews or nieces. And they
retained “till they shall successively become major or be married
event shall first happen, the annual proceeds being in the meant
exclusive discretion of my trustees, either added to the principal a
lated, or such interest, or a part, or even the whole of the fee
effeiring to such pupils or unmarried minors shall, in the exclusive
my trustees, be applied as my trustees shall in their judgment deem
support and education of such pupils or unmarried minors.”

Now, without going further, or saying anything in the meantim
clause upon which the greatest amount of argument has been expend
the effect of these words? Do they not demonstrate most clearly tha
of these unmarried minors or pupils, if there be an undivided port
residue of the estate, have become appropriated, because the trustee
with the fullest powers to apply the whole shares, principal and
they think fit, for the support and education of these minors to
belong. I can hardly conceive of any arrangement more reasonabl
than that the shares having become appropriated were to be devote
clusive interests of those to whom they were appointed to belong.

Now, if that be so, what shall be said as to the effect of the words
On the one hand it is said that they derogate from the effect of w
just read; and on the other it is contended that they add considerab
effect to the construction I have put upon the preceding clause. I
with the latter suggestion, I must say. The words are these,—

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although"—and that applies to the entire power of the trustees to dispose of the share of each pupil or unmarried minor for his benefit—"the said fee or principal should not then have vested in such pupils or unmarried minors."

Now, if the fee or principal has not vested in such pupils or unmarried minors, that must be because the term of division has not arrived, for it is already impliedly but distinctly provided that when the term of division has arrived it does vest, and therefore I apprehend the meaning of the words is simply this, "although the first term of Whitsunday or Martinmas that shall occur after the expiry of six months after my death has not arrived." And it was quite natural to provide for that, because eleven months might elapse from the death of the testator and the arrival of the period of division, and during that period it might be of the greatest possible consequence that the minors should be provided with support and education, and that a considerable sum of money should be expended for the purpose of setting them up in life. One can easily understand these things occurring to the mind of the testator, and they fully account for the words which I have just read. The words mean that if it should so happen that an opportunity or a necessity occurs for expending the share of one of the unmarried minors or pupils for his advancement in life or for his education or anything else in the interval between the testator's death and the arrival of the period of division, then the trustees shall have full power to use their discretion in the matter, and to advance money, although during that interval the provision has not in terms vested. To read that clause we are now construing in the way that the Lord Ordinary has done seems to me just to substitute one set of words and expressions for another set of words and expressions having an opposite meaning. Now, that is not interpretation, and interpretation is all that we are entitled to do in the case of a deed of this kind. I confess I do not entertain much difficulty in arriving at the conclusion I have just expressed. It may be that the clauses might have been expressed with a little more precision, but I think they are not susceptible of any construction except that which I have assigned to them.

I am therefore for recalling the interlocutor, and remitting to the Lord Ordinary to rank the reclaimers, the trustees of the deceased minor, in terms of their claim.

LORD MURE.—I agree, and have little to add to what your Lordship has said. In the first part of the eighth purpose of the settlement there is, in the view I take of it, a clear and express gift of certain portions or shares of residue to the testator's sister, to his nephews in fee, and to his nieces in liferent, and to their issue in fee, without distinct mention of any period of payment. It is simply a gift to the persons named, the nephews taking under it absolutely in fee, while the nieces are to take in liferent, and their issue in fee. Now, in the ordinary case of such a clear and distinct gift, with no mention of any period of payment, the usual presumption is in favour of vesting *a morte testatoris*, and if the clause had stopped there, that rule would, as I conceive, have applied. But the testator has not left this matter to presumption, for in the second part of the clause he goes on to declare that "the shares shall be payable, the one half falling to my said sister if she shall survive me, also the three-sixteenth parts falling to each of my said nephews (as well those shares destined to them failing my said sister, if she shall fail, as those shares directly destined to themselves), at the first term of Whitsunday or Martinmas that shall occur at

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the expiry of six months after my death." He is thus distinct as to the period of payment of the portion falling to his sister, whom failing, to the nephews, and of the shares falling to the nephews in their own right. Then, as to the interest of the portion which the nieces are to have in liferent, it is provided that they shall receive it in equal portions, beginning at the first term happening six months after the testator's death. Taking these clauses together, I find no difficulty in the construction of the deed. I think the term of payment must be held to be the term of vesting. There can, I conceive, be no doubt about this as regards the half portion gifted to the sister, or as to the first half year's interest provided in liferent to the nieces. As to these the period of payment is the same, and very express, and I can see no reason why the same rule should not be applied in the case of shares gifted absolutely to the nephews, as to which the clause is equally express.

As I understood the argument in support of the interlocutor, the respondents' view is based upon the clause of survivorship, and the provision as to the disposal of the shares of a beneficiary in minority. But I agree with your Lordship as to both the clauses. I do not think that the survivorship clause can be held to weaken the effect of the express declaration as to the period of payment in the earlier part of the deed. As regards the administration of the share of a nephew or niece who might be a pupil or a minor and unmarried at the testator's death, I see no difficulty. I think the mode of administration which the testator provides is a fair one, and not inconsistent with the construction I have put upon the earlier clauses.

Lord Adam.—Early in the discussion I thought that it would be hard to support the interlocutor of the Lord Ordinary. I remain of that opinion now, and on the grounds stated by your Lordship I concur.

Lord Shand was absent.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to him "to rank and prefer the reclaimers in terms of their claim."

Smith & Mason, S.S.C.—Andrew Newlands, S.S.C.—Fodd, Simpson, & Marwick, W.S.—Thomas M'Naught, S.S.C.—Agents.

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Dominion Bank v. Anderson & Co.

The Dominion Bank and Mandatories, Pursuers (Respondents).—*Balfour—Ure.*

William Anderson & Company, Defenders (Reclaimers).—*Asher—G. W. Burnet.*

Bill—Payment and discharge—Bills of Exchange Act, 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 63—*Cancellation by mistake, or without authority.*—The Bills of Exchange Act, 1882, sec. 63, subsec. 3, enacts that "A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority."

In an action upon a bill, on which the acceptor's name had been cancelled, the pursuer proved that the bank-agent to whom the bill had been sent for collection had taken payment from the acceptor, and had allowed him to cancel his signature; that the latter had paid the bill in the belief that the holder had agreed to a condition which he, the acceptor, had intimated to the bank-agents, viz., that payment of the bill should extinguish all claim by the holder for interest

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and expenses; that the holder had not agreed to that condition, or authorised the bank agent to take payment on that condition, and that the holder had accordingly returned the money to the acceptor, and recovered the bill.

Held that the bank-agent had no authority to agree to the payment and cancellation on the condition stated, and that if he believed that he had such authority the cancellation had been made under a mistake, and that in either view the cancellation was inoperative.

1st Division.
Lord Fraser.
M.

On 28th September 1886 a bill for £2939, 9s. 6d. was drawn by The M'Arthur Brothers Company, Limited, of Toronto, upon William Anderson & Company, Grangemouth, in payment of the price of a cargo of timber purchased by the latter. Messrs Anderson accepted the bill at 180 days' sight from 5th November following, making it payable at the Bank of Scotland, London, on 7th May 1887.

The drawers of the bill endorsed it to the Dominion Bank of Toronto, who transmitted it for collection to the National Bank of Scotland, Limited, in London. On 7th May 1887 it was presented at the Bank of Scotland, London, but payment was refused, a dispute having arisen between Messrs Anderson and The M'Arthur Brothers in regard to the state of the cargo on its arrival.

The dispute having been settled, Mr Mackenzie, the agent of the Bank of Scotland, Grangemouth, wrote to the National Bank, London, on 21st May 1887,—"With reference to my letter of 16th inst., if the bill p. £2939, 9s. 6d. be sent on here for collection, it will in all likelihood be paid, but not the expenses, as the fault was not on Messrs W. Anderson & Coy.'s side—at least so they say."

On 28th May following the Messrs Anderson wrote to Mackenzie as follows:—"Confirming our former instructions to you, it just now occurs to us that immediate payment might be made provided the National Bank, London, gave a guarantee to hand over the bill to you on its return, and hold us scathless in event of its miscarriage in any way whatever, also freeing us of all expenses and interest. On hearing you have received such guarantee, we will instruct you to pay." That letter was on the day of receipt forwarded to the National Bank, London.

On 7th June the National Bank, London, wrote to Mackenzie as follows,—"Referring to your letter of 21st ulto., we now enclose for collection and remittance through your London office (bill being accepted payable in London) Anderson £2939, 9s. 6d. Should the acceptors decline to pay protest charges, 12s. 6d., please return protest to us. Acceptors will of course pay the remitting charge.

"We presented the bill to-day at your London office, but they state that they are still without instructions regarding it."

On 9th June Messrs Anderson wrote to Mackenzie,—"We have yours stating the National Bank, London, will take payment of this bill, but we would like you to get a letter from them freeing us of interest and expenses as asked in ours of 28th ulto. The way we have been treated in the past is our excuse for being somewhat particular now." That letter was enclosed by Mackenzie to the National Bank in the following letter, dated 9th June,—"With reference to your letter of 7th inst., I enclose herewith a communication received from W. Anderson & Company, from which you will observe that they would pay the 12s. 6d., together with the remitting charge, *re* the bill, on condition that they were held free of further responsibility. Please favour me with your instructions.

"*P.S.*—As Mr Anderson is presently living at Callander, and may not be here till Monday morning, we retain the bill till that day if we have not contrary instructions from you."

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On 13th June Mr Anderson called at the bank, and paid the
12s. 6d. of charges, in return for which the bill was handed to
thereupon cancelled it by deleting the signature of his firm
quently on the same day Messrs Anderson wrote to Mackenzie
Sir,—Confirming our former respects, we hand you payment o
on the distinct understanding that we are freed from all respons
interest, expenses, &c."

That letter was enclosed by Mackenzie to the National Ban
letter written to them by him,—" Dear Sir,—I beg to enclose
£2940, 2s., being amount of W. Anderson & Company's a
referred to in your letter of 7th inst., with 12s. 6d. of protest ch

" Of course you distinctly understand, in accordance wi
Anderson & Company's letter herewith enclosed, that so far as
is concerned the draft is accepted by you in settlement of the tr
without any reservation."

On 18th June 1887 the National Bank wrote to Mackenzie,–
friends have not authorised us to take payment of the acceptan
conditions tendered, we return your draft £2940, 2s., and shall t
to send us the bill, with protest attached." Mackenzie then got
bill from the Messrs Anderson, and repaid the sum which had
to him.

The Messrs Anderson having afterwards refused to pay the s
the bill and the noting and protest charges, under reservati
other claims, this action was brought against them by the
Bank and mandataries for payment of the sum contained in
with interest from 7th May 1887, or for £2939, 9s. 6d., with int
that date. Action for any other claims competent to them, and al
the Bank of Scotland for parting with the bill, was reserved.

With regard to the transaction of the 13th June the pursuers
—" The deletion of the defenders' signature was made under
hension and mistake, and without the authority of the pur
holders of said bill. The said repayment and return of the
made by all parties on the footing that they should be restor
position they were in before the bill was given to the defende
bank."

The pursuers pleaded, *inter alia* ;—(1) The defenders being
resting owing to the pursuers the said The Dominion Bank of T
the sum contained in said bill, decree should be pronounced as
for, with expenses. (3) The alleged cancellation having been m
mistake and without the authority of the pursuers, the same is
against them. (4) The amount of the bill having been repaid
fenders, and the bill returned by them to the pursuers, the defe
still liable therefor.

The defenders stated, *inter alia* ;—" On hearing that the bill
returned for collection, as aforesaid, the defenders wrote to the Ban
land the letter dated 9th June 1887, and the agent of the Bank of
at Grangemouth thereupon intimated to the said National Bank
defenders would pay the bill on being held free of further resp
and asked instructions, stating that he would accept payment ac
failing instructions to the contrary on or before 13th June 1
contrary instructions were sent, and the amount of the bill, wi
charges and dues of remittance, were duly paid by the defend
Bank of Scotland, and forwarded by them to the National Ba
about 13th June 1887, and the bill marked paid and given up t
fenders." They pleaded, *inter alia* ;—(2) The pursuers having
payment of the sum contained in the said bill, and the same ha

duly cancelled, are not entitled to found upon the same, and the action ought to be dismissed, with expenses.

At the proof the above letters, *inter alia*, were produced, and the evidence of Mr Basil Mackenzie, agent of the Bank of Scotland at Grangemouth, is given below.*

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* From Mr Mackenzie's evidence it appeared that the Messrs Anderson were customers of his branch bank; that after the settlement of the dispute between them and the sellers of the cargo he had, on 16th May 1887, communicated with the National Bank in London (as shewn in the opinion of the Lord President, *infra*). Mackenzie further deponed,—"I kept Anderson posted up on every point. I shewed him every telegram and letter I received from the National Bank. Mr Anderson lives in Glasgow, and carries on business in Grangemouth, and he is in Grangemouth three or four times a-week. . . . I wrote the letter of 16th May 1887 to the National Bank (quoted in the opinion of the Lord President *infra*), because Mr Anderson asked me to communicate with the National Bank for the purpose of preserving his credit. . . . On 9th June, when I wrote to the National Bank, I enclosed Mr Anderson's memorandum asking me to get a letter from the bank freeing him of all interest and expenses. I never got such a letter from the bank; the only letter was the letter of 7th June, in which they laid down their conditions. The only instructions I had were those in that letter. The next step in the matter was that on the 13th of June Mr Anderson called and asked me what were the conditions on which the bill was to be given up. I said, in a jocular way,—'Here is the bill of fare,' referring to the letter of 7th June, and let him judge of it for himself. He said he thought he should not pay the 12s. 6d. of protest charges, because the bank stated that even if he objected to pay the protest charges the bill might be given up, and because he thought the shippers had been at fault. I advised him to pay it, and he accordingly paid the 12s. 6d., the remitting charges, and the principal in notes, which were received by the teller. The bill was then perforated 'paid,' and Mr Anderson lifted it up and put the pen through his signature. This happened about twelve or one o'clock. I have told all that passed as precisely as I recollect. About an hour afterwards he brought up the letter (quoted above), which I attached to the bank draft. He remarked that if there had been any interest or expenses he would not have paid them. I said, 'There is the National Bank's letter, and it speaks for itself.' There had been not the slightest stipulation about conditions when the money was paid. . . . By the Court.—(Q.) Were you acting as agent for the National Bank in this transaction? (A.) Not except in this way, that they send forward documents for negotiation and collection through us, and they state their conditions. The National Bank has no branch in Grangemouth. . . . . Examination continued.— . . . . (A.) I say distinctly that the bill was not cancelled in error. (Q.) Why? (A.) When he paid the money the bill was cancelled as is usually done, and Mr Anderson put the pen through his signature. At that time he had not imposed his conditions. (Q.) Then is it your view that at the time the bill was cancelled Mr Anderson intended an unconditional payment? (A.) I certainly understood that if I had said to him 'there is £15 or £20 of interest and so much for telegrams,' he would not have paid the bill. I understood it was a payment of the bill under the conditions of the letter of 7th June. . . . (Q.) Is it your view that Mr Anderson sought to impose fresh conditions afterwards? (A.) An hour afterwards, when he gave me the letter I have referred to. So far as I know, he has never agreed to dispense with those conditions, and to treat the payment as one free of those conditions. (Q.) You only forwarded on the payment subject to the condition expressed by Mr Anderson? (A.) Yes; when he came up an hour after the bill had been paid and perforated, I attached his letter to the bank draft. . . . Cross.—(Q.) When Mr Anderson gave you the letter of 13th June, did that appear to you at the time to be anything more than putting in writing the footing on which you had taken payment of the bill? (A.) I said to Mr Anderson that the thing was nonsense—the bill was paid—and I did not see any reason to send any such

The Lord Ordinary (Fraser), on 14th December 1887, decerned against the defenders in terms of the first conclusion of the summons.*

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letter, but out of courtesy I would send it on. (Q.) Was there anything in that letter other than an expression in writing of the footing on which he had paid the bill? (A.) Certainly not, because when he paid the bill he said he would be very glad to get rid of every other bill on the same conditions. . . . . Re-examined.—If I had known that the bank did not agree to the conditions expressed in my letter of the 9th, I would certainly not have given up the bill."

* "Opinion.—A bill for £2939, 9s. 6d., dated 28th September 1886, was drawn by the M'Arthur Brothers Company, Limited, of Toronto, upon the defenders, William Anderson & Company, merchants, Grangemouth, payable at 180 days after sight, at the Bank of Scotland in London. The drawers of the bill endorsed it to the Dominion Bank of Toronto, Canada, who transmitted it for collection to the National Bank of Scotland, Limited, in London. It fell due on the 7th of May 1887, and was dishonoured.

"The National Bank of Scotland in London, not obtaining payment at the place of payment mentioned in the bill, sent it, on 7th June 1887, for collection to the Bank of Scotland at Grangemouth (where the defenders carry on business), by a letter, in the following terms,—'Referring to your letter of 21st ulto., we now enclose for collection and remittance through your London office (bill being accepted payable in London) Anderson £2939, 9s. 6d. Should the acceptors decline to pay protest charges, 12s. 6d., please return protest to us. Acceptors will of course pay the remitting charge. We presented the bill to-day at your London office, but they state that they are still without instructions regarding it.' By this letter the Bank of Scotland at Grangemouth were authorised to deliver up the bill to the acceptors, upon payment of the protest charges, and the charge of remitting the money to London, which was 1s. per cent. The agent for the Bank of Scotland at Grangemouth, in answer to this letter, wrote to the National Bank of Scotland, London, a letter on the 9th of June, which is in the following terms,—'With reference to your letter of 7th inst., I enclose herewith a communication received from Messrs Anderson & Company, from which you will observe that they would pay the 12s. 6d., together with the remitting charge, *re* the bill, on condition that they were held free of further responsibility. Please favour me with your instructions. *P.S.*—As Mr Anderson is presently living at Callander, and may not be here till Monday morning, we retain the bill till that day, if we have not contrary instructions from you.' The last sentence of this letter implies that they were to keep the bill till Monday, unless instructions were sent to return it to London; and the letter from the defenders, which accompanied the bank-agent's letter, is as follows,—'We have yours stating the National Bank, London, will take payment of this bill, but we would like you to get from them a letter freeing us of interest and expenses, as asked in ours of 28th ulto. The way we have been treated in the past is our excuse for being somewhat particular now.' This was a new condition attached by the acceptors to payment of their bill. They wanted a letter of indemnity from the holders freeing them from liability for interest and expenses, and the Grangemouth bank-agent stated that he waited for instructions. Now, the National Bank were not themselves the holders of the bill, but were merely the agents of the holders, the Dominion Bank of Toronto, and, as considerable expenses had been incurred in consequence of the dishonour of the bill, they considered that they had no power to grant such a letter of indemnity without the authority of their principals. In consequence of the dishonour of the bill, it had been sent back to Canada, and the National Bank having obtained an assurance that the bill would be paid, cabled to Toronto that the bill should be returned to London, which was done. When the new condition of the letter of indemnity against responsibility for expenses and interest was imposed by the defenders, the National Bank cabled on the 10th of June to Canada making inquiry whether such a letter of indemnity could be given, and having got no answer they cabled again on the 14th, and on the 18th of June they wrote to

The defenders reclaimed, and argued;—On the 13th June the bill was in the hands of the Bank of Scotland for collection, and payment of it was taken on that day by the bank's agent, and the bill cancelled with the mutual consent of the holder and acceptor. So far as regarded the intention of Mackenzie (the bank's agent) and Anderson, there was thus a completed *bona fide* settlement of the transaction. The National Bank having allowed Mackenzie to proceed upon the footing of his letter to them of 9th June,—to which they sent no reply,—he was acting within the scope of his authority in accepting payment as he did. This was not a case of cancellation in error or mistake, because when Messrs Anderson paid the money their view was that they were paying it in extinguishment of the bill. It was not a case of want of authority, because the National Bank's letter of the 7th June authorised the settlement, which had taken place. There was no relation between the pursuers of this action and the defenders, except that the former were holders of the bill.

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the Bank of Scotland at Grangemouth to the effect that 'our friends have not authorised us to take payment of the acceptance on the conditions tendered.'

"But matters had proceeded at Grangemouth in such a way that the whole situation was changed. Without waiting for instructions from the National Bank, the Bank of Scotland's agent at Grangemouth, on the 13th of June, saw Mr Anderson, the defender, in the bank office, and had there a conversation with him as to the payment of the bill. Mr Anderson then reiterated his determination not to pay the bill unless upon the condition stated, that he should not be liable for interest and expenses. Now, plainly the bank-agent had no authority from the letter of the 7th of June, which accompanied the bill for collection, to agree to any such conditions. It was his plain duty to await instructions. He knew that the National Bank were merely the agents of the onerous holders, and he knew, or ought to have known, that that bank required, before agreeing to this new condition, to cable to their constituents in Canada. But he did not wait for any communication, and took payment from Anderson on the 13th of June upon the footing that the conditions were agreed to. The bill was marked paid and handed to Anderson, who scored out his own signature as acceptor, and it is now a cancelled document. To make matters more distinct, Anderson, an hour after he had paid the bill, and got possession of it, wrote the following note to the bank-agent at Grangemouth,—'Confirming our former respects, we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest and expenses, &c.' This note was sent on to the National Bank along with a letter from the bank-agent, and a bank draft for £2940, 2s. The National Bank not being authorised to agree to the conditions, demanded from the bank-agent at Grangemouth a return of the bill, and at the same time sent back the bank draft for £2940, 2s., which they had not negotiated. The bill was got back from Anderson by the bank-agent, who, on the 23d of June 1887, sent it to London, and he handed the bank draft for £2940, 2s. to Mr Anderson, who obtained cash therefor. The bill thus remains unpaid, and the defenders have got possession of the timber for which the bill was granted, and they refuse now to pay the bill because, as they say, it is cancelled. This defence is founded upon the 63d section of the Bills of Exchange Act, 1882, which is divided into three sections. The first section declares that where a bill 'is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.' This is not the section applicable to the circumstances that here appear. It is the third section, which is as follows:—'A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative.' The cancellation here was made intentionally, but the Lord Ordinary holds that it was made without the authority of the holder. The bank-agent at Grangemouth had no authority to agree to conditions proposed by Mr Anderson and accepted by him, and consequently the bill is not inoperative, and the pursuers are entitled to decree in their favour."

But the bill being cancelled, they could not sue upon it. And it was not proved that there was any debt resting owing except upon the bill.

The respondents' argument sufficiently appears from the opinions of the Court.

Lord President.—This is an action by the onerous holders of a bill of exchange, and the peculiarity of the case is that the acceptors' signature upon the bill is cancelled. We are instructed upon this subject by a provision in the Bills of Exchange Act of 1882 (sec. 63, subsec. 3), which says that "a cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority." The allegation on the part of the pursuers is that the cancellation was made by mistake, and also without the authority of the holder, and therefore that it is inoperative, and they have undertaken to prove that allegation. The question is, Have they succeeded?

The bill itself was granted for the price of a cargo of timber bought by Messrs William Anderson & Company from a Canadian firm, and it was discounted or acquired for value by the Dominion Bank of Toronto. When presented for acceptance it was protested for non-acceptance. It was afterwards accepted, but when it came to maturity payment of it could not be got at the place of payment mentioned in the bill, and the pursuers having failed to make anything of it, had had it returned to Canada that they might preserve their recourse against the drawers. But after the bill was returned to Canada Messrs Anderson, whose place of business is at Grangemouth, appear to have consulted their banker, Mr Mackenzie, about the bill, and that they were on very confidential terms appears from the letters which have been produced. One thing which is very clear from the correspondence is that until the 7th June Mackenzie had no authority from anyone to collect the bill. Up to that date he was acting entirely as Messrs Anderson's agent.

The first letter which is produced is dated 16th May 1887, from the Bank of Scotland, Grangemouth, to the National Bank of Scotland, London,—"An acceptance of Messrs Wm. Anderson & Co. of this town p. £2939, 9s. 6d. was presented at our London office, and payment refused on account of there being a dispute between the merchants who drew the bill and themselves. If the matter be now adjusted, you might send forward the document for collection." The answer to that is that the National Bank are not in a condition to send it, as it "was returned to our friends, the Dominion Bank, Toronto, on 10th inst.; but if you remit us the amount and charges we shall have pleasure in recalling the bill by cablegram." It is plain that the National Bank understood Mackenzie, who very commonly acted as their agent, to be the mouthpiece or adviser of the acceptors of the bill. Mackenzie writes again on the 21st to the National Bank,—"With reference to my letter of 16th inst., if the bill p. £2939, 9s. 6d. be sent on here for collection, it will in all likelihood be paid, but not the expenses, as the fault was not on Messrs W. Anderson & Coy.'s side—at least so they say." That is an intimation at a pretty early period that Messrs Anderson are to attach a condition to the payment of the bill. Then there is a letter, dated 28th May 1887, from Messrs Anderson to the Bank of Scotland. Mr Mackenzie is called the Bank of Scotland, but it is in reality to

Mr Mackenzie that the letter is written. Messrs Anderson write,—"Confirming our former instructions to you, it just now occurs to us that immediate payment might be made provided the National Bank, London, gave a guarantee to hand over the bill to you on its return, and hold us scathless in event of its miscarriage in any way whatever, also freeing us of all expenses and interest. On hearing you have received such guarantee, we will instruct you to pay." That certainly is the letter of a client to his agent—so far as a banker may properly be called an agent—telling him that in conformity with previous instructions he may intimate to the National Bank in London that the bill will be paid upon certain conditions. Mackenzie writes enclosing that letter to the National Bank on the 28th May, and mentions that Messrs Anderson think they have been harshly treated; and he states the position they take up. The answer from the National Bank to that letter is dated the 31st May, and they say,—"As we cabled recall of the bill on 23d inst. it will probably be here in a few days, and immediately on its receipt we shall re-present it at its London domicile for payment." That is certainly not an instruction to Mackenzie to collect the bill on behalf of the National Bank. They say, on the contrary, that they are to collect it again at the place of payment mentioned in the bill. Between the 31st May and the 7th June a change seems to come over the relation of the parties, because the National Bank write to the Bank of Scotland, Grangemouth, on the latter date, that they "enclose for collection and remittance through your London office (bill being accepted payable in London) Anderson £2939, 9s. 6d. Should the acceptors decline to pay protest charges, 12s. 6d., please return protest to us. Acceptors will of course pay the remitting charge. We presented the bill to-day at your London office, but they state that they are still without instructions regarding it."

From that time I apprehend that Mackenzie was acting for both parties. He did not give up the position of acting for the acceptors, but he undertook the additional duty of collecting for the National Bank, and in that character he goes on to correspond with the National Bank. And having received a letter from Messrs Anderson, dated the 9th June, to this effect,—"We have yours stating the National Bank, London, will take payment of this bill, but we would like you to get a letter from them freeing us of interest and expenses as asked in ours of 28th ulto. The way we have been treated in the past is our excuse for being somewhat particular now,"—he then writes to the National Bank, enclosing Messrs Anderson's letter, in the following terms:—"With reference to your letter of 7th inst., I enclose herewith a communication received from W. Anderson & Company, from which you will observe that they would pay the 12s. 6d., together with the remitting charge, *re* the bill, on condition that they were held free of further responsibility. Please favour me with your instructions. *P.S.*—As Mr Anderson is presently living at Callander, and may not be here till Monday morning, we retain the bill till that day if we have not contrary instructions from you." I understand that letter to the National Bank to mean "Will you entertain Messrs Anderson's proposal?" He did not receive any instructions in answer to that letter, and it is not surprising that he did not. It would have been very strange if it had been otherwise. The National Bank could not have answered affirmatively unless they got instructions from their principals, and I daresay they hesitated to suggest that such a guarantee as was asked should be given.

So standing matters upon the 9th June, the whole question was brought to a

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conclusion upon the 13th June, and it is very important to observe what happened. Mr Mackenzie and the Messrs Anderson being on confidential relations, proceeded, the one to pay, and the other to receive, the contents of the bill, and Mackenzie intimated to the National Bank what they had done. Mackenzie says in his evidence that he took payment of the bill from Anderson and delivered it up to him without any conditions, and that it was only after the lapse of an hour from the time that the money was paid and the signature cancelled by Anderson himself that Anderson brought him the letter of that date. It was from the Messrs Anderson to the Bank of Scotland, Grangemouth, and was to the following effect:—"Dear Sir,—Confirming our former respects, we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest, expenses, &c." This letter was then attached by Mackenzie to the draft on London, which he forwarded to the National Bank, thereby intending to unite both together and to make the conditions binding on the bank, if they accepted payment. To make the matter more distinct, Mackenzie wrote, along with the draft, saying that he enclosed it, and adding,—"Of course you distinctly understand, in accordance with Messrs Anderson & Company's letter herewith enclosed, that so far as that firm is concerned the draft is accepted by you in settlement of the transaction without any reservation." The expression "without any reservation" would be somewhat vague if it were not for the words which precede it, making reference to the "letter herewith enclosed," which make its explanation clear.

Mackenzie, acting for both parties, sent the draft accompanied and intended to be affected by Anderson's letter of the 13th June, taken in conjunction with the statement in his own letter. Thereupon the National Bank very properly declined to accept such a settlement. One thing is very clear upon the evidence, and that is, that neither the National Bank, nor anyone else entitled to represent the pursuers, ever agreed to the conditions imposed by the Messrs Anderson. And Mackenzie may say what he pleases as to his not being in error, but that there was error, and very serious error, or mistake on his part in supposing that he had any authority to assent to such conditions, or to undertake such a liability for them, is undoubted. Notwithstanding the very clever way in which Mr Mackenzie has given his evidence, he has made this admission,—"If I had known that the bank did not agree to the conditions expressed in my letter of the 9th, I would certainly not have given up the bill." If he did not know that the bank agreed to these conditions, he was under a very great mistake in giving up the bill, because most certainly the bank had not so agreed, and if he knew that they did not agree, then he was acting plainly without any authority in giving up the bill. He either committed a gross mistake or he was acting entirely without any authority, and on either ground I am clearly of opinion that the cancellation cannot receive any effect.

For these reasons, I am for adhering to the Lord Ordinary's interlocutor.

LORD MURE concurred.

LORD ADAM.—I think the limits of Mr Mackenzie's authority to give up the bill in question are to be found in the letter addressed to him by the National Bank on 7th June 1887, and that beyond these limits he had no power to go. He was certainly not authorised by that letter to assume that the Dominion Bank would guarantee that Messrs Anderson should be freed from interest and expenses.

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That letter of the 7th June being the limit of Mackenzie's authority, so long as he kept within that, he had authority to give up the bill. If we were to shut our eyes to everything that took place both before and after the transaction on the 13th of June—and were to look only to Mr Mackenzie's evidence of what then occurred, there might be some ground for the defence. But I am clearly of opinion that when the bill was given up and cancelled on the 13th June it was quite understood between Mackenzie and Anderson that the latter was to be freed from interest and expenses. Thus Messrs Anderson writing to the Bank of Scotland on that day say,—"We hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest, expenses, &c." This does not refer to anything that had previously taken place, but clearly implies that in return for payment of the bill they (Messrs Anderson) were to get the bill handed to them over the counter. That letter was adopted by Mackenzie, and was sent on by him to the National Bank as a true representation of what had occurred. He sends it on to them and says,—"Of course you distinctly understand, in accordance with Messrs Anderson & Company's letter herewith enclosed, that so far as that firm is concerned the draft is accepted by you in settlement of the transaction without any reservation." That was the representation which was made by Mr Mackenzie at the time the bill was paid. It was understood all along between them that that was to be the footing on which the bill was to be paid. But Mackenzie had clearly no authority to take payment of the bill on these terms, and I think that in these circumstances, in terms of the Bills of Exchange Act of 1882, the cancellation must be held to be bad.

Lord Shand was absent.

The Court adhered.

J. & J. Ross, W.S.—William B. Rainnie, S.S.C.—Agents.

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William Binnie and Others, Pursuers (Respondents).—*Shaw*—*A. S. D. Thomson.*

David Broom and Others (Binnie's Trustees), Defenders (Reclaimers).—*D.-F. Mackintosh*—*C. S. Dickson.*

Trust—Management—Trustees borrowing without sanction in deed—Liability.—The proprietor of house property in Glasgow of the value of £42,000 died in October 1857 leaving a settlement, in which he directed his trustees to pay his debts and to pay certain shares of the income of the free residue of his estate to his widow and children, and to make such further advances for the maintenance and education of his children as the trustees should consider expedient. He gave the trustees power to sell on his youngest child, then three years of age, attaining the age of thirty. The Western Bank of Scotland, Glasgow, suspended payment on 9th November 1857, and a commercial depression followed which greatly reduced the value of the heritable property. The trustees, in the expectation that the property would recover its value in a few years, borrowed £26,000 to pay debts. After the first year the revenue of the estate was insufficient to pay the interest on the borrowed money, but the trustees made payments to the widow and children necessary for their support, to the amount of £3000, till August 1867, when the estate was sequestrated. In the sequestration the estate, after paying the trustee's commission of £1217 and other expenses, proved insufficient, to the extent of £1337, to meet debts. The heritable property when sold in 1870 realised £41,900. In 1862 it was valued at £36,748, and in 1865 at £41,225.

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In 1885 an action was raised by some of the truster's children for damages alleged to have been sustained by them from the actings of the trustees. *Held* that while the trustees had acted *ultra vires* in borrowing money to pay debt the pursuers had sustained no loss, as if the heritage had been realised at an earlier date it would have been insufficient to pay the truster's debts. Defenders *assoilzied.*

1st Division.
Lord M'Laren.
M.

William Binnie, builder in Glasgow, died on 7th October 1857, survived by his wife Mrs Jane M'Dougall or Binnie, and by four sons, William, Louis, John and George, and by one daughter, the eldest being nine years of age and the youngest three.

He left a trust-disposition and settlement whereby he conveyed his estate to David Broom and others as trustees. He directed his trustees, in the first place, to make "payment of all my just and lawful debts, deathbed and funeral expenses, and the expense of executing this trust." He further directed his trustees to pay the income of "the free residue" of his estate "after paying all annuities, legacies, or other charges and burdens," as follows:—During the first three years one-fourth part to his widow and a fourth to his children; during the next seven years one-third to his widow and one-third to his children; from the end of the seven years "until the sale or division of my heritable property as after provided for," one-half to his widow if she remained unmarried, and one-third if she married, and one-half to his children. He then assigned to his wife directly "the liferent of the whole household furniture." He directed the provision to his children to be paid to their mother for their aliment, education, and upbringing so long as she remained unmarried, and they remained in family with her, "declaring that the said respective provisions to them shall continue to be paid to them, or for their behoof, until my youngest child shall attain the age of thirty years": Declaring that the trustees should have power within the first five years after his death, or during the minority of his youngest child, "to increase the allowances to my said children for their aliment and education, or for their outfit and advancement in the world in such manner as shall be deemed beneficial." "I earnestly recommend to the said Mrs Jane Macdougall or Binnie and my children, after the respective shares of the free residue of my estate shall be apportioned as before directed, that any residue beyond what may be reasonably required for their proper support should be accumulated and applied to the reduction and discharge of any debt affecting my estate." He then recommended his trustees to bring up two of his sons "for clerical orders in the Established Church, and other two for the bar of England or Scotland, or" one or more as an engineer or civil engineer. The deed further bore:—"I authorise and empower my said trustees and the survivors or survivor of them, so soon as my youngest child shall attain the age of thirty years complete, to sell and dispose of the lands." The deed contained no other power of sale, and no power to borrow.

The estate consisted mainly of house property in Glasgow, which was burdened to the extent of £12,000, and was greatly diminished in value after the failure of the Western Bank on 9th November 1857. He also left a large amount of personal debt, which more than exhausted his personal estate. The rents formed the whole revenue received by the trustees from the estate. During the period from 7th October 1857, the date of the testator's death, to Martinmas 1858, the surplus, after paying interest and other payments from revenue, amounted to £574, 3s. 6d. Of this the trustees paid to the widow for herself and children £402, 11s., and for board to children not living with her £23, 12s. 6d. In subsequent years there was no surplus revenue, but the trustees continued to make payments for the widow and children till August 1867. To enable them

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to pay the interest on the heritable debts and to make these payments, the trustees borrowed £26,000 from the Royal Bank of Scotland on the security of the heritable property. The trust-estate was sequestrated on 7th August 1867 on a petition by the trustees, with concurrence of a creditor. A dividend of 8s. 6d. per pound was paid on the unsecured debts due by the deceased, which amounted to £1525, the dividend being £648, 10s., and on £800 due to the law-agents of the trustees the dividend being £340.

In November 1886 the truster's sons, William, George, and Louis, raised an action against the trustees concluding for an accounting, or otherwise for payment of £20,000.

The pursuers averred that the free residue of the estate at the date of the truster's death, after providing for debts, amounted to £17,000; that the trustees, in place of paying off debts, as directed, by realising portions of the estate necessary for this purpose, had wrongfully borrowed money on the security of the heritage at exorbitant rates for the purpose; that they had made large payments to Mrs Binnie in excess not only of what was necessary for her support, but of the provisions in the settlement, and had made payments to her and the children when there was no surplus revenue. The trustees had applied for sequestration to secure their own discharge. In it the trustee, after paying £31,927 to preferable creditors, had paid to himself £921 of commission and £650 to his law-agents "(which two sums together amounted to more than the said truster's debts at the date of sequestration), and divided £988, 10s. among Mrs Aitken's trustees, Mr Muir, and Mr Binnie's trustees' law-agents, as creditors."

The pursuers pleaded, *inter alia*;—(4) The trustees having acted wrongfully, in disregard of the terms of the trust-deed, and in contravention of their duty as trustees, all as condescended on, are bound to make good to the pursuers the loss occasioned thereby.

The defenders averred that the truster left no funds sufficient for the payment of debts without realising or borrowing; that they had acted on the opinion of counsel that the terms of the trust-deed necessarily implied a power to borrow, that the trust-deed gave them no power of sale till the youngest child attained the age of thirty years, and that when they attempted to sell the title was objected to by intending purchasers, and that the only way the property could be realised was through a sequestration. That the bulk of the property was sold in 1870, when it realised a much larger sum than it would have done if sold sooner, a great commercial depression having existed for several years after the Western Bank suspended payment on 9th November 1857. By the settlement the trustees had full power to increase the allowances to the children, and to pay these to their mother so long as they remained with her and she remained unmarried. No payments were made except such as were necessary for the widow and children, the latter being at the date of the testator's death all under ten years of age; the trustees honestly believed the circumstances of the trust warranted them in making these payments. In 1861, on the truster's widow marrying again, they compromised for £400 her claim under a postnuptial contract to an annuity of £100, and her claims under the settlement. This was a favourable settlement for the trust. In borrowing the money they had acted for the good of the trust-estate, and in the circumstances of the case the beneficiaries had not suffered by their actings in the management of the trust. Further, that it was necessary, to carry out the instructions of the truster as to the allowance to the widow, and education of the children, to act as they had done.

The defenders pleaded;—(3) The pursuers' averments are irrelevant.

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(4) The pursuers' claims are excluded by *mora* and taciturnity trustees having acted within their powers, and *separatim* havin *bona fide* and under advice of counsel in the transactions con on, the defenders are entitled to absolvitor.

On 16th February 1887 the Lord Ordinary (M'Laren) allowe

The defenders reclaimed to the First Division.

On 3d March 1887 the Court recalled the Lord Ordinary's tor, and remitted to Mr J. A. Robertson, C.A., "to inquir amount of the trust-estate from the date of the truster's amount of debts due by the truster and paid by the trustee yearly income and expenditure of the trust, and to report."

The accountant in his report stated that at the date of the death the moveable estate (including furniture valued at £5 was of the value of £1135, 18s. 10d., and the heritage of th £41,900,—together, £43,035, 18s. 10d. That the amount of d the deceased and paid by the trustees was £32,685, 17s. 2d.

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* "OPINION.—This is an action instituted by beneficiaries agains and the representatives of other trustees, claiming compensation for the trust-estate, which they say was caused by the trustees first a interest of debt to accumulate at bank discount rates, and then t estate into sequestration and allowing it to be sacrificed with a vi own exoneration from the personal responsibility which they had the banks.

"It is with some reluctance that I have decided to make an order because the sequestration was applied for in 1867; and when a cl kind is made twenty years after the event it is natural to suppose th not much substance in it. Lapse of time, however, is not an absolu action for enforcing accountability; it is a circumstance to be wei with the other elements of fact, when these have been ascertained.

"In the argument on relevancy it was contended with much behalf of the trustees, that from the nature of the instructions received from the truster, they could not do otherwise than borro banks, and continue borrowing from year to year to make up deficits. Under such a mode of administration bankruptcy is of co table, and the period of its occurrence can be calculated in advance w able certainty. Nevertheless, the thing must be done, because it is the truster; this is the proposition that is masked by the eloquen addressed to me in defence of the trustees' administrations. Now, I very likely that the trustees may be able to shew that they were borrowing from the banks to pay off unsecured debts; but it could n administration to retain the heritable property and to continue the borrowing after it became clear that the interest of debt and necessa were permanently in excess of the rents. Their duty under such ci would be to realise the estate, and to invest whatever residue it migh the truster's family.

"I have difficulty in accepting the statement that it was imposs trustees to sell until the estate became insolvent. Under such circu I have supposed, the trustees might have obtained a declarator affirming their power of sale; at all events, they might have tri modes of solving the difficulty may be suggested. And it may be when the trustees wanted to sell a part of the property they did so (intervention of an heritable creditor) without raising any questio their powers.

"Therefore, while very sensible of the inconvenience of such an i proposed after such an interval of time, I cannot say that, on the fact the action of the trustees is so clearly right as to render all inquiry The evidence, I suppose, will be mainly documentary, and all the pleas are of course reserved entire."

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income of the trust-estate to May 1870 was £17,518, and the total expenditure £22,165.[*] [1]

At advising,—

Lord President.—When this case first came before us on a reclaiming note against the Lord Ordinary's interlocutor of 16th February 1887, we so far shared his reluctance to make an order for proof that we remitted to an accountant to report on the trust, and his report now enables us to decide the case without a proof.

The action relates to the testamentary deed of Mr William Binnie, who was a builder of some standing in Glasgow. The deed was executed on 24th October 1856, and he died on the 7th of October 1857.

The estate consisted chiefly of house property and there was a large debt on it.

The provisions with regard to his family were somewhat peculiar. In the first place, he dealt with what he expected to be the income of the estate; and with regard to that, he provided that during the first three years after his death one-fourth part should be paid to his wife and one-fourth part to his children, during the next seven years one-third part to his wife and one-third part to his children; and he provided that, after ten years had elapsed from the date of his death, one-half of the income should be paid to his wife and one-half to his children, and the balance of the income during these ten years was to go towards reducing the debt.

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[*] The reporter stated that the heritable subjects had been valued in 1857 at £42,980, but the trustees pointed out that these valuations were on the face of them prospective in character, and were obtained for the purpose of a loan, and were based upon increased rentals expected to be obtained after considerable outlay for improvements. They were again valued in March 1862 at £36,748, and in June 1865 at £41,225, and that when sold in 1870 they realised £41,900. It appeared that the rents received in 1862 amounted to £1156, and that in 1869 they were £1451.

The whole revenue of the trust-estate, amounting to £17,518, was derived from rents, and with the exception of the years 1858, 1868, 1869, and 1870, the interest payable exceeded the rents. The payments to the widow for herself and children (down to Martinmas 1861) amounted to £1583, 12s. 5d., and payments for the children not living with their mother to the date of sequestration amounted to £1468, 12s. 9d. The payments of interest to Whitsunday 1870 amounted to £18,702, 19s. 6d. Miscellaneous payments, £410, 1s. 6d., including £307, 8s. 4d. retained as commission by the trustee on the sequestrated estate in addition to the commission of £910 allowed him by the commissioners, in all, £22,165, 6s. 2d.

The reporter gave this summary,—

Amount of estate, ...		£43,035 18 10
Debts paid by trustees, . . .	£32,685 17 2	
Debts due by truster paid by trustee in sequestration, . . .	2,398 10 0	
Inventory, &c., . . .	819 7 1	
		35,903 14 3
	Surplus,	£7,132 4 7
Thus disposed of,—		
Excess of expenditure over income, .	£4,646 7 0	
Expenses in sequestration, . .	1,583 9 0	
Dividend on trustees' agents' account, £800,	340 0 0	
Furniture, ...	562 8 7	

[1] *Pursuers' Authorities.*—Henderson v. Somerville, June 22, 1841, 3 D. 1049; Ker, March 3, 1855, 17 D. 565; White, March 7, 1855, 17 D. 599; Erskine's Trustees v. Wemyss, May 13, 1829, 7 Sh. 594.

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It is obvious that he expected the income to be sufficient to keep his family independent, for he recommended that his sons should be educated for the church, the bar, and the profession of engineering.

Now, this was in any view a sanguine settlement, but unfortunately the condition of the estate was seriously affected by the stoppage of the Western Bank, which took place soon after the death of the testator. This materially reduced the market value of house property in Glasgow. Another circumstance which embarrassed the trustees in their management was that no power was given to them in the trust-deed either to sell or to borrow on the security of the trust-estate. Under these circumstances the trust ought to have been managed in a very careful manner.

We can easily see now that the best course the trustees could have adopted would have been not to accept the trust at all, but to have allowed the estate to be wound up under the Sequestration Statute. This is a course which I am surprised not to see more frequently adopted. It seems to be thought that the winding up of a trust-estate under the Sequestration Statute involves a kind of confession of bankruptcy. That is not so at all. It is not the least necessary that an estate should be bankrupt or insolvent to enable it to be wound up under the Sequestration Statute. The proceeding is one to be recommended, because it saves gratuitous trustees from the risk of being rendered personally liable, while at the same time it secures that the management be of a statutory kind, and also that the trustee in the sequestration may be guided by the decision of the Court if difficulty arises in the management of the trust.

Here the trustees took a different view, for they seem to have thought that at the sacrifice of all other interests they were bound to provide for the widow and children as the testator had directed.

They were met by the further difficulty that having no power of sale under the deed they were unable to find a purchaser for part even of the estate; but I think, considering the state the property was in at the time, that the trustees ought to have come to the Court, for it was a matter of necessity to the carrying on of the trust that some part of the estate should be sold. They might not have been able to obtain leave by means of a petition, but they certainly could have brought a declaratory action as in the case of *Henderson* v. *Somervill*.[1] However, instead of coming to the Court, the trustees adopted another course, for which they had no authority under the deed, and for which they could certainly have obtained no authority from the Court,—that is to say, they borrowed money on the security of the estate.

Any more imprudent course to be adopted by trustees under a deed of this kind I am unable to conceive. The conduct of trustees in borrowing money under any circumstances is highly imprudent. If it turns out to be a mistake it subjects the trustees to personal liability. But they did not stop here. They had very simple instructions under the deed to give one-fourth of the income to the widow and one-fourth to the children for three years, and for the next seven years one-third to the widow and one-third to the children. They not only gave the whole income to the widow and children, but they gave more than the income, and made up the deficiency by borrowing money at the ruinous rate of five per cent.

Now, these are the facts alleged against the trustees, and that they are of a grave character must be admitted.

In order, however, that the pursuers should be successful in rendering the

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[1] June 22, 1841, 3 D. 1049.

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present defenders personally liable, something more is necessary than merely to shew that the trustees were grossly negligent; the pursuers must shew that they themselves have suffered loss by the actings of these trustees. It is upon this part of the case that the report of the accountant comes to be so valuable as shewing whether, if this estate had been managed in the most prudent manner possible, the result would have been in any way different so far as the present pursuers are concerned.

If we turn to the accountant's report we find that he brings out a balance, which at first sight seems highly favourable to the pursuers, of £7132, and the pursuers say that is the measure of the loss they have sustained through the trustees' mismanagement. But this balance will not stand the test of further examination into facts, which are fortunately supplied by the reporter. The value of the moveable estate is stated by him to be £1135, 18s. 10d., but in this is included the sum of £562, 8s. 7d., which is the estimated value of the furniture. The furniture was liferented by the widow. She removed it to London, and there pledged it for advances made to her; in short, it was lost to the estate, but I do not see what the trustees could have done, because they were not in a position to have prevented her from acting as she did. Hence we must deduct the price of the furniture from the value of the moveable estate, which leaves a sum of £573, 10s. 3d.

Again, the heritable estate is taken by the accountant at the value of £41,900, which he fixes as the value of the property at the date of the truster's death in 1857. I do not consider that it is fair to adopt that as the real value of the estate. For the value of property was seriously affected by the failure of the Western Bank, and, indeed, in many cases it became unsaleable. After a time house property recovered its value somewhat, and the trustees obtained a fresh valuation with a view to a sale. This was in 1862, and the estimate then formed of its value was £36,748. This I consider a much fairer valuation, and one which I am prepared to take for the purposes of the present case, and for this reason, that, looking to the state of the property market in consequence of the failure of the Western Bank, this house property could not have been sold sooner than 1862, nor would it have fetched more than the amount of this valuation. Now, if we add these two sums together, the personal estate, £573, and the estimated value of the heritage, £36,748, we have £37,321 instead of the figure brought out by the accountant.

The valuation being thus reduced, let us turn now to the other side of the account. We there find that the total amount of debts brought out by the accountant is £35,903, 14s. 3d. I do not think, however, that this embraces the whole liabilities of the trust-estate. The accountant has taken the unsecured debts as paid in the sequestration, and he has estimated them at this amount as at the date of the truster's death. It appears to me, however, to be necessary to add to the amount of debt brought out by the accountant the sum of £877, 7s. 8d., being the difference between the amounts due to W. H. Muir and Aitken's trustees, and the dividends which they actually received. Then there was a heavy agent's account due by the trustees, which they compounded for £340, and against which account no objection was taken that the disbursements had been unnecessary. There was also the widow's annuity of £100, which undoubtedly was a debt due by the trust-estate, though it was constituted only by a postnuptial contract of marriage. This debt was also compromised, and upon terms most favourable to the trust-estate, for the trustees succeeded in buying

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off Mrs Binnie for a sum of £400, a sum very far below the actuarial value of such an annuity. Both these two last sums must be taken into account in estimating the amount of the debts due by the trust-estate.

Now, placing the sums I mentioned first on the credit side of the account, and adding to the amount of the debt, as shewn by the accountant's report, the sums I have just mentioned, we find that the total amount of the estate was £37,321, 10s. 3d., and that the debt amounted to £37,521, 1s. 11d., the result of which is that at the time when this trust commenced there was an absolute deficiency of £199, 11s. 8d. If this was the true position of the trust-estate when the trustees entered upon their management, it seems to me impossible that any action upon their part could have produced a surplus for the benefit of the beneficiaries. Therefore, while condemning the management of the trustees in the most emphatic terms, I do not see that even if their management had been of the most strictly legal and prudent character the result would have been different so far as the pursuers are concerned. It follows therefore that the pursuers have failed to establish their grounds of action, inasmuch as they have established only one of the two propositions upon which their case was founded, first, that there was mismanagement, and, second, that the mismanagement resulted in loss to them which could have been avoided if the management had been otherwise. Upon these grounds I think the defenders must be assoilzied.

Lord Mure concurred.

Lord Adam.—I concur, and desire to make only a single remark regarding the value of the heritable property here. The accountant in his report says,—"The accountant is of opinion that by taking the sums realised from time to time for the different properties, no injustice is done either to the pursuers or defenders"; and the sum which he does take is £41,900, which nearly corresponds with the valuation of the property at the commencement of the trust. What would have been realised if the trustees had sold this estate in 1862 can best be seen by the rent-sheet given in the accountant's report. In 1870, when the property was sold, the rental was £1576, and it is idle to suppose that this property in 1862, with a rental of only £1156, would have brought anything like what it realised in 1870 when the rental had been increased by more than a third.

Lord Shand was absent.

The Court assoilzied the defenders from the conclusions of the summons.

Marcus J. Brown, S.S.C.—Henry & Scott, S.S.C.—Agents.

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The Lord Advocate, Pursuer (Respondent).—*Sol.-Gen. Robertson—H. Johnston.*

Patrick Stirling, Defender (Reclaimer).—*D.-F. Mackintosh—Low.*

Teinds—Valuation—Cumulo or several—Division.—In a decree of valuation of, *inter alia*, the teinds of the lands and barony of K, comprehending the lands of A, B, C, D, and E, with the pertinents, the rent, stock, and teind of these lands was declared to be £157, 6s. $0\frac{4}{12}$d. sterling, the fifth part whereof being £31, 9s. $2\frac{5}{12}$d., was declared to be teind, and the usual decerniture followed. In the extract of the decree, which was in the old form, it was set forth that the decerniture proceeded upon a report by the Lord Ordinary, and conform to a

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* Decided Jan. 27, 1888.

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particular scheme of the rental, stock, and teind of the lands, and this scheme was narrated *ad longum*. From this scheme it was possible to ascertain the rental, and the particular deductions, and so to arrive accurately at the teind of each separate parcel of land making up the lands and barony of K. In a question arising as to the surplus teinds of D and E,—two of these several parcels,—which had been disjoined and erected into a new parish *quoad omnia*, *held* that, as regarded the lands and barony of K, the valuation was a *cumulo* valuation, and that it was not competent to look beyond the decerniture for the purpose of ascertaining the several valuation of the teinds of D and E.

Teinds—Cumulo valuation—Disjunction quoad omnia of part of lands—Surplus teind.—The teinds of the lands of K, in the parish of X, comprehending the lands of A, B, C, D, and E, with the pertinents, were valued *in cumulo*. D and E were afterwards disjoined, and erected into the parish of Y *quoad omnia*. In the locality of Y the teinds of D and E, as ascertained for the purposes of the locality, from data contained in the extract of the old decree of valuation, without process of division of the *cumulo* valuation, were exhausted. In consequence of the stipend having been modified in a year when the fiars' prices were abnormally low, the heritor's subsequent payments from these teinds to the minister of Y considerably exceeded the valued teind on which the locality proceeded. He continued, however, to pay without surrendering to the minister of Y. In the parish of X, on the assumption that the teinds of the lands of A, B, and C were severally ascertained on the same basis, there was surplus teind. *Held* that the valuation of the teinds of the lands of K being a *cumulo* valuation, and no formal process of division having been brought, the titular was only entitled to claim surplus teind from the whole lands of K, after deducting the stipend paid in both the parishes of X and Y, and was not entitled to claim the surplus teind of the lands of A, B, and C, parts of the lands of K remaining in the parish of X, after deducting only the stipend paid to the minister of the parish of X.

1st Division.
Lord Fraser.
M.

THE LORD ADVOCATE, on behalf of Her Majesty's Commissioners of Woods, Forests, &c., raised this action against Patrick Stirling of Kippendavie, to recover the sum of £91, 17s. $5\frac{2}{12}$d., as surplus teinds for the years 1853 to 1881 of the lands of Easter and Wester Kinbuck, Mill of Kinbuck, Craigton, and Whitestone, in the parish of Dunblane, of which the Crown, as coming in place of the Bishop of Dunblane, was titular.

Mr Stirling admitted a surplus on these years of £18, 18s. 2d., but *quoad ultra* resisted the demand.

The lands above mentioned, the teinds of which were in question, were part of the barony of Kinbuck, and in 1773 the lands and barony of Kinbuck, comprehending the lands of Corscaplie, Nether Cambushinnie, Craigtoun, Wester Kinbuck, Easter Kinbuck, Whitestoun, and Middle Cambushinnie, with the pertinents lying in the parish of Dunblane, were valued, stock and teind, at £157, 6s. $0\frac{4}{12}$d. sterling, the fifth part whereof, being £31, 9s. $2\frac{5}{12}$d., was declared to be teind, parsonage and vicarage. Prior to 1853 the barony of Kinbuck was wholly situated in the parish of Dunblane, and was localled on for the stipend of the minister of Dunbane. In 1853 parts of Muthill, Dunblane, and Blackford parishes were disjoined *quoad omnia*, and erected into the parish of Ardoch, and it was provided that the old stipend derived from the lands disjoined should continue to be paid to the ministers of the three parishes as before, and that the remaining portion of the teinds of these lands only should be localled on for the stipend of the minister of the new parish. Part of the barony of Kinbuck thereafter fell within the boundaries of the new parish of Ardoch, and was clearly defined, although there was nothing in the decree of disjunction to identify the portion disjoined with any of the lands enumerated in the decree of valuation. In the subsequent locality of Ardoch the teinds were dealt with on the footing that the disjoined lands were Nether and Middle Cambushinnie, including Andrew Eddie's croft,

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and stipend was localled and paid accordingly. There were assumed to be data within the decree of valuation for ascertaining the teinds of the several lands comprising the barony of Kinbuck, and on these data the free teind of the two Cambushinnies was ascertained to be £5, 15s. $4\frac{6}{10}$d. Following the statutory procedure, this amount of free teind was converted into victual, as follows:—

MEAL.					BARLEY.			
B.	F.	P.	L,		B.	F.	P.	L.
3	1	1	$0\frac{4}{8}$	and	3	1	1	$0\frac{4}{8}$

The whole of this victual was then allocated as stipend to the minister of Ardoch, and the teinds were thus exhausted. The victual stipend thus allocated was reconverted year by year according to the fiars' prices, and paid by Mr Stirling to the minister of Ardoch. It happened that in the year 1853, when the allocation was made, the fiars' prices were abnormally low; accordingly the victual conversion of the free teind was abnormally large. The fiars' prices from 1853 to 1881 were on the average considerably higher than those of 1853, and therefore the stipend actually paid by Mr Stirling to the minister of Ardoch, on reconversion year by year of the victual stipend into money, exceeded the valued free teind.

The claim of the Crown was stated on the footing that the teinds of Mr Stirling's lands remaining in the parish of Dunblane after disjunction were bound to bear only the stipend of the minister of Dunblane, and that the surplus teind was due to the Crown, without deduction for any excess of payments, which Mr Stirling might have made from the teinds of his lands disjoined from Dunblane and erected into the parish of Ardoch, and from which excess he might have got relief by surrendering his teinds to the minister. On this footing the sum claimed by the Crown was admittedly due.

Mr Stirling maintained his right in accounting with the Crown to have his teind both in Dunblane and Ardoch stated as a *cumulo* sum, and his full payments for stipend both in Dunblane and Ardoch deducted from it. On this footing the surplus teind was the £18, 18s. 2d. admitted by him.

The decree of approbation and valuation of 3d February 1773, so far as applicable to the teinds of the barony of Kinbuck, was as follows:—(After a narrative of the summons and procedure given *in extenso*, as was usual in extracts of decrees of that date)—"The Lords of Council and Session, commissioners aforesaid, have ratified, allowed, and approved, and hereby, &c., the reports of the subcommissioners of the Presbyteries of Muthill and Dunkeld, in so far as concerns the valuation of the pursuers, their respective lands libelled, lying in the parishes of Muthill, &c., . . . and have interponed, and hereby, &c., their decreet and authority thereto, and in terms thereof have found and declared, and hereby, &c., the just worth and constant yearly avail of the pursuers their respective lands libelled, in stock and teind, parsonage and vicarage, to be now, and in all time coming, the particular quantities of victual and sums of money following, viz., the lands following, pertaining at the time of the valuation to the Earl of Perth, now annexed to the Crown, lying in the parish of Comrie and shire of Perth, to wit: . . . And the rent, stock, and teind of the lands and barony of Kinbuck, comprehending the lands of Corsecaple, Nether Cambushinnie, Craigtoun, Wester Kinbuck, Easter Kinbuck, Whitestoun, and Middle Cambushinnie, with the pertinents, lying in the parish of Dunblane, £157, 6s. $0\frac{4}{12}$d. sterling; the fifth part whereof, being £31, 9s. $2\frac{5}{12}$d. money foresaid, they declare to be teind, parsonage and vicarage; which quantities of victual of the qualities foresaid and sums of money above set down the said Lords decern and

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ordain to stand, continue, and endure, and to be repute and holden the just worth and constant yearly avail of the stock and teind, parsonage and vicarage, of the said pursuers their respective lands above mentioned in all time coming: . . . The amount of this probation is that the yearly rent, stock, and teind of the pursuers, their respective lands libelled, lying in the parishes after mentioned, extended to the particular sums of money following, viz.: . . . The rent, stock, and teind of their lands, lying in the parish of Dunblane (after deduction of the annual rent of money advanced by the pursuers for enclosing, the rents of the mill of Kinbuck, and of a cot-house, and the rents of several pieces of grounds now planted with firs and bearing no rent), £157, 6s. $0\frac{4}{12}$d. sterling; the fifth part whereof, for teind, parsonage and vicarage, is £31, 9s. $2\frac{5}{12}$d. money foresaid: All conform to a particular scheme thereof, signed by the Lord Ordinary of that date, with the which the Lord Ordinary made avizandum to the Lords, as a report duly subscribed by the said Lord Alva, Ordinary, extant in process bears: Follows the scheme to which the foregoing prepared state relates—scheme of the valuation of the lands and estate of Perth, belonging to the commissioners of annexed estates lying in the parishes of Callander, Port Killin, Balquidder, Struan, and Dunblane. . . .

"*Parish of Dunblane.*—Lands and barony of Kinbuck, comprehending the lands following, viz.:—That part of the lands of Corsecaple possest by James Dunn, £16, 17s. 10d. of money rent, £8, 2s. 8d. of @rent of money advanced by the commissioners; that part thereof possest by James Dawson, £16, 17s. 10d. of money, £5, 12s. @rent of money advanced; that part of Nether Cambusshinnie possest by John Graham, £8, 1s. 6d. of money rent, 9s. $0\frac{4}{12}$d. of minister's stipend, 18s. 6d. of money advanced; that part thereof possest by James Dow, £8, 1s. 6d. of money rent, 9s. $0\frac{4}{12}$d. of minister's stipend, £1, 9s. of money advanced; that part thereof possest by William Finlayson, £8, 1s. 6d. of money rent, 9s. $0\frac{4}{12}$d. of minister's stipend, 16s. of @rent of money advanced; that part thereof possest by John Reid, £4, 0s. 9d. of money rent, 4s. $6\frac{2}{12}$d. of minister's stipend, 10s. money advanced; that part thereof possest by James Reid, £4, 0s. 9d. of money rent, 4s. $6\frac{2}{12}$d. of minister's stipend, 10s. of @rent of money advanced; the lands of Craigtoun and Limestone Quarry, possest by Alexander Cairns, £11, 3s. 8d. of money rent, 6s. 8d. of minister's stipend, £1, 6s. @rent of money advanced; that part of the lands of Wester Kinbuck possest by George Miller, £6, 13s. 4d. of money rent, 6s. 8d. of minister's stipend, £2, 4s. @rent of money advanced; that part thereof possest by James Paterson, £6, 13s. 4d. of money rent, 6s. 8d. of minister's stipend, £1, 18s. @rent of money advanced; the mill of Kinbuck, possest by George Miller and James Paterson, £3 money rent; that part of the lands of Whitestoun possest by John Reid, £7, 15s. 10d. of money rent, 8s. 4d. of minister's stipend, £1, 16s. @rent of money advanced; that part thereof possest by John Dawson, £7, 15s. 10d. of money rent, 8s. 4d. of minister's stipend, £2, 10s. @rent of money advanced; that part thereof possest by James Dawson, £7, 15s. 10d. of money rent, 8s. 4d. of minister's stipend, £1, 11s. @rent of money advanced; that part of the lands of Easter Kinbuck possest by Henry Stirling, £6, 13s. 4d. of money rent, 6s. 8d. of minister's stipend, £1, 19s. @rent of money advanced; that part thereof possest by James Paterson, £6, 13s. 4d. of money rent, 6s. 8d. of minister's stipend, £2, 3s. @rent of money advanced; that part of the lands of Middle Cambushinnie possest by Patrick Meiklejohn, £14, 3s. of money rent, 17s. 6d. of minister's stipend, £3, 18s. 6d. @rent of money advanced; that part thereof possest by John M'Ewan, £7, 1s. 6d. of money rent, 8s. 9d. of minister's stipend,

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£1, 8s. 6d. @rent of money advanced; that part thereof possest by Matthew Stirling, £7, 1s. 6d. of money rent, 8s. 9d. of minister's stipend, £1, 7s. 6d. @rent of money advanced; that piece of ground and cottary possest by Andrew Eddie, £1, 2s. 4d. of money rent. Sum is £159, 14s. 6d. sterling of money rent, £6, 9s. $5\frac{4}{12}$d. sterling of minister's stipend, and £39, 19s. 8d. sterling @rent of money advanced by the commissioners. Money rent as above, £159, 14s. 6d., minister's stipend, £6, 9s. $5\frac{4}{12}$d., @rent of money advanced by the commissioners, £39, 19s. 8d. Gross rent is £206, 3s. $7\frac{4}{12}$d. Deductions.—the @rent of money advanced by the pursuers towards enclosing, £39, 19s. 8d. The rent of the mill of Kinbuck, £3. The rent of the house possest by Andrew Eddie, cottar, 3s. 4d. The rent of the following pieces of ground taken from the tenants aftermentioned, and planted—that part of Henry Stirling's possession of Easter Kinbuck, £2, 17s.; that part of Widow Paterson's possession thereof, £1, 15s. 7d.; that part of John Dawson's possession of Whitestoun, £1, 2s.—Together, £5, 14s. 7d. Total deductions, £48, 17s. 7d.—Remains of free rent £157, 6s. $0\frac{4}{12}$d.; the fifth part whereof for teind, parsonage and vicarage, is £31, 9s. $2\frac{5}{12}$d. sterling." *

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* Of the state for teind of the parish of Dunblane embodied in the above excerpt from decree of approbation and valuation, the Commissioners of Her Majesty's Woods and Forests laid before the Court an analysis, concluding with the following summary:—

	Rent.	Interest on Money Advanced.	Stipend.
Corsecaplie, ...	£33 15 8	£13 14 8	...
Nether Cambushinnie, .	32 6 0	4 3 6	£1 16 1^4
Craigtoun,.	11 3 8	1 6 0	0 6 8
Wester Kinbuck, . .	13 6 8	4 2 0	0 13 4
Mill of Kinbuck, . .	3 0 0	...	...
Whitestoun, . . .	23 7 6	5 17 0	1 5 0
Easter Kinbuck, . .	13 6 8	4 2 0	0 13 4
Middle Cambushinnie, .	28 6 0	6 14 6	1 15 0
Eddie's Ground and Cottary,	1 2 4	...	...
	£159 14 6	£39 19 8	£6 9 5^4

" RESULT.

" Total money rent, ...			£159 14 6
„ annual rent of money advanced,. . .			39 19 8
„ minister's stipend, ...			6 9 5^4
Gross rent, ...			£206 3 7^4
" Deductions,—			
Annual rent of money advanced, .		£39 19 8	
Rent of Mill of Kinbuck, . .		3 0 0	
Rent of house (Andrew Eddie), .		0 3 4	
Rent of part of East Kinbuck, planted (Henry Stirling), .	£2 17 0		
Ditto (Widow Paterson),	1 15 7		
Rent of part of Whitestoun, planted (John Dawson),	1 2 0		
		5 14 7	
			48 17 7
" Remains of free rent, ...			£157 6 0^4
" One-fifth whereof for teind, ...			£31 9 $2\frac{5}{12}$"

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The questions upon which the decision of the case depended were (1) whether this valuation was a *cumulo* or a several valuation of the teinds of the lands and barony of Kinbuck; and (2) whether, assuming the valuation to be in form a *cumulo* valuation, it was not also a several valuation, or, at anyrate, afforded materials for ascertaining the teind of the several parcels of land comprised in the *cumulo* valuation.

The Crown founded upon the manner in which the decree had been made use of by the defender himself in connection with the preparation of the scheme of locality of Ardoch Parish.

The defender's free teind in Ardoch had been thus ascertained:—

The *cumulo* teind of the lands and barony of Kinbuck, as per valuation, was	£31	9	$2\frac{6}{12}$
Deduct for the lands of Corsecaplie, sold by the defender's predecessor, one-fifth of £33, 15s. 8d., being rent, as per state embodied in valuation,*	6	15	$1\frac{6}{10}$
Remains as teind of lands still belonging to defender,	£24	14	$0\frac{9}{10}$

In the Dunblane locality of 1860-62 the defender stated the teinds of his lands of Cambushinnie as £13, 0s. $5\frac{2}{10}$d., and of his lands of Kinbuck as £11, 13s. $7\frac{7}{10}$d. The teind so stated as the teind of Cambushinnie was arrived at by taking from the state embodied in the decree of valuation.*

Nether Cambushinnie, rent, . . .				£32	6	0
Stipend, . . .				1	16	$1\frac{4}{12}$
Middle Cambushinnie, rent, . . .				28	6	0
Stipend, . . .				1	15	0
Eddie's ground and cottary, .	£1	2	4			
Less rent of house, . .	0	3	4			
				0	19	0
				£65	2	$1\frac{4}{12}$
One-fifth whereof for teind was, as above, .				13	0	$5\frac{2}{10}$

And the teind so stated as the teind of Kinbuck was similarly arrived at by taking from the said state one-fifth of the rent and stipend of Craigton, Wester Kinbuck, Mill of Kinbuck, Whitestoun, and Easter Kinbuck, and giving effect to the deductions specified in the state.

The teind so stated as the teind of Cambushinnie and Kinbuck, when added together made up the total teind of the lands still belonging to the defender, as stated above, £24, 14s. $0\frac{9}{10}$d.

Proceeding on these data, the rectified state of teinds in the Dunblane locality of 1860-62 shewed as old stipend payable to the minister of

		B.	F.	P.	L.
Dunblane for the Cambushinnies, . .	Barley,	4	0	2	$1\frac{1}{8}$
	Meal,	4	0	1	$1\frac{2}{10}$

Turning to the locality of Ardoch, the re-rectified state of teinds shewed teinds of Cambushinnie, ... £13 0 $5\frac{2}{10}$

Deduct old stipend to Dunblane—

Victual.					Money Conversion.					
Barley,	4	0	2	$1\frac{1}{8}$	£3	19	$10\frac{9}{10}$			
Meal,	4	0	1	$1\frac{2}{10}$	3	5	$1\frac{5}{10}$			
								7	5	$0\frac{4}{10}$
					Balance, being free teind,			£5	15	$4\frac{8}{10}$

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* *Vide* Analysis, p. 428, note.

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This amount of free teind so ascertained was for the purposes of the locality of Ardoch reconverted into victual in terms of the statute, at the fiars prices of 1853, and gave

BARLEY.				MEAL.			
B.	F.	P.	L.	B.	F.	P.	L.
3	1	1	0$\frac{4}{8}$	3	1	1	0$\frac{4}{8}$

and this amount was localled as stipend to the minister of Ardoch, thus exhausting the teind of the defender's lands in the parish of Ardoch.

It was the reconversion of this victual stipend at the higher fiars price of the years subsequent to 1853 which caused the defender to pay to the minister of Ardoch more than his £5, 15s. 4d. of free teind in that parish. The defender had not surrendered his teind in the parish of Ardoch.

The Lord Ordinary (Fraser), on 23d June 1887, decerned against the defender in terms of the conclusions of the summons.*

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* "OPINION.— . . . The whole of the teinds of the parish of Ardoch are exhausted, and there is no surplus payable to the titular (the Crown); but it is averred that there is a surplus of teinds in the parish of Dunblane, which the Crown now claim under this action. The defender produces a state whereby he shews that, combining the payments which he has made of ministers' stipend to the two ministers of Ardoch and Dunblane from the year 1853 down to 1881, he has paid of valued teind the whole amount that could be claimed, with the exception of £18, 18s. 2d., which he offered to pay to the Crown before this action was raised, and which he is still willing to pay.

"According to the rectified state of teinds of the parish of Ardoch, after paying the old stipend to Dunblane, the balance amounted to £5, 15s. 4$^{6}/_{10}$d. Now, the Act of Parliament, 48 Geo. III., cap. 138, sec. 8, enacts that 'every stipend which shall be augmented after the passing of this Act shall be wholly modified in grain or victual, even although part or the whole thereof shall have been previously modified in money.' Therefore in the year 1853 the £5, 15s. 4$^{6}/_{10}$d. required to be converted into grain or victual, and it was so converted, and at that time the fiars prices happened to be very low. The conversion was into 3 b. 1 f. 1 p. 0$^{4}/_{8}$ l. of meal, and 3 b. 1 f. 1 p. 0$^{4}/_{8}$ l. of barley. This grain upon being reconverted into money according to the fiars' prices of each year of payment (which is the measure of the minister's right), exceeded the free teind of £5, 15s. 4$^{6}/_{10}$d. applicable to Ardoch, seeing that these fiars prices were higher during every year than they were in 1853, and consequently the defender has been overpaying to the minister of Ardoch more than the free teind.

"He naturally now desires to have this matter adjusted, and the mode that he proposes is to slump together the payments that he has made for stipend of the two parishes of Dunblane and Ardoch, and to deduct the combined sum from the valued teind of the whole barony. This is resisted by the Crown upon the ground that the two parishes are perfectly distinct; the valuations of the lands in both, it is said, are distinct and separate, and the only remedy that the defender has against being called upon to make overpayments is to surrender his teinds to the minister.

"Now, this question depends upon the construction to be put upon the decree of approbation and valuation of 1773. The pursuer contends that that decree contains a valuation of each separate portion of land composing the barony of Kinbuck, and therefore that each separate portion must be looked to by itself, and its teinds dealt with accordingly. On the other hand, the defender maintains that the valuation is a *cumulo* valuation, and as there has been no division of the valuation, his mode of stating the principle of accounting is correct. It is laid down by Connell as follows:—'In valuing teinds, whole estates, or several parcels of land belonging to the same landholder, were generally estimated by a *cumulo* valuation; and when the lands which have been valued together come to be divided among different proprietors it becomes necessary to proportion the *cumulo* valuation of the tithes among the different parcels of land, and this is done by a suit before the Commissioners of Teinds'

The defender reclaimed, and argued;—The Lord Ordinary had not the advantage of seeing the decree of valuation in *Macvicar* v. *Tweedie*,[1] and

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(1 Connell on Tithes, p. 221). Undoubtedly there has been no division under any suit before the Commissioners, and therefore, if this be a *cumulo* valuation, the law, as laid down in the case of *Macvicar* v. *Tweedie* (12th July 1866, 4 Macph. 1058) will apply. The rubric of that case is in the following terms:—'In a process of locality a heritor lodged a minute of surrender of his teinds. In the decree of valuation on which he founded, the teinds of his lands and of lands not belonging to him, and in part situated in a different parish, were valued *in cumulo*. The Court (*rev.* judgment of Lord Barcaple) *refused* to sustain the surrender, in respect the amount of the heritor's teind was not ascertained by the decree of valuation founded on, and could not be ascertained without a process of division of the *cumulo* valuation contained in said decree of valuation.' There is no authority, so far as the Lord Ordinary can see, defining what is to be held as a *cumulo* valuation. The extract decree is a very long document, and requires to be carefully considered. It narrates the whole of the proceedings in the action, as was the usual practice at its date. The first material part that needs to be referred to is where the Court interponed authority to the reports of the subcommissioners, and 'found and declared, and hereby,' &c."—(His Lordship quoted the decerniture as printed *supra*, p. 426.) "Then follows the 'scheme of the valuation,' and it is in this scheme that there is found the particular values put upon the specific portions of land constituting the barony of Kinbuck, and it is from what is to be found in this scheme that the pursuer derives support for his contention. In regard to the parish of Dunblane the extract decree thus proceeds:—'Parish of Dunblane.—The lands and barony of Kinbuck, comprehending the lands following, viz.'"—(His Lordship then quoted the scheme of valuation as printed *supra*, p. 427.) "Then the decree narrates that the Court having taken the scheme into consideration, 'found and declared the just worth and constant yearly avail of the pursuers' lands libelled, in stock and teind, parsonage and vicarage, to be then and in all time coming the particular sums of money following, viz.: . . . And the rent, stock, and teind of their lands lying in the parish of Dunblane £157, 6s. $0^4/_{12}$d. sterling. The fifth part whereof, being £31, 9s. $2^5/_{12}$d. money foresaid, they declared to be teind, parsonage and vicarage, and decerned in the valuation accordingly.'

"It is in these circumstances that the Court is required to decide whether the present case comes within the rule laid down in *Macvicar* v. *Tweedie*. Is this a *cumulo* valuation entitling the defender to say that there are no materials for separating the teinds of the lands which were disjoined from Dunblane and annexed to the new parish of Ardoch, and that consequently he is entitled to blend together the payments that he has made to both ministers? The Lord Ordinary is of opinion that this contention is not well founded. In the case of *Macvicar* v. *Tweedie* a number of lands were joined together, and the teinds were valued together, and the separate valuation of each was not ascertained by the Court, but only by minute of agreement between the parties to whom the separate lands were conveyed. The correctness of this agreement was denied. The facts appear more particularly in the report in the Jurist (vol. xxxviii. p. 590), but still more clearly in the Session Papers which the Lord Ordinary has examined. Now, that is not the case with reference to the circumstances with which we have here to deal. Every portion of the teinds of the lands that were annexed to Ardoch was separately valued. No doubt in the final judgment of the Court the whole of the separate valuations of the particular teinds are added up, and the total is declared to be the value of the teinds of the barony of Kinbuck; but this does not take away anything from the fact that we have got a valuation of the teinds of each portion of the barony. That valuation so standing, the defender is entitled to surrender his teinds to the

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[1] Macvicar v. Tweedie (Parish of Manor), July 12, 1866, 4 Macph. 1058, 38 Scot. Jur. 590.

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had fallen into error in thinking that the circumstances in that case were different from those in the present, and that the judgment in that case did not rule the present. An examination of the decree of valuation in that case, production of which had now been obtained,* shewed that with a little calculation it was just as possible as in the present to approximate to the teind of the several parcels of land, and just as impossible to ascertain it with absolute accuracy. If the cothouses disturbed the calculation in the one case, Andrew Eddie's croft did so equally in the other. *Quomodo constat*, as alleged by the Crown, that Andrew Eddie's croft was part of the Cambushinnies or was in the parish of Ardoch? Indeed, *quomodo constat* that the Cambushinnies themselves were in Ardoch? For the purpose of the locality it had been assumed that they were. But the minister of Dunblane had a word to say to that. There was at present plenty of surplus teind in Dunblane and he had no interest to object. But the moment his teinds were exhausted he would be entitled to open the question whether the assumption on which the localities had proceeded was correct.[1] The defender could make no surrender in Ardoch without a process of division of the *cumulo* teind, and in any process of division the minister of Dunblane must be called as well as the minister of Ardoch.

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minister, and get rid of all future liability. To decide otherwise would be to elevate the formal sentence of the Court to a position which was never intended, and to ignore altogether another portion of the valuation which had reference to the several parts of which the sum total is composed.

"The result is that the Lord Ordinary is of opinion that the contention of the pursuer in this case is right, and that judgment must be given for the Crown."

* The decree of valuation at the instance of Burnet of Barnes of the teinds of his lands in the parishes of Peebles and Manor, dated 16th July 1729, was as follows:—". . . The Lords of Council and Session, commissioners aforesaid, have found and declared, and hereby find and declare, the just worth and constant yearly availl of the stock and teind, parsonage and vicarage, of the pursuer's lands underwritten, to be yearly the sums of moneys and quantitys of victuall after specified, viz., his lands of Barns, Haswellsycks, two-thirds of Overglack, one quarter of Woodhouse, the lands of Hallmeadow, Templehouse, town of Mannor, two-thirds of Bonningtoun and lands of Woodgriveingtoun, £1532, 13s. 4d. Scots money, and 8 bolls meall, the fifth part whereof, being £306, 10s. 8d., and 1 boll 2 firlotts 1 peck 2 lippies and two-fifths of a lippy meall, they declare to be teind, parsonage and vicarage. Item, his lands of Glenrath, &c., . . . which sums of money above written, and quantitys of victuall above sett down of the quantity forsaid, the said Lords decerns and ordains to stand, continue, and endure, and to be requite and holden as the just worth and constant yearly availl of the stock and teind, parsonage and vicarage, of the pursuer's respective lands above written, in all time coming . . . In obedience to which remitt the said Lord Minto having considered the Act, with the depositions of the witnesses adduced by the pursuer, interloq^r circumducing the term against the defenders, and remitt, Fand that the pursuer adduced the witnesses underwritten, who deponed as follows, viz.: Imprimis John Keddie, servitor to Major Cochran, and deponed that the lands of Barns, before the present heritor took any part of it, paid and was worth £286, 13s. 4d., besides £2, 10s. paid to the minister for vicarage. Deponed that the lands of Haswellsycks pays, and may pay, £233, 6s. 8d. Scots and £2, 10s. of vicarage. That the two-thirds of Overglack pays £120 and £4 for vicarage . . . And further deponed that on the lands of Barns, Haswellsycks, Overglack, Woodhouse and Hallmeadow, Town of Mannor, and Bonningtoun, there are fourteen cotthouses upheld in timber by the heretor, and that the ordinary rate of a cotthouse in that country is from £4 to 10 merks each, *causa scientiæ*, the deponent possest a part of the lands for many years, was assisting to Barns in getting tenants, was present at setting the lands and uplifting the rents . . ."

[1] Simpson v. Ewing, &c. (Locality of Bonhill) Dec. 8, 1882, 10 R. 313.

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There was nothing therefore to distinguish the present case from that of *Macvicar* v. *Tweedie*. The valuation was a *cumulo* valuation, notwithstanding that the details were, as was usual in extracts of old decrees, given with great fulness, and shewed, as the process itself if examined would have shewn, how the *cumulo* valuation had been arrived at. It was not competent to use these details as a shorthand method of arriving at a division without calling the parties who were entitled to be represented in a process of division.

Argued for the Crown;—(1) A titular was entitled (unless the heritor had a heritable right to his teinds, or there was some other exceptional circumstance) to the whole teind under burden of the minister's stipend. The heritor might plead as set-off what he had paid to the minister, but only what he had properly paid. Now, in Ardoch the defender's teinds were exhausted, and he had gone on nevertheless paying in excess. But he could not plead that against the Crown as titular. The Crown was not responsible. The defender could have surrendered had he pleased and brought to an end the excess payments. But he had not chosen to do so, he had chosen rather to do what, if his contention were to be given effect to, was in effect to pay part of the free teind belonging to the Crown in the parish of Dunblane to the minister of Ardoch. And on the same ground he must be entitled to continue to do so, for the Crown could neither surrender for him, nor compel him to surrender. (2) It was maintained that as there had been no process of division of the *cumulo* valued teind[1] of the defender's lands, it was impossible to ascertain with any certainty what proportion of the defender's teind was payable in Ardoch and what proportion in Dunblane. But the defender was barred in a question with the Crown as titular from stating this plea. The minister of Ardoch, or the minister of Dunblane, were the case the same as that of *Macvicar* v. *Tweedie, supra*, which it was not, might possibly have done so, and put the defender to raise a process of division. But the defender had found no difficulty either in the locality of Dunblane or in that of Ardoch in dividing his teind, the material for doing so being contained in the valuation of 1771. That having been done in a process of locality to which the Crown was a party, the defender could not now turn round and refuse to be bound by that division so long as that locality lasted. Here again the defender's contention would enable him to prevent at will the Crown obtaining the surplus revenue which was due from the teinds of the parish of Dunblane, for as the Crown as titular could not surrender on behalf of the defender, neither could it bring an action of division.[2] (3) But the case was not the same as *Macvicar* v. *Tweedie, supra*. From the report and session papers in the case it was not clear how far the decree of valuation had been before the Court, nor did it appear what the grounds of judgment were. But the defender had recovered and produced the decree of valuation in this process, and it would be seen that it differed materially from that of the parish of Dunblane. In the first place, instead of proceeding upon and approving a prepared state reported by the Lord Ordinary in which the separate rent and separate deductions of every parcel of land were entered, the decree in the *Manor* case proceeded upon the mere evidence of the witnesses. In the second place, on the lands valued there were fourteen cothouses which were neither distinctly valued for deduction, nor localised on any one or more of the particular parcels of land. This alone made it impossible to interpret the evidence on which the decree proceeded as separately valuing the separate parcels. But in the *Dunblane* case, not only was it unnecessary to go back upon the evidence, but the prepared state on which the decree proceeded was free from all such disturbing elements as the cothouses in the *Manor* valuation. Much had been made of the entry "that piece of ground and cottary possest by Andrew Eddie, £1, 2s. 4d. of money rent." And it was attempted to make out that it was in the same position as the cothouses in the *Manor* case. But the prepared state (p. 428) shewed that it was as much a separate subject as Corscaplie or Kinbuck. The rent of £1, 2s. 4d. was given and the deduction of 3s. 4d. for the house was given, and the balance of 19s. was the teindable rental. That its whereabouts was uncertain was also pleaded. But that it was in the parish of Ardoch the defender admitted when he stated his teind in the localities of Dunblane and Ardoch, for the rental of the two Cambushinnies alone was short by 19s. of the sum on which the defender allowed himself to be localled in Ardoch. The difference between the prepared state in the case of *Dunblane* and the evidence in the case of *Manor* was that in the former case every deduction as well as every rent was applicable to a definite separate subject, while in the latter it was not. In fact there could be no doubt that the real valuation in the *Dunblane* case was in the Lord Ordinary's prepared state, and that what was called the grand decerniture was merely an arithmetical result deduced from that valuation and stated in words. To such a case the decision in *Macvicar* v. *Tweedie* did not apply, and a separate process of valuation was not required.

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[1] Connell, i. 221-2; Campbell v. Maclachlan, Feb. 6, 1822, Shaw's Teind Ca. 19.

[2] Juridical Styles, 2d edit. vol. iii. 483; University of Glasgow v. Pollock, May 27, 1868, 6 Macph. 878, L. J.-C. Patton at p. 882, Lord Cowan at p. 883.

At advising,—

Lord Adam.—The Crown is titular of the teinds of the lands and barony of Kinbuck. The barony comprehends the lands of Corscaplie, Nether Cambushinnie, Craigtoun, Wester Kinbuck, Easter Kinbuck, Whitestoun, and Middle Cambushinnie. These lands in 1853 belonged to the defender's predecessor with the exception of Corscaplie, which had been previously sold, and they all lay in the parish of Dunblane.

In that year a summons of disjunction and erection was instituted for the purpose of having a new parish erected out of the parishes of Muthill, Dunblane, and Blackford, and in this action decree was pronounced in 1855, by which the parish of Ardoch was erected into a parish *quoad omnia*, on the footing that the ministers of these three parishes should respectively continue to draw the stipends from the disjoined lands which they drew at the date of disjunction.

The lands of Cambushinnie were by the decree disjoined from the parish of Dunblane and included in the parish of Ardoch. The teinds of these lands were consequently liable for the stipends of the ministers of both parishes, and have been since localled on accordingly.

By decree of valuation, dated 3d February 1773, the lands and barony of Kinbuck comprehending as aforesaid the lands of Corscaplie, Nether Cambushinnie, Craigtoun, Wester Kinbuck, Easter Kinbuck, Whitestoun, and Middle Cambushinnie, with the pertinents, were valued at £157, 6s. $0\frac{4}{12}$d., one-fifth whereof being £31, 9s. $2\frac{5}{12}$d. was declared to be teind.

The Crown as titular of the teinds of Craigtoun, Easter and Wester Kinbuck, and Whitestoun, being the parts of the barony belonging to the defender still remaining in the parish of Dunblane, now sues for a sum of £91, 17s. $5\frac{2}{12}$d. which

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is alleged to be the surplus teind of these lands, after deduction of the stipend paid to the minister, for crops and years from 1853 to 1881 inclusive.

It is averred by the Crown that these lands were severally valued by the decree of valuation, and that the sum sued for is the amount of surplus teind due by the defender, after deducting the amount paid to the minister from the amount of the several valuations of the lands.

The defender denies that these lands were severally valued. He maintains that all the lands comprehended in the barony were valued *in cumulo*, that, consequently, he is entitled to bring into the account the stipend paid by him out of the lands of Cambushinnie, now in the parish of Ardoch; that the whole sum paid by him in both parishes should be deducted from the amount of the *cumulo* valuations, and that, if this be done, the surplus teind amounts to the sum of £18, 18s. 2d. only, which he offers to pay to the Crown.

There is no question of figures at issue between the parties. If the pursuer is right in his contention, then the amount sued for is due; if he is not right, then the sum offered by the defender is the proper amount.

The question therefore at issue between the parties is, whether the defender's lands in the parishes of Dunblane and Ardoch have been valued severally or *in cumulo* by the decree of valuation?

The Lord Ordinary quite correctly says that this depends upon the construction of the decree of valuation, and, so construing it, he comes to the conclusion that the lands have been severally valued. I cannot agree with him in this conclusion, for I think it is quite clear that the several lands comprehended in the barony have been valued *in cumulo*.

The decree of valuation has been produced, and, as was generally or uniformly the case in these old valuations, it proceeds by setting out and narrating at length the summons and its conclusions, and then the decerniture follows. I may here mention that it is both a decree of approbation and of valuation, because some of the lands included in it had been previously valued by the Sub-Commissioners, and these lands are set forth, but it appears that other lands included in the decree had never been valued, and the lands in question,—the barony of Kinbuck,—were in the latter position, and therefore, as regards these lands, it was a valuation for the first time. After narrating the summons, the extract goes on as follows:—"The Lords of Council and Session, . . . have found and declared, and hereby find and declare . . . the just worth and constant yearly avail of the pursuers their respective 'lands libelled in stock and teind, parsonage and vicarage, to be now and in all time coming the particular quantities of victual and sums of money following, viz., the lands following, pertaining at the time of the valuation to the Earl of Perth, now annexed to the Crown, lying in the parish of Comrie and shire of Perth, to wit . . . and the rent, stock and teind, of the lands and barony of Kinbuck, comprehending the lands of Corsecaple, Nether Cambushinnie, Craigtoun, Wester Kinbuck, Easter Kinbuck, Whitestoun, and Middle Cambushinnie, with the pertinents lying in the parish of Dunblane, £157, 6s. $0\frac{4}{12}$d. sterling, the fifth part whereof, being £31, 9s. $2\frac{4}{12}$d. money foresaid, they declare to be teind, parsonage and vicarage, which quantities of victual, of the qualities aforesaid, and sums of money above set down, the said Lords decern and ordain to stand, continue, and endure, and to be repute and holden the just worth and constant yearly avail of the stock and teind, parsonage and vicarage, of the said pursuers their respective lands above mentioned in all time coming. . . ."

Now, that is the decerniture, and the only decerniture, with reference to the teinds of the lands in question, to be found in the extract, and that, in my humble opinion, constitutes a decree of valuation of these lands, and is the decree of valuation of these lands. And if that be so, it is quite clear that that is a *cumulo* valuation of these lands. There is no valuation of each separate subject, but the whole is valued at one sum of £157, 6s. $0\frac{4}{12}$d.—£31, 9s. $2\frac{5}{12}$d. of that being the teind thereof. I have no doubt that, if you were to send to-morrow for an extract of this decree under the forms of extract now in use, you would get an extract of this decerniture and nothing else. That is all you would get.

But, according to the old form of these extracts, this extract goes on to set out the whole procedure in the case, and the materials on which the Court proceeded in pronouncing their decree. The pursuer was allowed a proof of the value of his lands, and he led proof accordingly, and after the proof was reported to the Court, the Court in the usual form pronounced an interlocutor on 17th June 1772, remitting to Lord Alva to prepare the cause. That was not a remit to the Lord Ordinary empowering him to decide anything in the cause; it was merely a remit to prepare the cause, and accordingly the process goes to the Lord Ordinary, who prepares a scheme of valuation, and it is this scheme which the Lord Ordinary holds to be a decree of valuation of the several subjects embraced in it. But that is in my humble opinion not in the least the character of this scheme. No doubt upon reading that scheme, which is printed in the print of documents for the Lord Advocate, you do find all the different subjects set forth separately or severally, and you do find the values of them opposite each respective subject, and you also find the whole summed up. But this scheme is nothing but a summary of the proof. That is all that it is, and it is prepared by the Lord Ordinary, in terms of the remit to him, to assist the Court in coming to a conclusion and to enable them to pronounce their decree of valuation. That is the nature of the scheme, and accordingly Lord Alva does not find that the sums set forth in it are valuations of the teinds of the respective lands; there is nothing of that sort. What he does is that he makes avizandum with the scheme to the Lords. And accordingly the scheme being before the Lords, they consider it, and they pronounce the decree of valuation which we now have here.

Now, if that is the nature of this scheme, it is of course not a decree of valuation at all; and it is perhaps worthy of observation that in pronouncing decree the Lords did not follow *in terminis* this scheme. You will see that by this scheme, as is very plainly shewn in the analysis of it prepared by the pursuer, the whole lands are separately set forth and the values set against them respectively; now, there is therein set forth, as a distinct and separate subject, a piece of ground belonging to Andrew Eddie, with a rent amounting to £1, 2s. 4d., and deducting from that the sum of 3s. 4d. set forth as the rent of Eddie's house, there is left 19s. as the rent of this separate subject. But you will observe that that sum of 19s. is included in the £157 making up the value of the barony; but when you come to look at the decree of valuation you do not find this piece of ground belonging to Andrew Eddie valued as a separate subject. It is only valued as a pertinent, and the result of that is simply this, that nobody now knows or can tell where this piece of ground of Andrew Eddie worth 19s. now is. Nobody knows in what parish it is. Nobody can tell that, and if that be so, it will be observed that that puts this case in exactly the same position as in the case of *Macvicar*, because in that case nobody knew where the fourteen cothouses there

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in question were, and nobody could tell the value of the particular subjects. It is exactly the same here. Nobody knows where this piece of ground of Andrew Eddie is, or whether it is attached to one or other of the subjects. I mention this merely to shew that this valuation was truly a valuation *in cumulo* of these lands. I do not think it would have been of any consequence in this case if Andrew Eddie's piece of ground had appeared as a separate subject in the decree of valuation.

Upon these grounds I have no hesitation in coming to the opinion that the Lord Ordinary's interlocutor ought to be reversed, and that the defender ought to be assoilzied.

LORD MURE.—I am quite satisfied with the explanations which Lord Adam has given about this decree of approbation and valuation.

It appears to me to be plain that the sum tendered by the defender in his defences is all that the Crown is entitled to, because there is no doubt of the fact that for the last twenty-five years the defender has paid away, either to the minister of Dunblane, or to the minister of Ardoch, which parish consists partly of what was at one time part of the old parish of Dunblane, the whole valued teinds of his lands, with the exception of the small amount of £18, brought out in the state referred to in his defences, and which the defender has tendered to the Crown.

The fact that the valued teind has been all paid away with the exception of this surplus of £18 is not disputed. But then it is said that this is a mistaken payment, as the payment so made to the minister of Ardoch was made out of the teinds of the defender's lands still left in the parish of Dunblane. That is the ground on which the Crown claims the sum now sued for in this action; but I agree with Lord Adam in thinking that this depends entirely upon whether the valuation is a *cumulo* valuation or not; and for the reasons stated by Lord Adam I think that it is a *cumulo* valuation, and that the defender is entitled to be assoilzied from the conclusions of the action.

LORD PRESIDENT.—I am of the same opinion. I think this is a decree of valuation *in cumulo*, and nothing else.

LORD SHAND was absent.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Decern against the defender for payment to the Crown-receiver of the sum of £18, 18s. 2d. sterling: *Quoad ultra* assoilzie the defender from the conclusion of the summons, and decern: Find the defender entitled to expenses," &c.

DONALD BEITH, W.S.—DUNDAS & WILSON, C.S.—Agents.

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Feb. 11, 1888.
Milne.

JESSIE RANKINE OR MILNE, Petitioner.—*Murray*.

Minor and Pupil—Aliment and education out of capital—Nobile officium.—Circumstances in which the Court allowed a mother as tutor to her pupil children to repay to herself out of the capital belonging to them a sum expended by her on their maintenance and education, and further, to take an additional sum annually until the majority of the eldest child for their maintenance and education.

2D DIVISION.
M.

IN June 1887 Miss Jessie Rankine or Milne, widow of the late Nicol Milne, residing at Blainslie, Juniper Green, Edinburgh, presented a petition to the Court stating that her husband died on the 25th day of April 1882, survived by the petitioner and by three children, viz., Robert

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Milne, born 30th March 1875, James Rankine Milne, born 12th December 1876, and Jessie Catherine Milne, born 31st March 1881, all of whom were therefore still in pupillarity, and who, upon the death of their father, became entitled to the share of residue of the estate of Miss Hunter, their father's aunt, which had been liferented by him.

That her husband had left a trust-disposition and settlement, by which he made certain provisions in favour of the petitioner and said children; but that after paying the whole debts due by him, and fulfilling the whole obligations prestable by him at his death, there only remained the reversionary interest in the house presently occupied by the petitioner and her said children at Juniper Green, which was, in terms of her said husband's settlement, liferented by the petitioner. The house in question was in course of erection at the time of Mr Nicol Milne's death, and for the purposes of its completion, and paying debts, and otherwise fulfilling the primary purposes of his settlement, it had been necessary to borrow upon the security thereof a sum of £400.

The petitioner further stated,—" One of the petitioner's children, the said Robert Milne, was last year elected a foundationer of Daniel Stewart's Institution, Edinburgh, and as such will now receive, until he is fifteen years of age, a free education, and an allowance on account of board, &c., of £20 per annum, but, with this addition, the only means available for educating and upbringing the children is their share of the residue of Miss Hunter's estate—the income from which, since the death of their father, has been about £40 per annum."

That Miss Hunter's trustee had conveyed to the petitioner as tutor to her children their share of the residue, viz.—(1st) Six shares of the Edinburgh Gas-Light Company, which had since been sold by the petitioner for the sum of £420; (2d) £168 Consolidated Preference Stock No. 1 of the Caledonian Railway Company; (3) £358, 15s. Consolidated Preference Stock No. 2 of the North British Railway Company; and (4) £120 Consolidated Lien Stock of the North British Railway Company.

" Since the date of her husband's death the petitioner has maintained the children from the interest of their said share of Miss Hunter's estate, so far as it would avail for this purpose, but she has been under the necessity of expending a considerable sum from capital belonging to herself, as she has been very desirous of affording her children as liberal an education as was within her power, and as the children advance the cost of maintenance and education is materially increased.

" Before obtaining delivery of the funds and estate already mentioned, she had expended on behalf of the children a sum of not less than £250, or at the rate of £50 per annum from the date of their father's death, in such maintenance and education, over and above the income from the children's funds. The whole income which for the future will be available from the balance of the children's funds amounts, after repayment of the advances so made by the petitioner, to not more than from £32 to £35, and as this sum is totally inadequate to meet the cost of their maintenance alone," the petitioner prayed the Court to authorise her to make repayment out of the capital held by her as tutor for her children of the advances, amounting to £250 or thereby, made by her for their maintenance and education; and further, to authorise her, out of the remaining capital, to apply towards the maintenance, education, and advancement in life of said children, or one or more of them, from time to time, such sum or sums, not exceeding in the whole in any one year the sum of £75, as may be necessary.

The Court remitted to Mr Martin, Principal Clerk of Session, to report on the petition.

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Milne.

Mr Martin reported,—That besides the liferent of the house and furniture mentioned in the petition, which were burdened with a debt of £400, and a feu-duty of £5, 18s. 9d., "the petitioner's means consisted of an annuity of £20, which, after her husband's death, she sold for £365, 5s., and out of that sum expended the £250, of which she now claims payment. . . . These children have no means of their own except the house and furniture at Juniper Green, liferented by their mother, and a share of the residue of the estate of an aunt of their father, the income of which share is said to be about £40 per annum.

"In these circumstances it appears to me that the petitioner did not act prudently in expending £250, or rather taking into account the income of £40—£450 on her children during the five years that have elapsed since the death of her husband." The reporter, after stating the facts as to the children mentioned in the petition, continued—"The family being thus situated, I do not think that the petitioner would be warranted in expending £75 a-year on her three children. The eldest is in great part provided for for some years to come, and the others are still very young, the one being eleven and the other six years of age."

Thereafter counsel was heard on Mr Martin's report, but the Court pronounced no order, suggesting, however, to the petitioner to lodge a minute containing a particular statement of the expenditure already made by her from her own funds, and applied for the use and benefit of the children.

The petitioner lodged a minute setting forth that she had "maintained and educated her children hitherto in such manner as to fit them for earning their own livelihood when they arrive at the years of maturity. The income available did not admit of this, and she conceived that the money which she has expended, and desires for the future to expend on their behalf, could not be more judiciously applied in their interest than in affording them a comfortable home and a liberal education. To deny them these advantages when young, and place in their hands when they come of age a few hundred pounds, would—especially if they were insufficiently educated—almost certainly have other than a beneficial result.

"The petitioner possessed in her own right an annuity of £20, and this sum, together with the annual income, amounting to about £40, arising upon the estate coming to the children from Miss Hunter, formed the only means for the maintenance of the petitioner and her mother, who is an old lady entirely dependent upon her, and for the maintenance and education of the children." Further, she gave detailed statements of the expenditure for each year, from 1882 to 1887.*

"The petitioner's total expenditure on account of the children has thus been				£513	7	9
which has been met by the income derived from the children's share of Miss Hunter's estate to the extent of	£240	0	0			
Carry forward,	£240	0	0	£513	7	9

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* The year 1884 may be taken as a specimen—

"School fees and books, ...	£9	5	6
Railway season tickets, ...	5	0	0
Clothing and boots, ...	11	15	9
Medical attendance and medicine, ...	5	5	0
Proportion of servant's wages and board, . .	11	0	0
Board and proportion of feu-duty, interest, and taxes,	46	0	0
	£88	6	3"

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Milne.

Brought forward,	£240	0	0	£513	7	9
and allowance during the last year from Daniel Stewart's Hospital for Robert Milne,	20	0	0			
				260	0	0
leaving of over-expenditure, ...				£253	7	9"

This sum of £253, 7s. 9d. the petitioner "has paid out of the proceeds, amounting to £365, 5s., realised from the sale of her annuity, and as that fund forms the only source out of which the future wants of herself and her mother can be met, she has no alternative to the present application. The children have always been and still are of delicate constitution, and the expenditure upon them was absolutely necessary; and further, as already stated, the petitioner has had in view that the children will ultimately have to earn their own subsistence, and that the money now belonging to them can be best applied in giving them such an education and upbringing as will enable them efficiently to do so."

The Court then heard counsel on the report and minute.[1] In consequence of doubt being felt by the Court whether the petitioner ought to be authorised to obtain repayment of the £250, as craved in the petition, and whether the annual sum of £75 she sought authority to expend in future was not too large, considering the amount of the children's estate the petitioner lodged another minute, craving leave to amend the prayer, to the effect that she should be authorised to repay to herself the £250 in annual instalments of £50, and to expend an additional sum of £50 annually for the children till the eldest child should attain majority.

> The Court thereupon pronounced this interlocutor:—"Authorise the petitioner out of the capital funds of the estate to repay to herself the sum of £250 sterling by half-yearly instalments each of £50, commencing the first payment as at the date of this deliverance: Further authorise her to expend out of the said funds an additional sum of £50 annually for the aliment, maintenance, and education of her children, but that only until the eldest child attains majority, and decern."

Thomas Dalgleish, S.S.C., Agent.

No. 81.

Feb. 24, 1888.
Magistrates of Greenock v. Commissioners on Educational Endowments.

The Provost, Magistrates, and Town-Council of Greenock, First Parties.—*Sir Charles Pearson—C. S. Dickson.*

The Commissioners on Educational Endowments, Second Parties.—*Darling—C. N. Johnston.*

Trust—School—Superior and Vassal—Educational Endowments Act, 1882 (45 *and* 46 *Vict. c.* 59)—*Scope of Act.*—A superior by feu-contract sold and disponed to certain persons described as "Bailies, Treasurer, and Counsellors" of the town of Greenock, "and to their successors in office, for the purposes after mentioned," a piece of ground. The contract proceeded,—"It is hereby expressly declared and agreed to between the parties that the piece of ground is given for the sole and express purpose of building accommodations for charitable institutions." The disponees bound themselves to pay in name of feu-duty £2, 0s. 8d. yearly, "so long as the said piece of ground, with the erections made thereon, shall be used for charitable purposes. But in the event, at any future period, the said Bailies and Council shall make use of and dispose of the said ground or erections for any other purpose, then, and in that event,

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[1] Hamilton, July 20, 1859, 21 D. 1379, 31 Scot. Jur. 760, and May 23, 1860, 22 D. 1095, 32 Scot. Jur. 497; Fraser on Parent and Child, 233.

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they oblige themselves and their successors in office, in place of the feu-duty above mentioned, to pay the sum of £18, 6s. sterling of yearly feu-duty, and that at the first term of Martinmas after the said occupation, and so forth yearly thereafter in all time coming."

The ground so feued was covered with buildings which were used as charity schools, built out of burgh funds, and repaired partly out of these, and partly out of voluntary subscriptions for fifty-nine years. Thereafter, on the passing of the Education Act of 1872, the buildings were let to the school board for public schools, on payment by the board of the feu-duty of £2, 0s. 8d. In 1884 the Caledonian Railway Company took the ground under compulsory powers, according to the provisions of the Lands Clauses Act, 1845 (8 and 9 Vict. c. 19), paying the sum of £8494, 4s., being the value of the subjects under deduction of the capitalised value of the feu-duty of £18, 6s.

The Educational Endowments Act, 1882 (45 and 46 Vict. c. 59), gives power to the Commissioners thereunder to frame schemes for the future government and management of educational endowments, and thus defines that term, viz.:—"any property, heritable or moveable, dedicated to charitable uses, and which has been applied, or is applicable . . . to educational purposes."

The Commissioners framed a scheme for the government and management of the educational endowments of Greenock, including among them the sum of £8494, 4s.

Held that the scheme, so far as regarded the £8494, 4s., was not within the scope of the statute, as the subjects had not been "dedicated to charitable uses," the feu-contract allowing them to be applied to other purposes.

1st Division.
B.

For several years prior to 1813 there had been carried on in Greenock two charity schools, one for boys, the other for girls, which were managed by committees of gentlemen and ladies of the town. The expenses of maintenance and management were met by subscriptions, and by the annual return from a bequest. The boys' school was carried on in a building the use of which was granted by the Magistrates, the girls' school in a building rented by the subscribers.

The Town-Council minutes under date 24th May 1813 contained this entry,—"Mr Ker [Mr Alan Ker, then Chief Magistrate of Greenock] stated that Sir Michael Shaw Stewart had made a present to the town of a plot containing about thirty-seven falls of ground, for building a charity school, and having a proper area around it; and that he had, on behalf of the community, addressed a letter of thanks to Sir Michael. This the meeting approved of, but defer till further in the season any procedure as to the removal of the present or the building of a new charity school," and on 14th August following this entry was found, viz.:—"The meeting appoint Mr Ker, Mr Bannatyne, and Mr Leitch, as a committee to consider and suggest the plan for the new charity school, and what aid the corporation may be able to give to the undertaking from the price to be obtained from the site and building of the present school, which, although the entire property of the corporation, there can be no objection to apply to so humane and beneficial a purpose as the erection of a new school upon a proper plan."

Thereafter by feu-contract, dated 15th and 19th September 1813, it was agreed between Sir Michael Shaw Stewart and the Bailies and Council of the town, in these terms, viz.:—"The said Sir Michael Shaw Stewart, in consideration of the feu-duties and others after specified, has sold and disponed, like as he hereby sells, dispones, and in feu-farm and heritage for ever lets and demits to and in favour of the said Hugh Crawford, &c., . . . Bailies, Treasurer, and Counsellors foresaid, and to their successors in office, for the purposes after mentioned, heritably and irredeemably, All and Whole . . . But it is hereby expressly declared and agreed to between the said parties, that the said piece of ground above disponed is

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given by the said Sir Michael Shaw Stewart to the said Bailies and Council and their successors in office for the sole and express purpose of building accommodations for charitable institutions. . . . For which causes, and of the other part, the said Bailies and Council bind and oblige themselves and their successors in office to pay to the said Sir Michael Shaw Stewart and his foresaids, or to their factors and chamberlains, in name of feu-duty, the sum of £2, 0s. 8d. sterling yearly, at the term of Martinmas, beginning the first term's payment at Martinmas 1813, and so forth yearly at the said term so long as the said piece of ground with the erections made thereon shall be used for charitable purposes: But in the event, at any future period, the said Bailies and Council shall make use of or dispose of the said ground or erections for any other purpose, then, and in that event, they oblige themselves and their successors in office, in place of the feu-duty above mentioned, to pay the sum of £18, 6s. sterling of yearly feu-duty, and that at the first term of Martinmas after the said occupation, and so forth yearly thereafter in all time coming, with the due and ordinary annual rent thereof from and after the same becomes due, aye and until payment."

The Bailies and Council, between 1814 and 1819, built upon the ground so feued at the town's charges, borrowing the money from various persons. The foundation-stone of the building bore,—"By the favour of Almighty God, the foundation-stone of this building, erected by the town of Greenock for the education of poor children, was laid," &c.

The two schools already mentioned were accommodated in this building, and continued to be carried on as before, the feu-duty being paid by the Bailies and Council.

Alterations and additions were made upon the buildings from time to time, the cost of these being borne in part by the Bailies and Council. In 1860 a sum of £150 was raised for this purpose by voluntary subscription, and in 1864 a sum of £300. In the annual accounts of the burgh, the buildings were entered as part of the common good of the burgh.

After the passing of the Education Act of 1872 the Council approved of the following recommendation, recorded in their minute under date 18th June 1873:—"The committee recommend the Council to lease the charity school and school of industry to the school board for a period of two years from Whitsunday last, at a yearly rent not exceeding the actual sum which may be expended by the Council on and for said schools, during the term of the lease. The sum expended to be held to include the feu-duty which may be payable by the Council, also all sums expended in maintaining and upholding said schools, insuring the same, and all public rates and burdens during the currency of said lease."

The school board continued to hold the buildings under this arrangement, until, in 1884, the Caledonian Railway Company, who were making a line of railway from Greenock to Gourock, took the ground on which the buildings stood under their compulsory powers. By the verdict of a jury summoned under the provisions of the Lands Clauses Consolidation Act, 1845, the sum of £8494, 4s. was awarded to the Provost and Magistrates as the value of the lands and buildings, under deduction of the capitalised value of the feu-duty at the rate of £18, 6s.

This money having been consigned in bank under the provisions of the Lands Clauses Consolidation Act, 1845, the Commissioners acting under the Educational Endowments Act, 1882 (45 and 46 Vict. cap. 59), framed a scheme for educational endowments in Greenock, and included in that scheme the consigned money.

The Provost and Magistrates, feeling themselves aggrieved by this provision of the scheme, submitted a case to the Court of Session, in

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which they were the parties of the first part, and the Commissioners were parties of the second part. The first parties contended that the subjects acquired by the railway company were part of the common good of Greenock, and that the consigned money was so also, and that neither they nor it was an educational endowment in the sense of the statute.* The parties of the second part contended that in the circumstances the buildings, and the money, as a *surrogatum* for them, were an educational endowment.

The questions submitted were—"(1) Whether said subjects in Ann Street and Sir Michael Street, or said consigned money, or any part thereof, was or is an educational endowment in the sense of the said Educational Endowments Act? (2) Whether the said scheme, so far as it includes the said sum of money awarded as compensation for the said subjects, consigned in bank as aforesaid, is not within the scope of the Educational Endowments Act, 1882, and is contrary to law?"

Argued for the first parties;—Two things were essential to the definition of educational endowment, for, by the 1st section of the Educational Endowments Act, 1882, the property must in the first place be dedicated to charitable purposes, and, in the second place, be applied or applicable to that particular species of charitable purposes with which the statute dealt, viz., educational purposes. The second element was present here, the first was wanting, for there was no dedication to charitable purposes. That property should be dedicated to any purpose it was necessary that it should be irrevocably destined to it. It could not be said that that was the case here, for the feu-contract, in which the dedication, if dedication there were, must be found, made provision for the application of the subjects feued to charitable purposes, or to other purposes, as the Magistrates pleased. One rate of duty was exigible so long as they pleased to devote them to charitable purposes, and another for all time coming, if they devoted them to other ends. Who could require the magistrates to keep the subjects devoted to charitable purposes? Not the superior, for he had agreed to take a certain feu-duty at a higher rate when the subjects were applied to other uses. Nor had anyone else the right to insist upon the maintenance of the subjects as a charity, for the subscribers, who alone could claim an interest to do so, had enjoyed the use of the buildings for many years free of rent. The present title was very different from that of *Gold* v. *Houldsworth*,[1] where the vassal was prohibited from using his premises as a public-house, and the additional rent was imposed as a penalty to be renewed upon each offence. The history of the subjects since 1872 was instructive. First, they had been occupied by the school board, who took fees from children attending them. Their occupation was not charitable. In the next place, they had been sold by the Magistrates under deduction of the higher rate of feu-duty.

Argued for the second parties;—The true interpretation of the title here was that the higher feu-duty was inserted as a fence or irritancy to prevent the subjects being diverted from charitable purposes. [LORD PRESIDENT.—But this is a title of property, and there is no irritancy in the event of a contravention.] It was possible that provision might be made

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* 45 and 46 Vict. c. 59, sec. 1, provides,—"'Educational endowment' shall mean any property, heritable or moveable, dedicated to charitable uses, and which has been applied or is applicable in whole or in part, whether by the declared intention of the founder or the consent of the governing body, or by custom, or otherwise, to educational purposes."

[1] Gold v. Houldsworth, July 16, 1870, 8 Macph. 1006, 42 Scot. Jur. 617.

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for the imposition of a penalty upon a contravention of the terms of the title without an irritancy, and it would not be held that the contravention was allowable upon payment of the penalty. That was familiar law in the case of penalties for miscropping. Another instance of the same rule in the case of a property title was the case of *Gold.*[1] [LORD PRESIDENT.—That also was the case of a lease.] But it was a lease for 999 years, and treated by the present Lord President as a feu-contract, a view subsequently adopted by Lord Watson in the House of Lords.[2] The language of the clause here was peculiar, for charitable purposes were declared to be the "sole and express" purposes of the feu. But long usage was dedication as much as an express clause in a grant.[3] No one could dispute the long usage here, in addition to which there was the solemn inscription on the foundation-stone, and the contribution of very considerable sums by voluntary subscription, given, there could be no doubt, for the furtherance of the charitable purpose to which the schools had been for so long applied. To allow the school board to enjoy the use of the buildings was not to depart from the charitable purposes prescribed in the feu-contract. The superior did not think so, for he continued to be content with the lower rate of feu-duty, and it had been held that an endowed school might be lent or leased to a school board without losing its character.[4]

At advising,—

LORD PRESIDENT.—The question in this case is, whether certain subjects in Greenock, or rather whether the price of these subjects, for they have now been sold to the Caledonian Railway Company, was or is an educational endowment in the sense of the Educational Endowments Act. The Act in question which is the 45th and 46th Vict. cap. 59, is entitled—An Act to reorganise the Educational Endowments of Scotland, and the preamble sets out that "it is desirable to extend the usefulness of educational endowments in Scotland, and to carry out more fully than is done at present the spirit of the founders' intentions," and so forth. The first section of the statute, which has been largely commented upon, provides that "'educational endowment' shall mean any property, heritable or moveable, dedicated to charitable uses, and which has been applied or is applicable in whole or in part, whether by the declared intention of the founder or the consent of the governing body, or by custom, or otherwise, to educational purposes." Now, it appears to me that the meaning of that section is not that property, heritable or moveable, applied or applicable to educational purposes shall fall within this statute, whether it be a charitable endowment or not; but it means merely to limit the class or description of endowments to which this statute shall apply, and it means that a subject to fall under this statute must in the first place be a charitable endowment. There are many educational endowments which are not charitable,—and which have no element of charity in them at all,—a great many foundations of chairs in universities are not in any sense charitable, and the purpose, therefore, of this section I apprehend to be to limit the educational endowments which fall under the operation of the statute to those which are dedicated to charitable uses.

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[1] Gold v. Houldsworth, 8 Macph. 1006.

[2] Earl of Zetland v. Hislop, &c., June 12, 1882, 9 R. (H. L.) 40, Lord Watson, at p. 49.

[3] Sanderson v. Lees, &c., Nov. 25, 1859, 22 D. 24, per Lord Deas, at p. 31, 32 Scot. Jur. 14.

[4] M'Culloch v. Kirk-Session and Heritors of Dalry, July 21, 1876, 3 R. 1182.

But we must consider in the first place whether this is an endowment in any sense of the term. Now, I understand an endowment to mean an irrevocable gift, and therefore, although this may be a charity in one sense, and may be applied or applicable to educational purposes, if it is not an endowment, or, in other words, an irrevocable gift, it does not fall under the statute.

Now, applying that construction of the statute in the present case, let us see how the matter stands. This is not a property the history of which is left in any doubt. We have before us the title under which the Magistrates originally acquired it; and we see from that title under what conditions they held it from the beginning. It is in the shape of a feu-contract between the Magistrates and Sir Michael Shaw Stewart, and no doubt the consideration of the feu is the usual consideration of the payment of the feu-duty, and the conveyance is made to the Magistrates and their successors in office, contemplating apparently that the property is of such a description that it will be held by the Magistrates for public purposes. And then there is a clause which expresses a sort of condition of the grant:—"It is hereby expressly declared and agreed between the parties, that the said piece of ground above disponed is given by the said Sir Michael Shaw Stewart to the said Bailies and Council and their successors in office, for the sole and express purpose of building accommodations for charitable institutions." Now, if there were nothing more than I have read, there would be very strong ground for holding that this grant was made under the express condition that it should be held in all time coming for charitable uses and for nothing else. But then there is the *reddendo* clause, which gives a different colour and complexion to it altogether. The *reddendo* clause begins thus:—"For which causes and of the other part, the said Bailies and Council bind and oblige themselves and their successors in office to pay to the said Sir Michael Shaw Stewart and his foresaids . . . in name of feu-duty, the sum of £2, 0s. 8d. sterling yearly, at the term of Martinmas, beginning the first term's payment at Martinmas 1813, and so forth yearly at the said term, so long as the said piece of ground with the erections made thereon shall be used for charitable purposes." Now, it is clearly contemplated here that a time may come when the ground and the buildings thereon shall not be used for charitable purposes. The deed accordingly goes on to provide what the obligation of the Magistrates shall be when the ground ceases to be used for charitable purposes, and provides:—"But in the event, at any future period, the said Bailies and Council shall make use of or dispose of the said ground or erections for any other purpose, then, and in that event, they oblige themselves and their successors in office, in place of the feu-duty above mentioned, to pay the sum of £18, 6s. sterling yearly of feu-duty, and that at the first term of Martinmas after the said occupation, and so forth yearly thereafter in all time coming." Now, here again it is plainly implied that the Magistrates may make use of the ground, or may dispose of the ground for other purposes than charitable purposes, and in that event they are to pay a feu-duty, which it may be assumed represents the true value of the ground, and not the much lower feu-duty which they undertook to pay so long as the ground and erections were used for charitable purposes; and that once the subject has been diverted from the charitable purpose to which it is at the beginning to be devoted, then the feu-contract resolves itself into a feu-contract of which the *reddendo* is to be £18, 6s., in all time coming thereafter. In short,

the moment the Magistrates elect to use this subject for other than ch
purposes, or to dispose of it, then it becomes simply an absolute feu i
hands for any purpose to which they choose to devote it, and after that t
never to pay less than the increased feu-duty of £18, 6s.

Now, the case comes to be whether this subject is vested in the Mag
as an irrevocable gift in favour of the public for charitable purposes, or
it is a property held by the Magistrates under this title upon conditio
that while they hold it for charitable purposes they are to pay a very sm
duty, and as soon as they devote it to any other purpose they are to
larger feu-duty corresponding to the value of the ground. I have no he
in saying that the latter is the true construction of this deed; and if tha
it seems to me that the Magistrates hold this property to use it in their
cretion, either for charitable purposes, or for any other purpose that the
more beneficial to the community or corporation. It is not immaterial to
that this property has been disposed of. It has been sold, no doubt by
sory sale, but still it has been disposed of; and the disponee, the Cal
Railway Company, holds it, and can hold it, only as absolute owne
accordingly they are under obligation to pay the full feu-duty of £18,
the price which the Magistrates received from the railway company is ca
upon the footing that the subject conveyed is burdened therewith.
that from the figures before us shewing the way in which the price was est
Therefore the price which is now in the hands of the Magistrates is
price of a subject that was devoted to charitable purposes, but the pri
subject which it is assumed is held on absolute title by the Magistrates
larger feu-duty. The *surrogatum* is the price of the subject burdened w
larger feu-duty of £18, 6s., and therefore what was given for that *surr*
is that same subject, namely, the property burdened with that larger fe
The circumstance that this property has been applied by the Magistra
a long time to charitable uses, and to educational uses, does not seem t
affect the question. Nobody can say that the Magistrates have n
exercising a perfectly wise discretion in applying it up to this time
purposes for which they thought fit, these being charitable purposes, b
cannot derogate from their right under this charter to apply it to other p
They cannot by that use lose, by a sort of negative prescription, the titl
they have to apply this to any other object which they think fit; and th
upon the whole matter I do not see any ground for holding that thi
"educational endowment" within the meaning of the statute.

LORD ADAM.—The question here is, "whether certain subjects in Ann St
Sir Michael Street, or said consigned money," being a sum of £8494, 4s., "
is an educational endowment in the sense of the Educational Endo
Act"? If it is an educational endowment, then, no doubt, it falls wit
scope of the Act; and if that be so then the scheme which has been p
is right and cannot be touched by us. But that takes us back to the pro
of the Educational Endowments (Scotland) Act, to see whether or
subject, or the price thereof, is an educational endowment in the sense
Act. That depends upon the construction of the first section of th
Now that section says this,—"'Educational endowment' shall mean any p
heritable or moveable, dedicated to charitable uses, and which has been
or is applicable in whole or in part, whether by the declared intention

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founder or the consent of the governing body, or by custom or otherwise, to educational purposes." It is obvious that there are two things required here to bring a fund within the Act; in the first place, it must be dedicated to charitable uses; and, in the second place, it must have been applied or be applicable to educational purposes. It is quite obvious, as it appears to me, that the fact that it has been applied to educational purposes is not in itself sufficient. We all know that there are hundreds of school-houses and schools which have been built in Scotland, and have been applied by the proprietors thereof for years to educational purposes, yet it is impossible to say that the Act can apply to such property as that, because the proprietors of these schools, although they have so applied them, can at any moment divert them to any other uses if they so please. Here there can be no doubt that this fund falls within the second requirement, because this property and fund have been applied to educational purposes for a long time. But then, the question remains behind that, has it been dedicated to charitable uses? Now, I think, a property or fund to be destined to charitable uses must be, as your Lordship has said, irrevocably so destined,—a fund or property which cannot be diverted from such uses without a breach of trust on the part of the governing body or holders of the fund. Whether or no this property is in that position appears to me to depend entirely upon the construction of the feu-contract which is the title of the first parties to this case; and upon the construction of that feu-contract I have no doubt at all that the fund is not so dedicated. I think it is clear upon the construction of the feu-contract that the Magistrates of Greenock have an option to apply this property to charitable purposes, or to any other purpose they may think advisable. The contract sets forth what the consideration is, and the consideration is this, that the said Sir Michael Shaw Stewart "in consideration of the feu-duties and others." Now, what are the feu-duties referred to there? The feu-duties are clearly the two feu-duties; the one of £2, 0s. 8d., which the Magistrates are to pay so long as they choose to use and apply the property to charitable purposes; and the other feu-duty is the alternative one of £18, 6s., if in their discretion they choose to apply it to purposes other than charitable. So that this contract states upon the very face of it that the consideration is the one or other of these as the contracting party may think right. Then the feu-contract goes on to say that "the ground above disponed is given for the sole and express purpose of building accommodations for a charitable institution," and if the deed had stopped there and gone no further I think there would have been a great deal to be said upon the ground that this was an irrevocable destination. But the deed does not stop there, for it goes on to set out a *reddendo* clause, which shews quite clearly that the contracting parties meant that there should be an option as to how this property was to be used. It appears to me that there can be nothing clearer than this, that it was intended that the Magistrates should have the option either to use it for charitable purposes, in which case they were to pay £2, 0s. 8d., or for purposes other than charitable purposes, in which case they were to pay the larger feu-duty of £18, 6s. Now, supposing the Magistrates here had made up their minds not to apply it to charitable purposes, who could have interfered with them? Could the supposed founder, Sir Michael Shaw Stewart, have prevented that? Would he not immediately have been met with the objection,—"You have agreed by your feu-contract that in the event of our using it for other than charitable purposes we shall pay you

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the moment the Magistrates elect to use this subject for other than charitable purposes, or to dispose of it, then it becomes simply an absolute feu in their hands for any purpose to which they choose to devote it, and after that they are never to pay less than the increased feu-duty of £18, 6s.

Now, the case comes to be whether this subject is vested in the Magistrates as an irrevocable gift in favour of the public for charitable purposes, or whether it is a property held by the Magistrates under this title upon condition only that while they hold it for charitable purposes they are to pay a very small feu-duty, and as soon as they devote it to any other purpose they are to pay a larger feu-duty corresponding to the value of the ground. I have no hesitation in saying that the latter is the true construction of this deed; and if that be so it seems to me that the Magistrates hold this property to use it in their own discretion, either for charitable purposes, or for any other purpose that they think more beneficial to the community or corporation. It is not immaterial to observe that this property has been disposed of. It has been sold, no doubt by compulsory sale, but still it has been disposed of; and the disponee, the Caledonian Railway Company, holds it, and can hold it, only as absolute owners; and accordingly they are under obligation to pay the full feu-duty of £18, 6s, and the price which the Magistrates received from the railway company is calculated upon the footing that the subject conveyed is burdened therewith. We see that from the figures before us shewing the way in which the price was estimated. Therefore the price which is now in the hands of the Magistrates is not the price of a subject that was devoted to charitable purposes, but the price of a subject which it is assumed is held on absolute title by the Magistrates for the larger feu-duty. The *surrogatum* is the price of the subject burdened with the larger feu-duty of £18, 6s., and therefore what was given for that *surrogatum* is that same subject, namely, the property burdened with that larger feu-duty. The circumstance that this property has been applied by the Magistrates for a long time to charitable uses, and to educational uses, does not seem to me to affect the question. Nobody can say that the Magistrates have not been exercising a perfectly wise discretion in applying it up to this time for the purposes for which they thought fit, these being charitable purposes, but that cannot derogate from their right under this charter to apply it to other purposes. They cannot by that use lose, by a sort of negative prescription, the title which they have to apply this to any other object which they think fit; and therefore upon the whole matter I do not see any ground for holding that this is an "educational endowment" within the meaning of the statute.

Lord Adam.—The question here is, "whether certain subjects in Ann Street and Sir Michael Street, or said consigned money," being a sum of £8494, 4s., "was or is an educational endowment in the sense of the Educational Endowments Act"? If it is an educational endowment, then, no doubt, it falls within the scope of the Act; and if that be so then the scheme which has been prepared is right and cannot be touched by us. But that takes us back to the provisions of the Educational Endowments (Scotland) Act, to see whether or no this subject, or the price thereof, is an educational endowment in the sense of that Act. That depends upon the construction of the first section of that Act. Now that section says this,—"'Educational endowment' shall mean any property, heritable or moveable, dedicated to charitable uses, and which has been applied or is applicable in whole or in part, whether by the declared intention of the

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founder or the consent of the governing body, or by custom or otherwise, to educational purposes." It is obvious that there are two things required here to bring a fund within the Act; in the first place, it must be dedicated to charitable uses; and, in the second place, it must have been applied or be applicable to educational purposes. It is quite obvious, as it appears to me, that the fact that it has been applied to educational purposes is not in itself sufficient. We all know that there are hundreds of school-houses and schools which have been built in Scotland, and have been applied by the proprietors thereof for years to educational purposes, yet it is impossible to say that the Act can apply to such property as that, because the proprietors of these schools, although they have so applied them, can at any moment divert them to any other uses if they so please. Here there can be no doubt that this fund falls within the second requirement, because this property and fund have been applied to educational purposes for a long time. But then, the question remains behind that, has it been dedicated to charitable uses? Now, I think, a property or fund to be destined to charitable uses must be, as your Lordship has said, irrevocably so destined,—a fund or property which cannot be diverted from such uses without a breach of trust on the part of the governing body or holders of the fund. Whether or no this property is in that position appears to me to depend entirely upon the construction of the feu-contract which is the title of the first parties to this case; and upon the construction of that feu-contract I have no doubt at all that the fund is not so dedicated. I think it is clear upon the construction of the feu-contract that the Magistrates of Greenock have an option to apply this property to charitable purposes, or to any other purpose they may think advisable. The contract sets forth what the consideration is, and the consideration is this, that the said Sir Michael Shaw Stewart "in consideration of the feu-duties and others." Now, what are the feu-duties referred to there? The feu-duties are clearly the two feu-duties; the one of £2, 0s. 8d., which the Magistrates are to pay so long as they choose to use and apply the property to charitable purposes; and the other feu-duty is the alternative one of £18, 6s., if in their discretion they choose to apply it to purposes other than charitable. So that this contract states upon the very face of it that the consideration is the one or other of these as the contracting party may think right. Then the feu-contract goes on to say that "the ground above disponed is given for the sole and express purpose of building accommodations for a charitable institution," and if the deed had stopped there and gone no further I think there would have been a great deal to be said upon the ground that this was an irrevocable destination. But the deed does not stop there, for it goes on to set out a *reddendo* clause, which shews quite clearly that the contracting parties meant that there should be an option as to how this property was to be used. It appears to me that there can be nothing clearer than this, that it was intended that the Magistrates should have the option either to use it for charitable purposes, in which case they were to pay £2, 0s. 8d., or for purposes other than charitable purposes, in which case they were to pay the larger feu-duty of £18, 6s. Now, supposing the Magistrates here had made up their minds not to apply it to charitable purposes, who could have interfered with them? Could the supposed founder, Sir Michael Shaw Stewart, have prevented that? Would he not immediately have been met with the objection,—"You have agreed by your feu-contract that in the event of our using it for other than charitable purposes we shall pay you the sum of £18, 6s.," and what answer could he have set up to that? I do not see that he could have had any answer, because that is one of the conditions on which they were entitled to hold their property. And if the founder has no title to interfere with them, if their doing so was in terms of the contract, who else could interfere or object? Who else could say that this was a diversion of the property from the purposes to which the Magistrates were entitled to apply it? I do not see that anybody could have the right to say that. I think, therefore, that this property was held by the Magistrates upon a title under which they had a right to divert it and use it for any purpose they chose, other than a charitable purpose, upon paying a certain sum of feu-duty; and if that be so, it is just in the position of any other property which for the time they choose to apply to educational purposes. But that will never bring it within the Act. This case is quite different from that of *Gold* v. *Houldsworth*, to which we were referred. In that case there was a permanent prohibition against using the property for public-houses. There was a perpetual prohibition against the lessee or vassal, fortified by a penalty of £10 for every time it should be so used; and accordingly it was held there that the superior or proprietor, for it was a long lease, had a right to insist that it should be applied to no other purposes. But here Sir Michael Shaw Stewart had no right whatever, because he had agreed that it was to be used in a certain way on payment of a certain sum in all time coming. On the whole case I have no hesitation in agreeing with your Lordship.

Lord Kinnear.—I agree with your Lordship. I think an educational endowment in the sense of this statute is an irrevocable gift, which must, in the first place, be set apart and appropriated to charitable uses; and in the second place, it must have been applied or be applicable to that particular form of charity which is described as educational purposes. I think that is very clear upon a construction of the words; and that construction is confirmed by the implication which arises from the remaining part of the clause, because that makes it very clear that the subject contemplated by the enactment is not a property in the hands of an unlimited owner, but an endowment, an educational endowment, in the hands of a governing body or managers or trustees. Therefore if an unlimited owner allows a building upon his property to be used for charitable purposes during his pleasure, being under no obligation either to the objects of the charity or anybody else to continue that use longer than he thinks fit, that is not an educational endowment in the sense of this statute any more than it is such an endowment in the ordinary meaning of the words. I entirely agree, therefore, with your Lordships that the question whether this compensation money does or does not fall within the scope of the statute really depends upon whether, on the construction of the title of the Magistrates of Greenock, they hold it as trustees for charitable uses, or as administrators of the common good of the burgh of Greenock. I entirely concur with your Lordship that upon the construction of the feu-contract there can be no question as to the purpose or the character in which they hold it. The subjects are conveyed to them for the purpose after mentioned, heritably and irredeemably; and then the deed goes on to say what the purposes after mentioned are. They are, in the first place, "building accommodations for charitable institutions"; and, in the second place, "for any other purpose for which the Magistrates shall make use of or dispose of the said ground or erections." Therefore it becomes

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very clear upon reading the whole deed that the reason for specifying that purpose of the erection of "building accommodations for charitable institutions" is simply to explain and make clear a very special agreement between the superior and vassal for the variation of the feu-duty in certain events. What the superior stipulates comes simply to this, that since the ground is acquired for the express purpose of being used for charitable purposes he shall be content with a very small feu-duty so long as it is in fact so applied; but since it has become the property of the Magistrates, who may use it for any other purpose for which they may use the property of the burgh, and may therefore divert it from charitable purposes, when they do that, or if they shall do that at any time, then they are to pay the feu-duty which your Lordship points out must be assumed to be the true value of the land. It appears to me therefore that the Magistrates hold this property under no other restrictions except those which necessarily attach to their character as Magistrates. They hold it as they hold the rest of the property of the burgh, in trust for the community; but they do not hold it for any purposes more definite than those to which the common good may be lawfully appropriated by the administrators. I entirely agree with your Lordships.

LORD MURE and LORD SHAND were absent.

THE COURT pronounced this interlocutor:—"Find and declare that the subjects in Ann Street and Sir Michael Street, Greenock, and the consigned money, being the price thereof, are not an educational endowment in the sense of the Educational Endowments Act, 1882; and find and declare that the scheme, so far as it includes the said sum of money, the price of the said subjects, consigned in bank, is not within the scope of the Educational Endowments Act, 1882, and is contrary to law, and decern."

CUMMING & DUFF, S.S.C.—DONALD BEITH, W.S.—Agents.

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JAMES BRAND, Pursuer (Appellant).—*R. V. Campbell—W. Campbell.*
MRS F. W. SHAW AND ANOTHER, Defenders (Respondents).—*Sir Charles Pearson—Maconochie.*
MISS G. SHAW, Defender (Respondent).—*Sir Charles Pearson—Maconochie.*

Title to Sue—Parent and Child—Action for custody of bastard child—Personal and intransmissible.—Held that an action at the instance of a mother for custody of her bastard child could not be insisted in after her death by a person named by her in a testament as "tutor, curator, and guardian" to her child.

Sheriff—Jurisdiction—Action at instance of mother of bastard for custody.—Opinions as to the competency in the Sheriff Court of an action at the instance of a mother concluding for the custody of her bastard child.

Parent and Child—Bastard—Guardianship of Infants Act, 1886 (49 *and* 50 *Vict. c.* 27).—*Question,* whether the Guardianship of Infants Act, 1886, applies to bastards.

1st DIVISION.
Sheriff of Ayrshire.
M.

ON 31st August 1886 Ann Hammel, residing at the Convent of the Good Shepherd, Dalbeth, raised an action in the Sheriff Court at Ayr against Mrs F. W. Shaw, Ayr, and her husband for his interest, concluding for an order on the defender to restore to her the pursuer's illegitimate child, John Ingram Hammel, presently in the custody or under the control

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of the defender, and failing the defender doing so, for a warrant to officers of Court to search for the child, and to take possession of it, and deliver it to the pursuer.

On 28th September 1886 Ann Hammel, in respect Mrs Shaw averred that the child was not under her control, raised an action also in the Sheriff Court against Miss Shaw, with conclusions similar to those in the other action.

These actions were conjoined.

The pursuer's condescendence in these actions stated that she was the mother of the child, which at the date of the action was four years of age, having been born on 3d April 1882. That in 1883 the child was entrusted to the charge of the defenders, and that though she had repeatedly asked the defenders to return the child to her, they had refused to do so.

The defenders averred that for some time previous to 1883 the pursuer had been leading a dissolute life, and that at that time she was in very delicate health and in great poverty. That in March of that year she was admitted with her child to a Charitable Institution in Ayr, and that while there she handed over the child to Miss Shaw on the footing that the pursuer was to have no further control over the child. It was further averred that Miss Shaw took charge of the child till he was four years of age, when he was sent to the Home for Little Boys at Farningham, where he was to be educated and taught a trade. The defenders further averred that when the pursuer came out of the Home in Ayr she went to service for a time, then relapsed into criminal courses, and was in jail, and, when released, was placed in the Roman Catholic Convent of the Good Shepherd at Dalbeth.

The pursuer pleaded;—(1) The female defender having been entrusted with the child during the pursuer's pleasure only, and having no legal right to retain it in her custody or under her control against the pursuer's will, the said female defender should be ordained to restore it to the pursuer.

The defender in each action pleaded;—(1) The action is incompetent in the Sheriff Court. (4) In respect of the facts averred by the defender, and in the whole circumstances stated by her, the child should not be delivered to pursuer, and the defender should be assoilzied, with expenses.

In October 1886 the pursuer died in the Convent, leaving the following settlement:—"I, Ann Hammel, residing at the Convent of the Good Shepherd, Dalbeth, near Glasgow, do hereby leave and bequeath my whole means and estate to James Brand, contractor, Glasgow, in trust for behoof of my son, John Ingram Hammel; and I hereby nominate, constitute, and appoint the said James Brand to be my sole executor, and to be tutor, curator, and guardian to my said son; and being a Roman Catholic myself, it is my desire that my said son be brought up in that faith."

On 2d February 1887 the Sheriff-substitute (Orr Paterson), in respect of a minute lodged for James Brand, sisted him as pursuer in the conjoined actions, and the Sheriff adhered, but "reserving all objections to his title."

The defenders added this statement,—(Stat. 10) "The document, No. 16 of process, produced by James Brand, contractor, Glasgow (who has been sisted as pursuer, under reservation of all objections to his title to insist in this action), confers on him no title to insist therein. The original pursuer, as the mother of an illegitimate child, had no legal power to appoint the said James Brand, or any other person tutor to her child. The said James Brand has no legal status or right, through kinship or other right, to the custody of said child. The pursuer had no means and

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estate whatever at the time of her death. She was dependent on the charity of others. The said James Brand, if known to her at all, was only known to her by name, and his name, it is believed, was inserted in said document on the suggestion of those who surrounded the deceased during her last illness."

The pursuer Brand added this plea,—"The defenders having no right or title to retain the custody of the child in question, and the pursuer Brand being duly appointed tutor, curator, and guardian to it by its mother, is entitled to an immediate order for delivery of the child as craved, with expenses."

The defenders added these pleas,—"(5) The pursuer Brand having no title or interest to insist in the present proceedings, and the document founded on by him having conferred no such title or interest, the defender should be assoilzed, or the action dismissed, with expenses. (6) *Separatim*, the right to insist on the cravings of the petition not being transferable, the defender should be assoilzied, or the action dismissed, with expenses."

On 24th May 1887 the Sheriff-substitute (Orr Paterson) allowed parties a proof, under reservation of their pleas.

The pursuer appealed to the Sheriff (Brand), who, on 29th September, pronounced this interlocutor:—"Recalls the interlocutor of the Sheriff-substitute: Finds, under reference to the annexed note, that the action is incompetent, and dismisses the same," &c.*

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* "NOTE.— . . . . The motion to have Mr Brand sisted was opposed, but by interlocutor of the Sheriff-substitute was granted, and this judgment was adhered to on appeal, under reservation, however, of all objections to Mr Brand's alleged title. Since then the Sheriff-substitute has pronounced an interlocutor allowing a proof, and against that interlocutor the present appeal has been taken by Mr Brand, who, in his reclaiming petition, maintains that inquiry is unnecessary, and that, having regard to the settlement, there is no room for any judgment save a decerniture in terms of the conclusions of the first petition. In their answers the defenders contend that as the action has been raised to determine the permanent custody of a pupil child, it is incompetent in the Sheriff Court, which, it is said, can only deal with questions of interim custody arising on emergency. On the other hand, it is argued for Mr Brand that under the Guardianship of Infants Act, 1886, 49 and 50 Vict. cap. 45, and particularly section 3 (1), there is conferred on the Sheriff the jurisdiction requisite to deal with a case like the present. On the question whether, apart from the Act, the Sheriff has jurisdiction in this case to make an order for permanent custody, there is no room for serious doubt. The suggestion that there is emergency is out of the question. The protection and guardianship of infants 'is,' as Lord Fraser says (Parent and Child, p. 131), 'the peculiar province of the Court of Session as the Supreme Court of Equity, and to that Court must application be made in regard to all questions as to the custody of bastards. The Sheriff has power to decide as to their temporary custody where any sudden contingency prevents an application to the proper Court.' See also page 222.

"This passage fully sets forth the rule of law as to jurisdiction, and the various cases on the matter which the Sheriff has examined do not modify or vary the rule as now stated. See the cases of *Buchan* v. *Cardross*, 27th May 1842, 4 D. 1268; *Lang*, 30th June 1849, 11 D. 1217; *Harvey* v. *Harvey and Others*, 15th June 1860, 22 D. 1209; *Muir* v. *Kerr*, 18th July 1868, 6 M. 1125; and *Hood* v. *Hood*, 24th January 1871, 9 M. 449. There may, it is true, be a question whether the Sheriff has power to interfere to enforce or protect the legal title of a parent of lawful children,—see Dove Wilson, 3rd, p. 60; but no such question exists here. As an instance of procedure in the competent Court in reference to the custody of an illegitimate child, reference may be made to the case of *Macpherson* v. *Leishman*, 4th June 1887, 14 R. 180. Taking it, accordingly,

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The pursuer appealed to the Court of Session. It was admitted at the bar that Ann Hammel had left no property of any kind.

Argued for the pursuer;—The action, as originally brought, was competent in the Sheriff Court. It was an action to enforce the legal right of a mother to the custody of her bastard child.[1] Such actions were competent in the Sheriff Court.[2] Further, under the Guardianship of Infants Act, 1886, the Sheriff Court had now jurisdiction in such cases. The present pursuer's title was good to insist in the action, as the mother, who was the guardian of the child, had validly appointed him tutor under her settlement. At common law, even though a bastard had, in the eye of the law, no father, the putative father could appoint a guardian to him.[3] Further, under the Guardianship of Infants Act, 1886, a mother had power to nominate a tutor to her son. The Act throughout spoke of "infants"; that meant any infant, whether legitimate or not. Such broad words in any Act of Parliament were construed in the widest sense, *e.g.*, under the Act 1672, c. 2, the words "ony minor" were held to include bastards, and they could therefore choose curators when they ceased to be pupils.[4]

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as sound law that jurisdiction does not exist apart from statute, has it been conferred by the Guardianship of Infants Act? The result of an examination of its provisions has been to satisfy the Sheriff that it does not apply to illegitimate children. The preamble sets forth that it is expedient to amend the law relating to the guardianship and custody of infants; or as, by the 8th section, the word 'infants' is to be read in Scotland, of 'pupils.' This means infants or pupils lawfully begotten. The second section makes mothers the guardians of infants on the father's death; but it is trite law that an illegitimate child has no father, and to illegitimates, therefore, the second section cannot apply. Section 3 (1) contains the provision specially founded on by Mr Brand. It sets forth that 'the mother of any infant may, by deed or will, appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried); and where guardians are appointed by both parents, they shall act jointly.' But it is clear from these words that the infant or pupil referred to is a person who has a father and mother, or, in other words, has been lawfully begotten. Further, by section 3, where guardians are appointed by both parents, they are to act jointly; but a father has no right to appoint a tutor to an illegitimate child, and therefore the father of the child referred to in the Act must be the father of a child lawfully begotten. As Bell says (section 2071), 'A natural child has no recognised father, and so his reputed father cannot appoint tutors,' &c. A reference to the 7th section adds force to the view now stated. It provides for the case where there is a decree of judicial separation, or a decree of divorce; and enacts that the Court pronouncing such decree may declare the guilty parent unfit to have custody of the children, if any, of the marriage, &c. This section, dealing with persons married, but afterwards judicially separated or divorced, must be taken as following on sections dealing also with persons who had entered into the marriage relation, and had not been divorced or separated. It may be added, that had it been intended that the Act should apply to illegitimate children, it would have contained a provision to that effect. The view now taken renders it unnecessary to offer any opinion on various other questions raised, and, in particular, whether Mr Brand was validly appointed, and whether the action, with its personal conclusion for delivery to the deceased when alive, can be transferred into an action for delivery to Mr Brand. On the whole matter, the Sheriff is of opinion that he has no jurisdiction in the present case."

[1] *Cf.* Macpherson v. Leishman, June 4, 1887, 14 R. 780; Sutherland v. Taylor, Dec. 22, 1887, *supra*, p. 224.

[2] Goadby v. Maccandys, July 7, 1815, Fac. Coll.

[3] Johnston v. Clark, 1785, M. 16,374; Whitson v. Speed, May 28, 1825, 4 S. 42.

[4] Wilson v. Campbell, March 10, 1819, Fac. Coll.

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Argued for the defenders;—The custody of infants was the peculiar province of the Court of Session, as the Supreme Court of Equity.[1] This had always been recognised, the only exception being where a case of emergency was averred.[2] Here there was no such averment, the only averment of that kind having been added after the death of the original pursuer. If the Sheriff had jurisdiction to enforce the legal rights of the mother that only applied to the case up to the date of the mother's death. In the case of *Goadby* the question was never raised, and the Court throughout took the case as one for an exercise of the *nobile officium*. In the later cases where such actions had been begun in the Sheriff Court the question of jurisdiction had either been waived,[3] or the Court had reserved it.[4] Further, the Sheriff had no jurisdiction under the Act of 1886. Every section of that Act bore on its face that the infants there dealt with were children having two parents, *i.e.*, legitimate children. (2) The action was personal to the mother and intransmissible, and therefore fell by her death. The mother left no estate, and what she claimed here was not anything which would accrue to her estate, and therefore, *qua* executor, Brand had no title to insist in the action. Actions with pecuniary conclusions, *e.g.*, for damages, alone transmitted to executors.[5] As tutor he had no title. Only a father could nominate a tutor to his son.[6] There was no authority for holding that a mother, in any circumstances, could do so. In all cases where tutors had been nominated to bastards they were nominated by persons who left money to be expended on the education of the child, and the custody of the child was therefore necessary for the proper expenditure of the money. The Court was the proper guardian of a bastard.

LORD PRESIDENT.—The Sheriff in this case, recalling the interlocutor of the Sheriff-substitute, which allowed a proof, finds "that the action is incompetent, and dismisses the same." Now, if the Sheriff means that the action, as originally brought by the mother of this infant, was incompetent in the Sheriff Court, I think that is somewhat doubtful; because an application by the mother of an illegitimate child for delivery of it to her custody is *prima facie* a just and legal demand, as she has the only legal title to its custody, and I am not disposed to throw any doubt upon the competency of such an application in the Sheriff Court, where there are no special circumstances which can be pleaded against her legal title. Therefore I can hardly agree with the Sheriff in holding that the action, as originally brought, was incompetent. It is, however, not now necessary to consider whether the original issue which was joined between the mother as pursuer and the defenders raised a question which was improper for decision in the Sheriff Court, for the case has changed its aspect altogether since that issue was joined.

The original pursuer died about the end of October 1886, and in February following Mr Brand came forward, and proposed to have himself sisted as pursuer. This was assented to by the Sheriff-substitute and the Sheriff,—although opposed by the defenders,—under reservation as to his title,

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[1] Fraser on Parent and Child, pp. 131 and 222; Mackay's Practice, 1, p. 209, and 2, p. 267.

[2] Earl of Buchan v. Lady Cardross, May 27, 1842, 4 D. 1268, 14 Scot. Jur. 415.

[3] Lang v. Lang, June 30, 1849, 11 D. 1217, 21 Scot. Jur. 485.

[4] Hood v. Hood, Jan. 24, 1871, 9 Macph. 449, 43 Scot. Jur. 215.

[5] Auld v. Sharp, Dec. 16, 1874, 2 R. 191; Wrights v. Burns, Nov. 30, 1883, 11 R. 217.

[6] Fraser on Parent and Child, 174; Ersk. i. 7, 2.

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and the question—the important question—now is, whether Mr Brand,
executor of the deceased woman, or as tutor-nominate of the child, is e
sist himself. I have come to be of opinion that he is not. In
place, it appears to me that this is an action of a purely personal
No one could have brought it except the mother, and it was just be
was the mother, and in a condition to take charge of the child, and n
and bring it up, that she was entitled to the custody of her ill
child. That title cannot possibly pass to anyone else. The mother
convey it by deed either *inter vivos* or *mortis causa*. It is a purely
title in her. Mr Brand's title as executor gives him no title at all to
action. It is not an action for recovery of funds belonging to the ex
the like. I think it is clear that Mr Brand is not in the position of th
pursuer, because he has not acquired her title, by transmission or o
Her title could not transmit. No one could carry on the action e
mother. I am therefore for dismissing this action on the ground that
has no title to continue it. We have no need to decide anything
title otherwise, nor whether the mother of an illegitimate child can na
to it; nor need we decide the question which was raised as to th
statute.

Lord Adam.—I am of the same opinion. It appears to me to be m
doubtful whether the Sheriff's interlocutor, if he means that the actio
competent as originally brought, was well founded; for I am not satisfie
thing that we have heard from the bar that a petition by the mother of a
mate child, whose title to it is undisputed, may not competently ask in t
Court for a warrant for its delivery to herself. But I agree with your Lor
when she died, her action being a purely personal one could not be i
by Mr Brand. It was the fact of her being the child's mother which
a title to insist. That character could not transmit to Mr Brand nor t
else. I think the clear course, then, was to dismiss the action. Mr
respect of the expressed wishes of the deceased woman, may have
apply. I say that may be, but I think it doubtful whether he could
the Sheriff Court, and that is an additional reason why the proceedin
action after the death of the original pursuer have been incompetent.

Lord Kinnear.—I am of the same opinion. I think the tit
deceased mother was personal and intransmissible, and on that ground
with your Lordships.

Lord Mure and **Lord Shand** were absent.

The Court pronounced this interlocutor:—"Recall the She
terlocutor . . . Find that the compearing pursuer Bran
title to sue: Therefore dismiss the conjoined actions, and de

William B. Glen, S.S.C.—J. & F. Anderson, W.S.—Agents.

No. 83.
Feb. 24, 1888.
Fraser v.
Morris.

Alexander Fraser, Pursuer (Reclaimer).—*J. C. Thomson—C*
James Morris, Defender (Respondent).—*A. J. Young—Fle*

Reparation—Slander—Innuendo.—In an action of damages fo
founded on words not in themselves libellous but innuendoed to b
Court will not allow an issue unless the words founded on will fairly
innuendo put on them.

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2D DIVISION.
Lord M'Laren.
M.

Averments founded on words innuendoed as slanderous which were *held* not to bear the innuendo so as to entitle the pursuer to an issue, and action *dismissed* as irrelevant accordingly.

ON 22d September 1887 Alexander Fraser, sole partner of the firm of Fraser & Carmichael, wholesale merchants, Dunfermline, brought this action of damages for alleged slander against James Morris, grocer, Dunfermline.

The pursuer averred;—(Cond. 1) "The pursuer is the sole partner of the firm of Fraser & Carmichael, merchants, Dunfermline, who carry on a large and extensive business in Dunfermline and the west of Fife. The defender was employed by the pursuer for some years until 1st March 1887 as a traveller, when he commenced business, along with his brother, under the firm of J. & Wm. C. Morris, as wholesale and retail grocers in Dunfermline." (Cond. 2) "In or about the month of June 1886 James Hutton, grocer, Baldridgeburn, near Dunfermline, ordered from the pursuer's firm, through the defender as their traveller, ten casks of Linlithgow oil. There are two qualities of oil sold in the trade known as qualities Nos. 1 and 2, of which No. 1 quality is the superior and higher in price. The order by the said James Hutton, as received by the defender, and written in his order-book, was for ten casks of No. 2 quality, the price of which was fivepence per gallon. The pursuer's firm duly implemented said order." (Cond. 3) "The said James Hutton and his wife in or about the month of July 1887 complained to the pursuer that they had been supplied with No. 2 oil, instead of with No. 1 oil, for which they alleged they had contracted with the defender at fivepence per gallon, and they withheld payment of a portion of the account for oil due by them to the pursuer. The pursuer explained to Mr Hutton that he knew nothing of the order except what appeared from the defender's order-book, of which he gave Mr Hutton an extract. Mr Hutton thereafter shewed this extract to the defender, and the defender, on the extract being shewn to him, in the presence and hearing of Hutton and his wife, on or about 5th August 1887, and in Hutton's shop at New Row, Dunfermline, falsely and calumniously stated of and concerning the pursuer, that 'it was very mean of Mr Fraser to try and throw the blame on him after he had reaped the benefit,' by which the defender intended to convey, and did convey, the insinuation and false accusation against the pursuer, that he knew that Mr Hutton had ordered No. 1 quality, but that he had nevertheless supplied No. 2 quality, and thereby knowingly cheated and defrauded Mr Hutton, and acted dishonestly towards him, or did falsely and calumniously use words to that effect, to the loss, injury, and damage of the pursuer. Both Hutton and his wife distinctly understood and believed, from the said statement by the defender of and concerning the pursuer, that the pursuer had defrauded and cheated, or tried to defraud and cheat, or act dishonestly towards them." (Cond. 4) "Mrs Hutton, believing that the pursuer and defender were parties to the alleged fraud and dishonesty, threatened to prosecute both of them criminally, to which threat defender falsely and calumniously replied in the presence and hearing of Mr and Mrs Hutton, and at the time and place aforesaid, that 'if the worst came to the worst, he would speak the whole truth about the matter,' by which he insinuated against the pursuer that he, the defender, was innocent of the alleged fraudulent and dishonest acting of the pursuer, and that pursuer was alone guilty of it, or did falsely and calumniously use words to that effect, of and concerning the pursuer, to his loss, injury, and damage." (Cond. 5) "The defender in making the foregoing statements has falsely and calumniously slandered the pursuer, and has injured him and his firm in their business

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dealings with Mr Hutton and other customers. The pursuer believes and avers that the defender was the author of the complaint made by Mr Hutton to the pursuer, in order to deprive pursuer of his custom, and secure it for himself. The defender, it is further believed, has circulated his said slanderous statements against the pursuer in reference to Mr Hutton's order among a number of persons for the purpose of damaging the pursuer's business. The pursuer has suffered loss in his business, and his character as an honest merchant has been seriously affected through the fault of the defender."

The pursuer pleaded;—The defender having made false and calumnious statements of and concerning the pursuer as condescended on, to his loss, injury, and damage, the pursuer is entitled to reparation as concluded for, with expenses.

The defender pleaded, *inter alia*, that the pursuer's statements were irrelevant.

The pursuer proposed the issue quoted below.*

On 19th November the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that there is no issuable matter stated in the record: Disallows the proposed issue: Dismisses the action, and decerns: Finds the defender entitled to expenses," &c.

The pursuer reclaimed, and argued;—The statements which the defender had made about the pursuer, as innuendoed, entitled the pursuer to an issue. Unless the innuendo was utterly extravagant the Court would not prevent the case going to a jury. Comparatively innocent looking words might conceal an atrocious slander.[1]

Argued for the defender;—The statement set forth in cond. 3 could not possibly bear the innuendo put on it. An innuendo, to entitle a pursuer to an issue, must be a reasonable inference from the words founded on. Here it was not. The statement in cond. 4 would no doubt bear the construction that the pursuer and the defender had together been guilty of a conspiracy to cheat the pursuer's customers, but that was not the innuendo contended for.

LORD JUSTICE-CLERK.—It is no doubt within the power of any person who brings an action for defamation of character, not merely to found on the words of which he complains, but to put upon these words a construction which he says they bear and were intended to bear; and in general, if the words will fairly bear the innuendo which is put on them, we are not to weigh the words in very nice scales. But, on the other hand, the words themselves must be fairly susceptible of bearing the libellous interpretation which the pursuer says they were intended to have.

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* "Whether, on or about the 5th day of August 1887, and within the shop at New Row, Dunfermline, of James Hutton, grocer, and in the presence and hearing of the said James Hutton and his wife, the defender did falsely and calumniously state of and concerning the pursuer, that 'it was very mean of Mr Fraser (the pursuer) to try and throw the blame on him after he had reaped the benefit,' and also that, 'if the worst came to the worst, he would speak the whole truth about the matter,' meaning thereby that the pursuer had knowingly supplied to the said James Hutton a quantity of oil of No. 2 quality in fulfilment of a contract made between the pursuer and the said James Hutton for the supply of a quantity of oil of No. 1 quality, which is superior in quality and higher in price to oil of No. 2 quality, and had thereby cheated and defrauded the said James Hutton, or tried to cheat and defraud the said James Hutton, and to act dishonestly towards him; or did falsely and calumniously use words to that effect, to the loss, injury, and damage of the pursuer?"

[1] Inglis v. Inglis, Feb. 24, 1866, 4 Macph. 491, 38 Scot. Jur. 227; Broomfield v. Greig, March 7, 1868, 6 Macph. 563, 40 Scot. Jur. 299.

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Morris.

In this case I think that the conclusion at which the Lord Ordinary has arrived is the right one. The words complained of here will not, I think, bear the interpretation which the pursuer desires to put upon them.

The pursuer's averments amount substantially to this,—He is a grocer in Dunfermline, and among other things he deals in oil. He has two qualities of oil—an inferior and a superior quality. Among his customers were two persons of the name of Hutton, and they gave him an order for oil. The order was given to the defender, who at that time was employed as traveller by the pursuer. He took the order, and entered it in his order-book. The entry in the order-book was for the inferior quality of oil known as No. 2, and the No. 2 quality was accordingly furnished to the Huttons, and was charged for as that quality. But the Huttons afterwards alleged that their order was for the superior or No. 1 quality of oil, and at the price charged for the No. 2 quality, and that it was a mistake on the part of the defender to enter No. 2 quality in his order-book as the quality of oil that had been ordered. Then the question arose as to how the mistake came about. The pursuer when challenged by the Huttons said he obeyed the order as he found it entered in the order-book, and in proof of the truth of his statement he gave them an extract from the book. They then seem to have shewn the extract to the defender, and he then appears to have made use of the words of which the pursuer complains, that "it was very mean of the pursuer to try and throw the blame on him after he had reaped the benefit." That is the whole of the first statement. I do not think that these words will bear the construction which the pursuer seeks to put on them. I do not think that they imply that there was any fraud in the matter at all. Probably the defender thought that the accusation was one of carelessness in the business, and he resented that.

But then comes the other statement, that on another occasion the defender made the remark that "if the worst came to the worst he would speak the whole truth about the matter." I do not think that these words will bear the innuendo sought to be put upon them. I do not think they imply anything of a fraudulent nature, unless it were averred that these two men had for a long time been engaged in a course of fraud, and there is no such allegation. I think this nothing more than a foolish squabble, and that the Lord Ordinary has taken the right view.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK.—I daresay your Lordships are right, and I am quite sure that the judgment proposed is the best for both parties, but I have had great doubts whether the proper course is not to send this case to a jury, and I cannot say that these doubts have been altogether removed.

LORD YOUNG was absent.

THE COURT adhered.

RHIND, LINDSAY, & WALLACE, W.S.—WALLACE & BEGG, W.S.—Agents.

No. 84.
—
Feb. 25, 1888.
Clark *v.* Keirs.

ANDREW CLARK, Pursuer (Respondent).—*C. S. Dickson.*
FINLAY KEIR AND WALTER KEIR, Defenders (Appellants).—*Salvesen—Shennan.*

Lease—Hypothec—Hypothec Abolition Act, 1880 (43 *Vict. c.* 12), *sec.* 1—*Houses and land separately let by one writing—Invecta et illata—Cattle.*—A proprietor granted a written lease of a dwelling-house, with byres and other offices, "for one year from Whitsunday 1887 till Whitsunday 1888 at the rent of £30 sterling, payable at Martinmas, also three grass fields . . . 25 acres, till Martinmas, at the rent of £70 sterling, payable at Martinmas." The house and offices were not on the fields let, but on separate though adjoining lands. *Held* (1) that the house and offices were let separately from the fields, and therefore that the Hypothec Abolition Act did not apply to them, and (2) that the landlord was entitled to sequestrate cattle in the offices.

2D DIVISION.
Sheriff of Lanarkshire.
1.

BY memorandum of lease, dated 22d January 1887, Andrew Clark, farmer, High Possil, near Glasgow, let to Finlay Keir and Walter Keir, dairymen, "the dwelling-house of Colston, with byres, milk-house, three stalls in stable, and garden, for one year, from Whitsunday 1887 till Whitsunday 1888, at the rent of £30 sterling, payable at Martinmas, also three grass fields, namely, West Hill, Barn Park, and Todhole Park, 25 acres, till Martinmas, at the rent of £70 sterling, payable at Martinmas."

The Keirs entered into possession of the subjects.

On 12th November 1887 Clark presented a petition to the Sheriff against the Keirs praying for sequestration of the defenders' effects, so far as subject to the pursuer's hypothec, in the dwelling-house, byres, milk-house, and stable, in security and for payment of the £30 as the unpaid year's rent from Whitsunday 1887 to Whitsunday 1888, and for warrant to sell.

The Sheriff-substitute (Erskine Murray) granted warrant to cite the defenders, and " meantime sequestrates and grants warrant to officers of Court to inventory and secure as craved."

The execution of sequestration, dated 14th November 1887, shewed that the pursuer had attached, besides household furniture, the bestial in the byres, consisting of twelve milch cows, three queys, and three calves.

The Keirs lodged defences, in which they pleaded;—The bestial are not now liable to the law of hypothec, nor the subjects in any buildings on the farm.

The Sheriff-substitute, on 10th December 1887, granted warrant to sell " as many of the effects sequestrated as would pay the £30 rent."

The defenders appealed to the Sheriff.

On 7th January 1888 the Sheriff (Berry) adhered.*

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* " NOTE.—I think, with the Sheriff-substitute, that the pursuer is entitled to the remedy of sequestration for the rent due at Martinmas of the house and buildings connected therewith. If there had been one letting of the house and fields, the case would have fallen under the provisions of the Hypothec Abolition Act of 1880, and no right of hypothec would have existed. Here, however, although no doubt in one document, we have separate lettings for the house and buildings on the one hand and for the fields on the other, separate rents are payable for these two sets of subjects, and there are separate periods of duration, the lease of the house and buildings extending to Whitsunday 1888, while that of the fields expired at Martinmas last, and when this petition for sequestration was brought the lease of the fields was at an end. In these circumstances I think that the case, in as far as regards the house and buildings, does not fall within the operation of the Act of 1880, and that the pursuer is entitled to

No. 84.

Feb. 25, 1888.
Clark v. Keirs.

The defenders appealed.

It was stated at the bar that the houses and offices were not situated in the fields let. They were on separate but adjoining lands.

Argued for the defenders;—The sequestration was incompetent in respect of the Hypothec Abolition Act, 1880.* There was one lease and one subject. The houses and fields were let as one to dairymen for the purposes of their business. The buildings were a necessity for the profitable use of the fields. The fact that separate rents were stipulated for made no difference. It was a formal separation, but gave the respondent no right to treat the cattle which were to feed on the fields as subject to hypothec for the rent of the houses. The case was the same as if the whole subjects had been let for the *cumulo* rent of £100.

Argued for the pursuer;—The subjects were different, a house and offices, and grass lands. These were capable of being enjoyed separately, and were let separately for different rents on contracts with different terms of endurance. It was of no consequence that these contracts were expressed in the same paper, or that the term of entry was the same.

LORD JUSTICE-CLERK.—I think there is no ground for disturbing the decision of the Sheriff. There is here indeed one transaction, but in two parts. I think the buildings are not within the category referred to in the section of the statute. They are not on the lands in point of fact, and the sequestration for the rent of the houses was competent. I am for adhering to the judgment of the Sheriff.

LORD CRAIGHILL.—I am of the same opinion, and have felt no difficulty. It appears to me that there were two subjects let—the house, byres, and garden on the one hand, and the grazing fields on the other. There was one rent for the one and another for the other. The terms were not the same, the term of expiry being in the one case Martinmas and in the other Whitsunday. It seems to me, however, that there is as little difficulty as if there had been one lease for the one and another lease for the other.

Further, the houses are not in fact upon the ground. They are separate from it.

LORD RUTHERFURD CLARK.—I also think that the Sheriff is right.

LORD YOUNG was absent.

THE COURT refused the appeal, and affirmed the judgment of the Sheriff.

JAMES COUTTS, S.S.C.—GILL & PRINGLE, W.S.—Agents.

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sequestration for the rent of the house and buildings. The Sheriff-substitute, in the latter part of his note, says that he abstains from expressing an opinion as to whether the cattle belonging to the defender are liable to sequestration for the rent of the house and buildings. But it has been pointed out to me that the cattle are included in the inventory, and I have been asked to express an opinion on the point. I think that under the head of *invecta et illata* the cattle are liable to sequestration as being property of the tenant in the byres or stables belonging to the landlord for the rent of which he seeks sequestration."

* The Hypothec Abolition (Scotland) Act, 1880 (43 Vict. cap. 12), provides (sect. 1), "From and after 11th November 1881 . . . the landlord's right of hypothec for the rent of land, including the rent of any buildings thereon, exceeding two acres in extent let for agriculture or pasture shall cease and determine. . . ."

No. 85.

Feb. 29, 1888.
Milne v. Leslie.

JAMES MILNE, Pursuer (Appellant).—*D.-F. Mackintosh—M'Lennan.*
JAMES LESLIE, Defender (Respondent).—*J. C. Thomson—Ferguson.*

Administration of justice—Law-agent—Sheriff—Small-Debt Court—Small-Debt Act, 1837 (1 *Vict. cap.* 41), *secs.* 14 *and* 15—*Law-Agents Act*, 1873 (36 *and* 37 *Vict. cap.* 63), *secs.* 2, 13, *and* 16—*Interdict.*—The Small-Debt Act, 1837, sec. 14, enacts that "no procurators, solicitors, nor any persons practising the law shall be allowed to appear or plead for any party without leave of the Court upon special cause shewn, . . ." Sec. 15 enacts that "any defender, who has been duly cited, failing to appear personally, or by one of his family, or by such person as the Sheriff shall allow, such person not being an officer of Court, shall be held confessed, and the other party shall obtain decree against him; and in like manner, if the pursuer or prosecutor shall fail to appear personally, or by such person as the Sheriff shall allow, such person not being an officer of Court, the defender shall obtain decree of absolvitor, . . ." The Law-Agents Act, 1873, sec. 16, enacts,—"From and after 1st February 1874 no person shall be allowed to practise as an agent in the Court of Session or any Sheriff Court until he shall have subscribed the roll of agents practising before such Court."

In a petition presented by an enrolled law-agent in a Sheriff Court for interdict against a person who was not an enrolled law-agent practising as a law-agent in the Small-Debt Court, *held* (*diss.* Lord Rutherfurd Clark) (1) that sec. 16 of the Law-Agents Act, 1873, had no application to persons allowed by the Sheriff to appear for others in the Small-Debt Court, and (2) that it was entirely within the discretion of the Sheriff to grant such leave to any person not an officer of Court.

Opinions (*per* the Lord Justice-Clerk and Lord Young) that an application for interdict was not an appropriate remedy in such cases. *Opinions* (*per* Lord Craighill and Lord Rutherfurd Clark) *contra.*

2D DIVISION.
Sheriff of Aberdeenshire.
M.

JAMES MILNE, an enrolled law-agent, practising at Fraserburgh, raised an action before the Sheriff Court at Peterhead, craving the Court to interdict James Leslie, "writer, Fraserburgh, from practising as a law-agent for or on behalf of any litigant or litigants in any of the Courts to be held at Fraserburgh, or elsewhere within the city or county of Aberdeen, by the Sheriff of Aberdeen, Kincardine, and Banff, or his Substitutes, until such time as he shall have legally qualified himself so to do."

The defender was a notary-public, and practised as such in Fraserburgh. He was not an enrolled law-agent.

The pursuer averred that the defender had unwarrantably, illegally, and publicly usurped the functions of a law-agent in the Sheriff Courts held at Fraserburgh; and particularly, that he had been in the habit of appearing and conducting causes for or on behalf of litigants, whereby the pursuer had sustained loss and damage; further, that the defender threatened to continue the practice.

The defender admitted that he had, "by leave of the Court, occasionally appeared in small-debt cases."

The pursuer, in reply to this averment, averred that it was *ultra vires* of the Court to give the defender leave to appear.

The pursuer pleaded;—(1) The defender not having signed the roll of law-agents kept for the county of Aberdeen, and not being qualified to do so, he is not entitled to practise as an agent in the Sheriff Court of the said county, and should therefore be prohibited from so doing. (2) The defender having unwarrantably and illegally assumed the name of a solicitor, or at least usurped the functions of a law-agent, the pursuer is entitled to interdict against him in terms of the prayer of the petition, with expenses. (4) *Separatim*, The leave of the Court, even if it had been granted to the defender, being *ultra vires*, cannot be pled by him as a defence to this action.

The defender pleaded that the action was irrelevant and incompetent.

The Sheriff-substitute (Brown), on 22d October 1887, pronounced this interlocutor:—"Finds that the pursuer has a sufficient title to sue the present action: Finds that the defender has not subscribed the roll of agents practising before the Court of the Sheriff of Aberdeen, Kincardine, and Banff, at Fraserburgh or elsewhere within the city or county of Aberdeen, and therefore is not entitled to practise in said Court: Therefore ordains the defender to abstain from the acts complained of: Further, instructs the Clerk of Court to refuse the privileges of an enrolled law-agent to the defender," &c.*

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* "NOTE.—The only point which I have felt to present any difficulty in connection with this case is one not raised by the pleadings, but I think requiring serious attention, viz., the question of the jurisdiction of the Court to entertain such an application. The doubt is suggested by the repeal of the Procurators Act of 1865, the 25th section of which gave right to any procurator to complain to the Sheriff in whose Court he is entitled to practise against any person practising in such Court who is not a procurator thereof, and to the provisions of the Law-Agents Act of 1873, placing law-agents within the jurisdiction of the Court, that is, the Court of Session. It may plausibly be contended that it was the intention of the Legislature, especially by the repeal of the Act of 1865, to make the whole question of the status, not only of procurators, but of persons professing to act as such, subject to the supervision of the Supreme Court only. It was pleaded by the pursuer in this case that the provision in the Act of 1865 was to be read as declaratory of the then existing law, and it is just the repeal of the statute without substituting anything in its place in this matter that raises the question whether the Procurators Act of 1865 was a true expression of the law when it passed. I have come to the conclusion, however, although not without difficulty, that the Act does not remove the right of a person possessing the necessary title and interest to have his rights protected by proceedings in the inferior Court, and that what the Law-Agents Act of 1873 makes privative to the jurisdiction of the Court of Session are questions affecting the title to be placed on the register of enrolled law-agents or the liability to be struck off that roll by reason of misconduct. But the defender in this case is admittedly not an enrolled law-agent, and therefore the question raised does not fall within either of the categories just stated, but simply is whether the pursuer is entitled to be protected from patrimonial loss caused by another engaging in practice in the Court without having qualified his right to do so. I do not think that the concluding section of the Act of 1873 (the 26th section) touches the question, for that obviously conserves only the right of inferior Judges in so far as that is necessary to maintain the discipline of their Courts, but I do not see that the right of the Sheriff to give such redress as the pursuer seeks here is withdrawn, either by express enactment or necessary implication.

"In the light of the foregoing remarks it appears clear that the only matter which can be regarded as falling within the merits of the case is the simple fact whether or not the defender is an enrolled law-agent, and that is not matter of dispute. In the view I take of the question of jurisdiction it is not within my province to decide whether as a notary-public he has any right to be put upon the register, the ground of action to which I have given effect simply being that, until he has been put upon the roll, the defender does not qualify the right to practise. It is proper, however, that I should say, with reference to a part of the argument addressed to me on his behalf that, so far as I am aware, there is no practice of sanctioning the appearance, either in the Small-Debt Court or the Debts Recovery Court, of a person to act professionally who does not possess the qualification and the title of a law-agent. Under both Acts there are certain classes of persons who are entitled in their absence to represent the parties to the suit, among which the pursuer is obviously not included, and the 'leave of

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On appeal the Sheriff (Guthrie Smith), on 11th November 1887, recalled the interlocutor of the Sheriff-substitute, and dismissed the action.*

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the Court' is not extended to anyone who, apart from such permission, has not the right to practise. The defender has from time to time appeared in the Court at Fraserburgh, but only on the assumption that he was entitled to exercise the privileges of a law-agent, and it is this unlawful practice which the pursuer now challenges and seeks to bring to an issue.

"The form of action which the pursuer has adopted to put an end to what, quite relevantly as I think, he represents to be an invasion of his legal rights, has given me some consideration, and in the end I have come to be of opinion that it should not be the course followed. In a question of interdict it is an essential element in the course of action proposed to be interdicted and prohibited that it shall be illegal and wrongful. But any acts performed with the sanction of the Court, such as appearing in judicial proceedings without objection from any quarter, do not possess that character of illegality and wrongfulness that is necessary to bring them within the category of acts that may be interdicted. The reason is obvious—a Court of law cannot interdict itself, and it seems to follow that it cannot interdict any act performed under its sanction or authority. In my opinion the actings here complained of must come to an end, but my view is that the decree should not take the form of an interdict but that of an order of Court."

* "NOTE.—The parties to this action are both engaged in the practice of the law in Fraserburgh. The pursuer, who is a law-agent enrolled under the Act 36 and 37 Vict. cap. 63, asks the Court to interdict the defender, who is merely a notary-public, 'from practising as a law-agent for or on behalf of any litigant or litigants in any of the Courts to be held at Fraserburgh or elsewhere within the city or county of Aberdeen by the Sheriff of Aberdeen, Kincardine, and Banff or his Substitutes, till such time as the defender shall have legally qualified himself so to do.' It is perhaps a sufficient answer to the application that the defender neither admits that he has practised, nor apparently does he claim the right to practise, in the ordinary Court of the Sheriff or Debts Recovery Court. He has no interest to make so broad a claim, for the simple reason that at Fraserburgh no ordinary Court is held; and although there is now a monthly Court for both Small-Debt and Debts Recovery cases, it is only as regards the Small-Debt Court that he claims the same privilege as other practitioners. That privilege, however, is very limited, for no one except the parties themselves is entitled to appear in any case without the leave of the Court. The Small-Debt Act (sec. 14), enacts 'That no procurators, solicitors, nor any persons practising the law, shall be allowed to appear or plead for any party without leave of the Court on special cause shewn, and such leave and the cause thereof shall in all cases be entered in the book of causes kept by the Sheriff-clerk.' If the defender is not a procurator I am not sure that he may not be quite accurately described as a 'solicitor' (for in Scotland that is not a *nomen juris* with a fixed technical meaning), and in any case I have little doubt that, being a notary accustomed to give advice and frame deeds, and entitled (under *Aiken* v. *Kirk*, 3 R. 595) to charge the same *ad valorem* and other fees as the members of any incorporated society of law-agents, the defender is a person practising 'the law' within the meaning of the statute. I cannot, therefore, interdict him from exercising such right as the statute gives him in the Small-Debt Court; and in the Debts Recovery Court there is no dispute between the parties requiring to be settled by interdict—the right not being claimed.

"I am also not satisfied that the pursuer has either title or interest to make the application. The parties are two rival practitioners, but the pursuer *fails* to shew what benefit he will gain by the defender being driven from the field. The usurpation of a practice may be a breach of law but it is for the public authority to enforce the law, and no private citizen is entitled to complain of its violation without shewing that it directly affects him in his personal and patrimonial rights. Interdict then becomes an appropriate remedy, for *it is better* to prevent a wrong than leave the party to a claim of damages after it is accom-

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The pursuer appealed, and argued;—In point of fact it could be proved that the defender had not only practised in the Small-Debt Court, but in the Debts Recovery Court, and had even done so since the action was raised. The pursuer had plainly an interest to prevent this competition with him of a person having no right to practise. The first question was whether the defender was entitled with the Sheriff's leave to practise in the Small-Debt Court. That question fell to be decided on the construction of section 16 of the Law-Agents Act, 1873. The effect of that provision, the object of which was to prevent the evil caused by the practising of unqualified persons, was that in order to practise professionally for gain in the Small-Debt Court, which was one of the Courts of the Sheriff, the person so practising must (1) have the leave of the Sheriff in the particular case; and (2) be a qualified agent. The Sheriff's leave was requisite, because the Small-Debt Act of 1837 * had a special exclusion of professional assistance in that Court. The Sheriff could give that leave, but only to a qualified professional man to appear professionally. The enrolled law-agent had a right to practise in that Court

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plished. But here no damage is relevantly averred, or is indeed conceivable, unless we are to suppose that the pursuer has a grant of monopoly.

"In former times we were familiar in Scotland with exclusive trading corporations within burgh, the privileges of which were sometimes enforced by interdict, but always (so far as I am aware) by the corporation itself—never by an individual member. But the object of the Procurators Act was not to create a monopoly, or to call into existence a species of trades union of lawyers. The preamble of the Medical Act (21 and 22 Vict. cap. 90) explains the motive and purpose of all this kind of legislation. It rests on the expediency of enabling persons requiring medical or legal aid 'to distinguish qualified from unqualified practitioners.' The object was the protection of the public, and this is enforced by its being enacted in the case of medical men that a practitioner who falsely describes himself as a duly qualified physician, &c., shall be liable to a penalty of £20, which is recovered in Scotland by the procurator-fiscal or 'any other person' in the mode pointed out by sec. 41. The Procurators Act of 1865 is not so severe. It first declares that an agent possessing a certain qualification may be enrolled in the roll kept by the Sheriff-clerk of the Court where he wishes to practise for the sum of five shillings (sec. 13), and then it enacts that 'no person shall be allowed to practise as an agent in the Court of Session or any Sheriff Court until he has subscribed this roll' (sec. 16). This provision it is of course the duty of the Court to enforce—but as the Sheriff has no access to the roll he is entitled to assume that when audience is claimed by someone whose name is not on the roll the Sheriff-clerk will duly inform him of the fact. It is not to be supposed that this official will neglect his duty in this respect, and if that be so I fail to perceive what useful purpose the proposed interdict will serve. Evidently the time to enforce the statute is in open Court when the claim to appear and plead is actually made, and it is probably this consideration which induced the Legislature to omit from the present Law-Agents Act the provision in the repealed Procurators Act of 1865, that any law-agent might sue out an interdict against an unqualified practitioner. The title of a member to inform the Court of Session of any act of misconduct with a view to the exercise of discipline on a party already on the roll is a different matter. I therefore think that the present application is altogether incompetent, and I abstain from issuing the order on the defender which has been granted by the Sheriff-substitute, because the Act of Parliament is itself a sufficient standing order on the subject."

* The Small-Debt Act, 1837 (1 Vict. c. 41), enacts by sec. 14 that "No procurators, solicitors, nor any persons practising the law shall be allowed to appear or plead for any party without leave of the Court upon special cause shewn, and such leave and the cause thereof shall in all cases be entered in the book of causes kept by the Sheriff-clerk."

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as one of the Courts of the jurisdiction, subject only to this, that there was a disqualification of all professional pleading, which in his case, but his only, could be removed by the Sheriff's leave to appear. The provision of the next section of the same Act* for the appearance of an absent party, by a member of his family, or someone else whom the Sheriff might allow, did not apply at all to persons appearing for a party in the practice of the business of an agent. The object of the Law-Agents Act of 1873 was to check the evil which had grown up of unqualified persons appearing and conducting cases in Court. The defender not having the statutory qualification to appear, the leave of the Sheriff could never supply it. [LORD YOUNG.—Your interdict should be against the Sheriff himself.] It would not be incompetent so to direct it, but that was not necessary. An inferior Judge might be interdicted from unlawfully giving audience to an unqualified person. Interdict directed against the defender was the appropriate remedy. It had been held in early cases that notaries had a right to prevent improper and unqualified persons from practising along with them.[1] In a recent case the right at common law of any enrolled law-agent to have an unsuitable person struck off the roll and prevented from practising had been affirmed.[2] The Law-Agents Act of 1873 provided no pecuniary penalty for unlawful practice such as the defender carried on, which was another reason for holding the remedy of interdict an appropriate one.

Argued for the respondent;—It was not maintained that the respondent had a right to appear in the Debts Recovery Court, but he might lawfully, with the Sheriff's leave, appear in the Small-Debt Court. He was then "such person as the Sheriff shall allow," and it was immaterial to the question that he received payment. It was the public advantage that was to be considered by the Sheriff in such a matter,[3] and not the interest of particular bodies. But even assuming that the public interest required that a notary-public quite able to conduct small-debt cases ought to be debarred from doing so, even with the Sheriff's leave, interdict was not an appropriate process for the purpose. In the first place, the process was one which practically asked the Sheriff to whom it was addressed to interdict himself from allowing the respondent to appear. Again, the only power ever given to an agent to interdict the practice of another was one which was conferred by the Procurators Act, 1865, and had with the rest of that Act been repealed by the Law-Agents Act of 1873.† The proper time and way to object to the respondent was when the appearance was made. The Sheriff, who was the best judge of the matter, could then refuse to hear the respondent if he thought fit.

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* Sec. 15 enacts that "any defender, who has been duly cited, failing to appear personally, or by one of his family, or by such person as the Sheriff shall allow, such person not being an officer of Court, shall be held confessed, and the other party shall obtain decree against him; and in like manner, if the pursuer or prosecutor shall fail to appear personally, or by such person as the Sheriff shall allow, such person not being an officer of Court, the defender shall obtain decree of absolvitor, unless in either case a sufficient excuse for delay shall be stated."

[1] Mitchell v. Greig, Dec. 7, 1815, F.C.; Procurators of Paisley v. Craig, March 8, 1823, 2 S. 249; Sands v. Meffan, Jan. 20, 1829, 7 S. 290.

[2] Incorporated Society of Law-Agents v. Clark, Dec. 3, 1886, 14 R. 161.

[3] Graham v. Society of Advocates of Aberdeen, March 6, 1841, 3 D. 813.

† The Procurators (Scotland) Act, 1865 (repealed by the Law-Agents Act, 1873) (28 and 29 Vict. c. 85), provided (sec. 25)—"Any procurator shall be entitled to complain to the Sheriff in whose Court he is entitled to practise against any person practising in such Court who is not a procurator thereof; and the Sheriff shall, on such complaint being proved to his satisfaction, interdict such person from practice."

At advising,—

Lord Young.—This is a case of an unusual kind, and therefore of some interest. The pursuer of the application for interdict is an enrolled law-agent in Aberdeenshire, and he practises at Fraserburgh. He seeks to have interdict to prevent the defender, who is not an enrolled law-agent, "from practising as a law-agent for or on behalf of any litigant or litigants in any of the Courts to be held at Fraserburgh or elsewhere within the city or county of Aberdeen by the Sheriff of Aberdeen, Kincardine, and Banff, or his Substitutes, until such time as he shall have legally qualified himself so to do."

It is admitted that the defender is not an enrolled law-agent, and also that he is not entitled to practice in the Debts Recovery Court or in the ordinary Court of the Sheriff. But he contends that he is entitled to "act for" or "represent" others in the Small-Debt Court. I use these expressions because we have seen from the argument that a good deal may depend on the particular expression. "Acting as a law-agent" is one form of expression which has been used, and "represent" or "appear for" others with the permission of the Sheriff under the Act of Parliament is another. At all events, what the defender contends for is the right to represent others or appear for them, with the leave of the Sheriff, under the Small-Debt Act; and the question is whether he has that right. I shall therefore address myself to that interesting question in the first place, but I shall also have something to say on the form of the remedy.

The Small-Debt Act of 1837 was intended to confer a boon on the lieges by enabling them in a summary manner and at a small cost to recover small debts or defend themselves against small claims. For that purpose a special protection against law-agents is extended to them by section 14 of the statute. Of course in 1837, as now, procurators, solicitors, and others lawfully practising the law, were entitled to appear for others and represent them, and therefore without a prohibition they would in the exercise of their ordinary right have been entitled to appear for litigants in the Small-Debt Court. But the Legislature intended benignantly to protect the public from them, and prohibited law-agents from practising in that Court, as they would otherwise have been entitled to do, and so deprived them of the right which otherwise their professional position would have given. That prohibition, however, has attached to it the qualification that on special cause shewn law-agents may appear in the Small-Debt Court. The Legislature contemplated that there might occasionally be wealthy litigants in the Small-Debt Court, and serious questions to be argued there (and we have all known such cases), and therefore put it in the discretion of the Sheriff to remove that disability which in the interest of the public it had laid upon law-agents.

Again the Legislature, still compassionating the ordinary poor litigants, does not insist absolutely upon their appearing personally. The general rule is that they shall, but the Sheriff is permitted to relax that rule and to allow either party to appear and be represented by a member of his family or "by such person as the Sheriff shall allow, such person not being an officer of Court." That provision, like any provision of such a character, may be abused, but the general intention of it is plain, and is that the poor litigant is to be protected against legal practitioners, whose charges might be considerable, and be represented,

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with permission of the Sheriff, by any person not being an officer of Court. We are told that the consequence has been that a number of practitioners have started up in the Small-Debt Courts of large towns who are thought expert in ascertaining the subject of dispute, and representing the parties in Court, and examining their witnesses, and who ask only a moderate remuneration. This may become an abuse, but may be a great good, and I firmly believe it has been a prevailing good on the whole. The services of people quite competent for the work have been procured. Whether they have any action for their hire is another matter. It does not arise here. The point is that they are willing to give their services for what the litigants are willing to give them. This Mr Leslie, it appears, has been in the way of representing litigants in the Small-Debt Court with the leave of the Sheriff, and I see no illegality in his doing that. The permission may have been given, indiscreetly or not. I am not the judge of that. The Sheriff is the best judge of whether it should be given or withheld. If he gives it, he does so in the interest of the public, as I apprehend, and in the discharge of his duty to the public, and so also if he withhold it. I cannot pronounce that in giving permission to Mr Leslie to perform this part he would have been acting illegally.

It is, I think, clear that this matter stands as I have described it under the Small-Debt Act of 1837, and I rather understood the Dean of Faculty to admit that, and to put his case on the Law-Agents Act of 1873. I think the provision of that Act which is founded on has no bearing at all upon the matter, and I am quite certain it was not intended to have any, or to interfere at all with the Small-Debt Act of 1837. The particular clause of the Act of 1873 which is founded on is the 16th, which is a section having regard to an institution established by that Act, namely, the roll of agents practising before each Court in Scotland. Before 1873 the practitioners in each Sheriff Court were admitted by that Court, and there was no other authority for doing so than the Court itself, while the agents admitted to the Supreme Court were in like manner confined to practice in that Court itself. The Act of 1873 requires all law-agents, wherever they are to practise, to be admitted in the same way, by the Court of Session, and being so admitted they may practise anywhere in Scotland. There is to be a roll of agents practising in each Sheriff Court and in the Court of Session, and section 16, which never was intended to bear upon the Small-Debt Act, and I think does not bear upon it, relates to that roll, providing that "no person shall be allowed to practise as an agent in the Court of Session, or in any Sheriff Court, until he shall have subscribed the roll of agents practising before such Court, or after his name shall have been struck off such roll, unless the same shall have been subsequently restored thereto."

I must say I think it requires some ingenuity to make that section bear upon the Small-Debt Act, which otherwise it is conceded is clear upon the matter.

I am therefore clearly of opinion that the defender is entitled with the Sheriff's leave—and he admits he has no right without it—to appear for and represent the interest of any pursuer or defender in the Sheriff's Small-Debt Court, and I assume that the Sheriff will have regard to the interest of the litigants in considering whether to give leave or not.

As to the Debts Recovery Court and the ordinary Sheriff Court, I am not apprehensive that the Sheriff will give permission to appear in these Courts to anyone not duly enrolled as a law-agent in his Court. The Sheriff says he will not grant such leave. Even if I thought this were the right form of process I would not be disposed to entertain an application to interdict a person from appearing, or the Sheriff from allowing him to appear, in the Debts Recovery or ordinary Court on such a statement as is before us here.

On the form of process I entirely agree with the Sheriff-principal. To some extent I agree also with the Sheriff-substitute, when he says the case is not one for an interdict. The proper result of that view is, I think, the dismissal of the application. He says the proper view is that the application is for an order of Court. Well then, if the application is for an order of Court, and the Sheriff-substitute grants, but the Sheriff refuses it, it is to me a novelty that the person applying for the order and being refused it can appeal the refusal to this Court as in an ordinary litigation.

But on the form of process I agree entirely with the Sheriff-principal that the proper time to take the objection to Leslie's appearance is when the appearance is made. I do not think it is a case for application for an interdict. I am strengthened in that opinion by the fact that whereas by the Act of 1865 there was provision made for an application for such an interdict, that provision has been repealed. It was, I suppose, found inconvenient, and it was therefore repealed.

On the whole matter I am of opinion that this application for interdict ought to be refused *de plano*, and with expenses.

Lord Craighill.—I concur with Lord Young. I have no difficulty as to the Small-Debt Act. I do not think that section 16 of the Act of 1873 affects it. The latter Act assumes two things in all its provisions (1) that enrolment gives the right to appear in all Sheriff Courts; and (2) that no other title than that which is conferred by the statute is required for practising in any of the Courts to which its provisions apply. If these views are right then so far as regards appearance in Court that Act can neither give nor take away a right otherwise possessed.

The Small-Debt Act of 1837, by section 14, enacts that procurators, by which we now mean law-agents enrolled under the Act of 1873, shall not appear for a party in the Small-Debt Court "without leave of the Court upon special cause shewn." There is nothing in the Act of 1873 which overcomes that. The case provided for in the Act of 1873 has no application to the provisions of the Act of 1837. It provides that agents must be enrolled, and once an agent is enrolled he has a title to appear. Nothing more is needed to make certain his right of audience. That is not the case with the Small-Debt Act. There an enrolled law-agent is not entitled to audience. That which gives the right there is the leave of the Sheriff. On that view I come to the conclusion that there is no ground for the interdict sought. In fact, though not in form, the thing sought is to interdict the Sheriff from giving his permission to the defender to appear. I think there is no warrant for that. The Sheriff is the judge of that. He is charged with the protection of all concerned. If there is any hardship the Sheriff's duty is to prevent it. If he do not give leave, no one appearing for another has audience, and his leave, if given, is the only title.

As to the Debts Recovery Court the defender does not insist in any right to appear there. But I think there is an interest in an enrolled law-agent to object to the right of a person who is not such to appear. Such a person is an unauthorised competitor with him. I think that whether there be any other remedy or not we ought not to conclude that he cannot come to the Court for an interdict against such a person appearing. But in doing so the enrolled law-agent is not acting in the public interest as has been suggested. He is acting for his own interest and is protecting himself.

Lord Rutherfurd Clark.—After as much consideration as I have been able to give to this case, I am disposed to take a different view from that which has been expressed by Lord Young and Lord Craighill.

It is now certain that no one but an enrolled law-agent is entitled to practise in any Sheriff Court. I think that was the law before 1873 and before 1865. I am not concerned to inquire whether that was the common law rule or not. It is now matter of statutory provision that no one but a duly enrolled law-agent may practise in any Sheriff Court.

That being clear, the next thing to consider is to what Court that statutory provision applies. I see no exception to the generality of the words. The Small-Debt Court is one of the Sheriff's Courts as much as the Debts Recovery Court or the ordinary Court, and hence it seems to me a matter of plain statutory declaration that no one is entitled to practise in it as a law-agent except a duly enrolled law-agent.

It is true that in the Small-Debt Act there exists a certain disqualification which is applicable to law-agents. They are not entitled as of right, as they are in the other Courts, to appear for their clients in the Small-Debt Court. They are only entitled to do so with the leave of the Sheriff given in the particular suit. This cannot take the shape of a general permission. The permission is limited to each particular case. But it seems to me to follow from what I have said that the Sheriff has no right to give leave to anyone to practise as an agent in his Court except only an enrolled law-agent. For the Sheriff cannot confer a right to practise. It is a right given by a statute to certain persons, and he can only give leave to them to appear in particular suits. Therefore I think that the law-agent is the only person entitled to practise in the Sheriff Court, and that he is the only person to whom the Sheriff can give leave to act as a law-agent in any particular suit in the Small-Debt Court.

The defender is not a law-agent, but he maintains that he is entitled to take the cases of people who may employ him in the Small-Debt Court, and conduct them on their behalf for remuneration. I cannot see that that is anything else than practising as a law-agent. It is true that he only claims to do so with the leave of the Sheriff, but the Sheriff is, in my opinion, not entitled to give him right to practise as a law-agent.

It is said that the Sheriff may do so under section 15 of the Small-Debt Act, 1837. I cannot read that as applying to the employment of law-agents. They had been dealt with under section 14, which provides for their appearance only by leave given for the particular case. The 15th section does not relate to persons practising as law-agents. It enables the Sheriff to give decree *condemnator* or *absolvitor* if the party does not appear personally, or by a member of his family, or by such other person as the Sheriff shall allow. It enables the Sheriff to allow another person to appear for a pursuer or defender. But I do not think that in the exercise of that power he is entitled to permit a person to practise as an agent. I do not say to what extent his power is limited, or how it is to be exercised. I only say that it is not permissible under that section to

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allow a person to practise as an agent who has not the legal qualification. The Sheriff cannot dispense with or set at naught a statutory provision as to the qualification of the persons who may appear in that capacity. To hold otherwise seems to be equivalent to holding that the Sheriff may create a special class of law-agents to act as legal practitioners before the Small-Debt Court.

It follows, if I am right in what I have said, that an unqualified person who appears in the Small-Debt Court is a person doing an unlawful thing, and if so, that unlawful thing ought to be stopped.

It requires little interest to give a title to complain of what is unlawful. But the pursuer here has, I think, a plain title and interest to stop an unlawful thing which interferes more or less with his practice of his profession and his earnings in it.

Therefore, as to practising in the Small-Debt Court, I think interdict should be granted.

There is little importance in the question as to the Debts Recovery Court. The Sheriffs both think, and there is no doubt, that the defender is not entitled to practise in it. The respondent himself does not contend that he is, and has stated at the bar that he does not intend to claim so to do.

LORD JUSTICE-CLERK.—I so entirely concur with Lord Young in the result at which he arrives, and in the reasons for which he arrives at it, that it is unnecessary for me to enter at length into this question, though it is one of some public and some professional interest.

In the first place, I think it is clear that this application cannot be sustained under the Act of 1837. Under that Act we have not a leave given to a qualified agent to appear, but a statutory prohibition against his doing so except with the leave of the Sheriff. From plain views of expediency, the Court is to be one not of lawyers, but a popular tribunal where each party is to plead his own case, but in which the Sheriff may give leave to appear to one who is not himself a party. I cannot, for my part, say that the Sheriff, if he give leave to appear to one who makes a charge for his services, is doing an illegal thing.

In the next place, I think that the Law-Agents Act of 1873 does not apply to the matter at all. Its object was to provide that a qualification for one Court should be a qualification for the other Courts throughout the country. It was not intended to interfere with the Act of 1837, and particularly with the Sheriff's discretion to permit one not himself a party to appear, and I think it has not done so.

As to the Debts Recovery Court, no case with regard to it has been established. It will be time enough to decide it when it arises. It does not seem a matter for much doubt, for the respondent does not maintain that he has a right to act for clients in the Debts Recovery Court.

As to the form of the remedy, I am strongly of opinion that interdict is here an inconvenient, and I rather think it is an incompetent, remedy.

THE COURT dismissed the appeal, and affirmed the judgment of the Sheriff.

J. D. MACAULAY, S.S.C.—BOYD, JAMESON, & KELLY, W.S.—Agents.

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Menzies v. Whyte.

ROBERT MENZIES, Pursuer (Appellant).—*M'Lennan.*
WILLIAM THOMAS WHYTE, Defender (Respondent).—*Gunn.*

Reparation—Lease—Urban tenement—Injury to business by operations of neighbouring occupier.—Where a tenant of an urban tenement sues his landlord for damages in respect that his rights as occupant have been encroached on by operations carried on by the proprietor of a neighbouring tenement, he must aver, in order to found a relevant action, that he has applied to his landlord to have his rights protected, and that the landlord, in breach of his duty, has refused, or unduly delayed, to protect them.

1st Division.
Sheriff of the Lothians.
M.

ROBERT MENZIES, fishmonger, Leith, raised an action in the Sheriff Court at Edinburgh against William Thomas Whyte, C.A., Edinburgh, concluding for payment of £50.

The pursuer averred that the defender let to him the premises, No. 173 Morrison Street, at a rent of £15 per annum, for three years, from Whitsunday 1887, to be occupied by him as a fishmonger's shop.

He averred;—(Cond. 3) "The pursuer entered into possession on 1st July 1887. On the 4th of that month, being three days after pursuer's entry, operations were commenced to take down the old buildings immediately to the west of pursuer's said premises, and a new tenement is in the course of erection on the site. In these operations there has been erected on the west side of pursuer's front shop a hoarding of about six feet high, and which extends from the front wall of said shop and into Morrison Street 36 feet or thereby. Said hoarding encroaches on the front wall of pursuer's said shop, cutting off or covering part of his signboard; besides the hoarding is so defective that it does not afford protection against lime and other dust from said operations reaching pursuer's said premises, and destroying his goods. The drainage pipe within the front railing of pursuer's said premises, and connected therewith, has been cut, and the pursuer deprived of the use thereof. Part of the oven in the pursuer's back shop, and which oven is required by him in his business, has been taken down, and an opening made, through which any person may enter the premises. As said new building is proceeded with, the pursuer will be deprived of the window light in the centre room or division of said premises. By these proceedings the pursuer has been deprived of the use of said shop and premises, and he has been compelled to leave the same, and relinquish his business." (Cond. 4) "The pursuer has sustained loss and damage through being obliged to leave the shop, and abandon his business there, in the establishment of which he has incurred considerable expense, and which business was turning out to be very lucrative. It was the duty of the defender to have protected the pursuer in the beneficial occupancy of said shop and premises, and having failed in that duty, the defender, as pursuer's landlord, is liable in damages to the pursuer, which he estimates at not less than £50 sterling, the sum pursued for. The pursuer has repeatedly complained to the defender, and informed him that the pursuer was unable to carry on his business, and that he would be compelled to leave the premises unless the grounds of complaint were removed, but the pursuer has received no redress."

A letter, dated 12th August 1887, from the pursuer to the defender, and quoted in full by the Lord President in his opinion, p. 472, was lodged in process.

The pursuer pleaded;—(1) The defender having let to the pursuer the premises as condescended on, and the pursuer having been compelled to leave the same through his being deprived of the use thereof, the pursuer is entitled to damages as concluded for. (2) The defender being proprietor of the premises let by him to the pursuer, is bound to protect him in the useful possession thereof, and the defender having failed to do so, and the pursuer having been compelled to remove from the same under the circumstances condescended on, the pursuer is entitled to decree as craved, with expenses.

The defender pleaded;—(1) This action is irrelevant as regards the defender, and should be dismissed, with expenses. (3) The operations complained of not being under the control of the defender, he is not responsible therefor, and the defender should be assoilzied, with expenses. (4) The operations complained of were not such as to warrant the relinquishment of the business by the pursuer, and the closing of the premises by him, and any loss sustained by the pursuer by cessation of profit, proceeding from the due exercise of proprietary rights, must be borne by the pursuer himself, and the defender should therefore be assoilzied, with expenses.

On 21st October 1887 the Sheriff-substitute (Rutherfurd) pronounced this interlocutor:—"Finds that the pursuer's averments are not relevant or sufficient to infer liability for damages on the part of the defender: Therefore dismisses the action, and decerns."

The pursuer appealed to the First Division, and argued;—The pursuer had called on the landlord to put a stop to the operations complained of, which were a clear invasion of a tenant's rights, and he had failed to take any steps to do so. The failure was therefore not unintentional on the landlord's part, but wilful, and he was in such circumstances liable in damages.[1]

Argued for the defender;—The tenant had taken the law into his own hands, and shut up his shop. His proper remedy would have been to have intimated to the landlord that failing his stopping the nuisance, he would remove from the premises and hold him liable. He had not done so, and did not aver that he had. The landlord was therefore not liable.[2]

LORD PRESIDENT.—The premises let by the defender to the pursuer were to be occupied by the latter as a fish shop. The allegation of the pursuer is that he entered into possession on 1st July 1887. Immediately after that, viz., on the 4th of that month, certain operations were commenced to take down old buildings immediately to the west of his shop. In consequence of these operations he says that he suffered much inconvenience. A hoarding was erected which, as he alleges, encroached on his shop, and being of defective workmanship, allowed dust and lime to reach his premises, whereby his goods were destroyed. So far it was, I think, admitted by the appellant's counsel that his averments were not relevant, but he relies on what immediately follows. "The drainage pipe within the front railing of pursuer's said premises, and connected therewith, has been cut, and the pursuer deprived of the use thereof. Part of the oven in the pursuer's back shop, and which oven is required by him in his business, has been taken down, and an opening made through which any person may enter the premises." Now, these are undeniably encroachments on the pursuer's right of occupation to which he is not bound to submit, whether they are made by his landlord or any other person. The pursuer being a tenant on

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[1] Ersk. Inst. ii. 6, 43; Deans v. Abercromby, 1681, M. 10,122; Goskirk v. Edinburgh Railway Station Access Co., Dec. 19, 1863, 2 Macph. 383; Laurent v. Lord Advocate, March 6, 1869, 7 Macph. 607, 41 Scot. Jur. 329.

[2] Gardner v. Walker & Donald, July 19, 1862, 24 D. 1430, 34 Scot. Jur. 600.

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a short tenure, would naturally go to his landlord in the first instance. If he had done so, and the landlord had refused to take any steps to stop the nuisance, the action would have been relevant, but in order to make the action relevant it is essential that he should make an averment that he took that course—that he should aver that he called the landlord's attention to the nuisance, and that he asked him to have it remedied. Here, however, the pursuer does not make such an averment in relevant terms. He says in condescendence 4,—"The pursuer has sustained loss and damage through being obliged to leave the shop and abandon his business there, in the establishment of which he has incurred considerable expense, and which business was turning out to be very lucrative. It was the duty of the defender to have protected the pursuer in the beneficial occupancy of said shop and premises, and having failed in that duty, the defender, as pursuer's landlord, is liable in damages to the pursuer." That is not a relevant statement. To make it relevant the pursuer ought to have stated that he applied to the landlord to defend him against the operations complained of, and that the landlord either declined to do so or delayed doing so, so as to amount to a breach of duty on his part. There is no averment of that kind. In place of that he merely refers us to a letter written by him to the defender, which we would willingly embody in cond. 4 if it would make the action relevant. The letter is in these terms:—"By the operations on the tenement, or in the building of a new tenement, adjoining Mr Menzies' shop at 173 Morrison Street, his business has been stopped, and the shop shut. A hoarding has been put up in front of, and close to, and on the front wall of the shop, the window in the centre division of the shop has been broken, and in time will be built over. Part of the back wall has been taken down, and through the opening the shop can be entered. Mr Menzies will claim damages for the stoppage thus put to his business, and being compelled to leave the shop." It appears, then, that the pursuer, without previously calling on his landlord to defend him, shut up his shop, and put a stop to his business there. This does not shew any failure of duty on the landlord's part, but, on the contrary, a failure on the tenant's part to do his duty. In respect of that failure, I think the pursuer's case breaks down.

Lord Adam and Lord Kinnear concurred.

Lord Mure and Lord Shand were absent.

The Court refused the appeal.

Robert Broatch, L.A.—Cownie & Galbraith, S.S.C.—Agents.

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ROBERT M'NAB, Pursuer (Respondent).—*J. C. Lorimer.*
JEAN MORRISON OR CAMPBELL AND ANOTHER, Defenders (Appellants).—
M'Kechnie—Shaw.

Lease—Crofter—Removing—Crofters Holdings (Scotland) Act, 1886 (49 *and* 50 *Vict. cap.* 29), *secs.* 1, 19, *and* 34.—The Crofters Holdings (Scotland) Act, 1886, sec. 1, enacts that a crofter shall not be removed from his croft except for breach of certain specified conditions. Sec. 19 enacts that the Crofters Commission, after due inquiry, shall ascertain what parishes within certain counties are crofting parishes, "and shall determine that this Act shall apply to such parishes: Such determination shall be reported to the Secretary for Scotland in one or more reports, and may be confirmed by him with or without modification: From and after the date of such confirmation this Act shall apply to the parishes included in the determination . . . Within the parishes to which this Act is determined to apply as aforesaid, this Act shall apply to every crofter who is the

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tenant of a holding at the passing of this Act, and to his heirs and legatees, in the same manner as if the tenancy were a lease . . . ." Sec. 34 defines "crofter" to mean "any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed £30 in money, and which is situated in a crofting parish, and the successors of such person in the holding, being his heirs or legatees . . ."

A person who at the passing of the Act was a crofter complying with the conditions of sec. 34 died before the parish in which his croft was situated had been declared a crofting parish in terms of sec. 19. In an action of removing by his landlord against his heir, who was in possession and occupation of the croft, *held* that the defender was a crofter in the sense of the Act, and entitled to resist removing, subject to the conditions of sec. 1.

2D DIVISION.
Sheriff of Argyllshire.
I.

THE CROFTERS HOLDINGS (SCOTLAND) ACT, 1886 (49 and 50 Vict. cap. 29), was passed on 25th June 1886.

On 14th September 1886 Hugh Campbell, the tenant and occupant of a house and croft in the United Parish of Kilninian and Kilmore, in Mull, for the year ending Whitsunday 1887, died.

On 24th October 1886 intimation (dated 22d October) reached the Sheriff-clerk at Tobermory that Kilninian and Kilmore had been declared a crofting parish under the Crofters Holdings Act, 1886.

On 10th November 1886 Dr Robert M'Nab, of Penmore, the proprietor of the house and croft of which Campbell had been tenant, brought an action in the Sheriff Court at Tobermory against Jean Morrison or Campbell, the widow of Campbell's brother, and Colin Campbell (a minor), her son and Campbell's heir-at-law, who had possessed Campbell's house and croft since his death, for removing at Whitsunday 1887, on the ground that the tenancy then expired.

In defence Mrs Campbell and her son founded on sec. 1 of the Crofters Holdings Act, which enacted that "a crofter shall not be removed from the holding of which he is tenant, except in consequence of the breach of one or more of the conditions following," none of which were alleged by the pursuer to have been contravened, and also on sec. 34, which defined "crofter" and "crofting parish."*

In answer to this defence the pursuer founded on sec. 19 of the Act,†

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* The Crofters Holdings Act, 1886, sec. 34, enacts,—"In this Act 'crofter' means any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed £30 in money, and which is situated in a crofting parish, and the successors of such person in the holding, being his heirs or legatees. 'Crofting parish' means a parish in which there are at the commencement of this Act or have been within eighty years prior thereto, holdings consisting of arable land held with a right of pasturage in common with others, and in which there still are tenants of holdings from year to year, who reside on their holdings, the annual rent of which respectively does not exceed £30 in money at the commencement of this Act."

† The Crofters Holdings Act, 1886, sec. 19, enacts,—"The Crofters Commission after due inquiry shall ascertain what parishes or islands or districts forming aggregates of parishes within the counties of Argyll, Inverness, Ross and Cromarty, Sutherland, Caithness, Orkney and Shetland, are crofting parishes, or aggregates of crofting parishes, and shall determine that this Act shall apply to such parishes. Such determination shall be reported to the Secretary for Scotland in one or more reports, and may be confirmed by him with or without modification. From and after the date of such confirmation this Act shall apply to the parishes included in the determination. . . . Within the parishes to which this Act is determined to apply as aforesaid, this Act shall apply to every crofter who is the tenant of a holding at the passing of this Act, and to his heirs and legatees, in the same manner as if the tenancy were a lease. . . ."

No. 87. and contended that, as it had not been determined under that section that the Act applied to the parish of Kilninian and Kilmore until after Campbell's death, neither he nor the defenders were entitled to the benefit of the Act.

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On 19th May 1887 the Sheriff-substitute (MacLachlan) pronounced this interlocutor:—"Finds that the defender Colin Campbell is heir to the deceased Hugh Campbell, who died in the month of September last, and as such is entitled to succeed to him in the dwelling-house and croft on the pursuer's estate of Penmore of which the said Hugh Campbell was tenant: Finds that the said Colin Campbell cannot be removed on the grounds stated in the petition; therefore dismisses the action: Finds the pursuer liable to the defenders in the expenses of process."

On appeal the Sheriff (Forbes Irvine), on 13th July, recalled this interlocutor, and gave decree as craved.

The defenders appealed, and argued;—On the construction of section 34 by itself, Hugh Campbell at his death was plainly a crofter in the sense of that section, and the defender Colin, as his heir, was entitled to succeed to him in his rights under the Act. But it was said that section 19 must be read as controlling section 34—that a crofter, though fulfilling all the requirements of section 34, did not become a crofter in the sense of the Act until his parish had been determined to be a crofting parish, and that determination had been confirmed by the Secretary for Scotland. If that were the true reading of the Act, it was a most unmeaning and inequitable provision, for it did not give all crofters equal rights—some parishes had been early declared to be crofting parishes, but others, which would undoubtedly be so declared, were still undetermined. The true view, however, was that the proceedings of the Commissioners and the Secretary for Scotland were executorial merely, and that they drew back to the date of the Act.

Argued for the pursuer;—It was impossible to read section 19 in the way proposed by the defenders. It could only mean that until the Secretary for Scotland had confirmed the determination of the Commissioners the Act did not apply to the parish, and consequently no one within the parish could take advantage of any of its provisions.

At advising,—

LORD CRAIGHILL.—This is an action of removing at the instance of the proprietor of Penmore, in the island of Mull, and it is directed against Mrs Campbell and her son Colin Campbell, who claim to be crofters on the estate of Penmore. The facts are not in controversy, and appear to be these. The late Hugh Campbell, uncle of Colin Campbell, one of the defenders, was tenant of the house and croft of which the defenders claim to be crofters. He was a yearly tenant, the tenancy with reference to which the present proceedings have arisen extending from Whitsunday 1886 to Whitsunday 1887. For how long previously he had been tenant has not been explained, and probably is not of importance. He did not survive the expiry of his tenancy, for he lived only till September 1886. At the time of his death there were living with him the two defenders, one of whom, Colin Campbell, his nephew, was his heir-at-law, and the other, Mrs Campbell, was Colin's mother, and had things remained as it was expected for some time before the death of Campbell that they would, there is no doubt that Mrs Campbell and her son, who came in place of the uncle, would have been removeable on the expiry of the tenancy according to the contract at Whitsunday 1887. But before Martinmas 1886, when the summons of removing was served, an event occurred which is vital to the decision of this case, namely, the passing of the

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Crofters Act of 1886. The question is whether that Act alters the rights of the parties to this contract, and if so, what is the change thereby effected. There can be no doubt that but for the Act the landlord would have been entitled to remove his tenants, after proper warning, at the expiry of the lease. But the Act makes a change in the position of crofters, giving them a right to the continued occupation of their holdings, except in certain events specified in sec. 1 of the Act, none of which occur in the present instance, and the defenders contend that Colin Campbell being the heir-at-law of his uncle, who survived the passing of the Crofters Act, and the parish in which the holding was situated having been declared a crofting parish, he cannot be removed. The Sheriff-substitute takes that view, holding that the Act applies to the case. His opinion was that the late Hugh Campbell having been alive when the Act passed, and Colin being his heir-at-law and in occupation when the Act became operative in consequence of the parish of Kilninian, in which the croft is situated, having been declared a crofting parish, he cannot be removed, because the ground of removal was not within the exceptions contained in sec. 1 of the Act. The Sheriff takes the opposite view. His opinion is that Hugh Campbell died before the Act in regard to one of its essential conditions was fulfilled, having died before the determination of the Commissioners declaring Kilninian a crofting parish had been confirmed by the Secretary for Scotland, as required by section 19 of the Act. The result, in the Sheriff's view, is that Colin Campbell is not entitled to the benefit of the Act, because he was not tenant when the Act was passed into law, and Hugh Campbell, the tenant at that date, did not survive till the Act had been declared to apply to the parish. In short, the Sheriff-substitute thinks that it is enough if Hugh Campbell was alive when the Act passed, while the Sheriff thinks that he must live till the parish to which his holding belongs has actually been declared a crofting parish.

Now, this resolves itself into a question of the interpretation of an Act of Parliament. I think this is one of the cases in which a liberal interpretation ought to be given, and all the more is it necessary that such an interpretation should be given to prevent any defeat of what I think must obviously be assumed to be the spirit and intendment of the Act.

The first clause enacts that a crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of one or more of certain conditions which the clause proceeds to specify. The first question therefore is, was Hugh Campbell, who was in occupation in June, when the Act passed, but who died before the confirmation of the Commissioners' determination by the Secretary for Scotland, a crofter in the sense of the Act of Parliament? All the essentials as regards occupation were fulfilled, but we must refer for light upon the question to the definition of the word "crofter" in section 34. That definition is, "In this Act 'crofter' means any person who at the passing of the Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed thirty pounds in money, and which is situated in a crofting parish, and the successors of such person in the holding, being his heirs or legatees."

It is quite plain that the first part of that definition applied to Hugh Campbell. He was a crofter at the passing of the Act, he was a tenant of his holding from year to year, he resided on his holding, the annual rent of which did not exceed £30, and the holding is now situated in what has been designated a crofting parish. It does not appear that there is anything awanting in this

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case to comply with this definition. It does not say that to be a crofter at the passing of the Act will not be enough. Nothing of the kind. The expression used is a very remarkable one—"Anyone who at the passing of this Act is" in the occupation of a croft upon a yearly tenancy. It is not "was" but "is." There may be a little difficulty as regards the time at which the parish becomes a crofting parish, but anything awanting in that respect is made up for by the direction that "crofter" shall include the heirs and successors of the man in possession at the passing of the Act. Thus Hugh Campbell remained in his croft until his death in September, and when he died the other part of the definition comes in—"heirs and successors." There was thus all that was necessary in the way of occupation, and that was followed by the designation of the parish by the Commission, and the approval of that designation by the Secretary for Scotland.

The only other part of the Act requiring to be specially referred to is the 19th section, which enacts that "the Crofters Commission after due inquiry shall ascertain what parishes or islands or districts forming aggregates of parishes" within certain counties "are crofting parishes, and shall determine that this Act shall apply to such parishes. Such determination shall be reported to the Secretary for Scotland in one or more reports and may be confirmed by him with or without modification. From and after the date of such confirmation this Act shall apply to the parishes included in the determination." Now the provisions of the Act, no doubt, can only be carried out after these proceedings have been completed, but there is nothing in that, according to my view of the matter, which detracts from the character stamped upon "crofter" and "heirs and successors" in the occupation of the croft at the time of the passing of the Act. The rest of the section, which I have still to read, is of some moment, for it says —"Within the parishes to which the Act is determined to apply as aforesaid, this Act shall apply to every crofter who is the tenant of a holding at the passing of the Act, and to his heirs and legatees, in the same manner as if the tenancy were a lease." It is to apply to the man in occupation at the passing of the Act, and if he is not alive at the time when the Commissioners designate the parish and the Secretary for Scotland approves, the other portion of the section comes to receive effect, and indeed, if that were not so, the Act in many cases, as in this, would become of no avail. I do not think there is room for doubt. I do not see how you can get the better of that reading. I quite see how a plausible complexion may be given to a reading the other way, but I do not think the difficulty is a great one. I therefore take the same view as the Sheriff-substitute. I am obliged to dissent from the other view which was adopted by the Sheriff. It would seriously encroach on the provisions of the statute, and the rights intended to be conferred.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"Sustain the appeal; recall the interlocutor appealed against, and assoilzie the defender, with expenses."

CURROR, COWPER, & CURROR, W.S.—F. J. MARTIN, W.S.—Agents.

WALKER & DICK, Petitioners (Appellants).—*Gloag*—*W. Campbell.*
MOSES PARK AND ANOTHER, Objectors (Respondents).—
Sir Charles Pearson—*Low.*

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Superior and Vassal—*Building restrictions.*—By feu-contract dated in 1855, Allan, the vassal, bound himself to erect two villas of specified dimensions and style, and Dixon, the superior, bound himself to take the whole feuars of the remaining portions of his estate bound in similar terms, and to insert in their feu-rights the like clauses with reference to the erection of buildings. These obligations were appointed to be inserted in the infeftment, and to be validly referred to in all future conveyances of the feu.

In 1862, Dixon granted a feu to Hunter by a feu-contract which contained clauses obliging him to erect villas only, and obliging the superior to take the feuars of the ground "immediately adjoining to the north" similarly bound.

In 1883, Allan and Dixon executed a deed by which they discharged each other of the foregoing obligations, and in the same year Dixon feued to Allan an additional piece of ground to the north of Hunter's feu, but not adjoining it, under a contract which permitted the erection of tenements of dwelling-houses and shops.

In 1887 Allan presented a petition to the Dean of Guild for warrant to erect tenements of dwelling-houses in flats and shops on his additional feu.

The petition was opposed by Hunter, who objected to the erection of tenements and shops, founding, in the first place, on the feu-contract of 1855, which he maintained created a *jus quæsitum* in favour of the other feuars, rendering the unrestricted title of 1883 null, and, in the second place, on his own title.

Held (on appeal from the judgment of the Dean of Guild, which gave effect to Hunter's objections) that Allan's title was not subject to any restrictions in favour of Hunter, and that as it was not alleged that he had taken it in the knowledge that it was in violation of any obligation by the superior in favour of Hunter, he was entitled to obtain the authority craved.

Dean of Guild—*Jurisdiction.*—*Held* (*per* the Lord Justice-Clerk and Lord Craighill) that the Dean of Guild in considering a petition for a lining has no jurisdiction to entertain the question whether, on a construction of the titles of other feuars, a restriction ought to be imported into the title of the petitioner, when that title is in itself unambiguous and unrestricted.

2D DIVISION.
Dean of Guild of Crosshill.
M.

BY feu-disposition, dated 25th May 1855, William Johnston, trustee for William Dixon of Crosshill, feued a portion of the lands of Crosshill, extending to about three acres, to James Allan. The feu-disposition contained the following clauses:—"But these presents are granted and accepted, and the subjects hereby conveyed are disponed with and under the following conditions, provisions, and obligations, viz.:—That the said James Allan and his foresaids shall be bound to erect upon the said piece of ground a neat dwelling-house, or separate dwelling-houses, or villas, or cottages, which shall cost at least £300 each, exclusive of the ground." Then followed conditions regarding the style of the dwelling-houses and the formation and maintenance of roads and sewers, but there was no express prohibition of the erection of buildings other than dwelling-houses, villas, or cottages. The deed then continued,—"And that I, the said William Johnston, as trustee foresaid, and my foresaids, shall be bound and obliged to take the whole feuars or purchasers of the remaining portions of Crosshill lands bound in similar terms, and to insert in their feu-rights, dispositions, or other conveyances, the like clauses with reference to the erection of buildings, and formation and upkeeping of the same . . . and of the streets and sewers therein, as are hereinbefore inserted; which conditions, provisions, and obligations, are appointed to be inserted in the infeftment to follow hereon, and thereafter validly referred to in all future conveyances and investitures of the said plot or piece of ground."

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In 1868 the trustees of James Allan, as proprietors of the ground feued to him in 1855, brought an action against the testamentary trustees of William Dixon to have them interdicted from feuing the lands of Crosshill without taking the feuars bound by similar restrictions as in the feu-disposition to Allan. In this action the Court of Session granted interdict, and this judgment was affirmed on appeal.—*Allan's Trustees* v. *Dixon's Trustees*, Dec. 9, 1868, 7 Macph. 193, aff. July 12, 1870, 8 Macph. (H. L.) 182.

On 25th May 1883, by deed of mutual discharge and assignation, proceeding on the narrative of the feu-disposition of 1855, and of the interdict granted in 1868, Allan's trustees on the one hand renounced and discharged the obligations in their favour in the feu-disposition, to take the whole feuars or purchasers of the remaining portions of Crosshill lands bound in similar terms, and to insert in their feu-rights, dispositions, or other conveyances the like clauses with reference to the erection of buildings and formation and upkeeping of the same, and of the streets and sewers therein as were inserted in the feu-disposition, and declared the lands of Crosshill, "now belonging to" Dixon's trustees, "to be now and for ever freed, disburdened, and disencumbered thereof, declaring that the said" Dixon's trustees "and their successors in office and disponees, shall in all time coming be entitled to feu and dispose of all or any part of the said lands of Crosshill, now held by them, without taking the feuars and purchasers thereof bound in terms of the said obligation", and Dixon's trustees on the other hand renounced and discharged the conditions, provisions, and obligations created by and contained in the feu-disposition, with reference to the erection of buildings and formation and upkeeping of the same, and of the streets and sewers therein, but that only in so far as the said conditions, provisions, and obligations applied to and affected the portion feued to Allan and belonging to his trustees, and declared the said portion to be now and for ever freed, disburdened, and disencumbered of the said conditions, provisions, and obligations.

On 28th May 1883 Dixon's trustees feued another portion of the lands of Crosshill to Allan's trustees. The feu-contract, which proceeded on the narrative of the deed of discharge, provided that the buildings to be erected on this feu "shall be suited for and shall only be occupied and used as dwelling-houses or shops, and dwelling-houses as hereinafter provided," and the subsequent clauses of the deed shewed that tenements of dwelling-houses and shops might be erected.

In May 1887 Messrs Walker & Dick, who had taken a feu from Allan's trustees of a portion of this last-mentioned ground, but had not feudalised their title, presented a petition to the Dean of Guild of Crosshill for authority to erect five tenements of houses and shops on their feu.

The petition was opposed by two other feuars on Crosshill estate, Messrs Moses Park and James Hamilton, who objected to the erection of the tenements and shops.

Park's title was a feu-contract granted by W. S. Dixon, William Dixon's successor, dated August 1874, by which Park bound himself to erect on the ground feued two villas or cottages, each of which were to cost at least £300. There was no obligation binding the superior to restrict the remaining feuars in regard to the houses they might erect, and at the end of the deed there was this clause:—"Declaring that the said first party [Dixon] and his foresaids shall be entitled at any time at their own discretion to discharge or modify in favour of the said second party or his foresaids all or any of the said burdens, reservations, conditions, provisions, declarations, obligations, and others without consent of any of the other feuars or disponees of any lands belonging to them, these presents being intended only to regulate and express the terms of the contract between the parties hereto."

Hamilton's title was derived from William Hunter, who had, in 1862, taken a feu of a part of the lands of Crosshill, and had disponed a lot of this ground to Hamilton. The feu-contract of 1862, which was granted by Johnston as trustee for William Dixon, bound Johnston, as trustee, and his foresaids, when they should "come to feu or sell the remainder of the ground belonging to them fronting the said road of fifty feet in breadth and the ground immediately adjoining the ground hereby disponed on the north to take the feuars or purchasers thereof bound to build villas or cottages only, with suitable offices thereon, in all respects similar to those to be built by the said William Hunter on the plot or area of ground hereby disponed in terms of the stipulations to that effect after written"; and further bound Hunter to erect eleven villas or cottages, each of the cost of at least £300, with suitable offices, and not to erect any other buildings.

Of the feus thus in question Allan's original feu of 1855 was bounded on the east by the New Cathcart Road. Immediately opposite it, on the other side of the road, were the feus of Park and Hamilton, whose western boundaries were together exactly co-extensive with Allan's eastern boundary. Hamilton's was the southern, and Park's the northern feu; Hamilton's formed the corner of a cross street called Queen Mary's Drive (the rest of Hunter's feu extending eastward along that street), and Park's the corner of a parallel cross street called Albert Road, which thus formed its northern boundary. Allan's second feu formed the northern side of Albert Road, the petitioners' subfeu being the corner portion immediately opposite Park's feu.

The objectors averred, with reference to the clause above quoted in Hunter's feu-contract of 1862, that the expression therein contained, "ground immediately adjoining the ground hereby disponed on the north," included the petitioners' feu. They did not aver that either Allan's trustees or the petitioners had any knowledge of the terms of Hunter's feu-contract.

The objectors pleaded;—(1) The predecessors and authors of the petitioners having come under an obligation to impose similar restrictions to those narrated in the feu-disposition of the said James Allan, and in the titles of the objectors and their predecessors, and having been interdicted by the Court of Session and House of Lords from feuing, selling, or disposing of the lands of Crosshill without imposing such restrictions, the petitioners, whose titles disclose the existence of that obligation, and the granting of said interdict, are bound thereby, and cannot erect on the ground in question other buildings than cottages or villas of the description before specified. (2) The petitioners' authors and predecessors having expressly undertaken an obligation in favour of the said William Hunter, the author and predecessor of the objector James Hamilton, and his successors, not to erect on the ground in question any buildings other than cottages or villas, of the description before specified, the petitioners are not entitled to erect thereon the tenements of dwelling-houses for which the lining is sought. (3) The objector Moses Park having feued his steading in the knowledge that the lands of Crosshill, and particularly the ground immediately to the north of William Hunter's feu, were restricted as before specified, and having erected on said steading a villa of the description specified in his title on the faith and assurance that only buildings of a similar character could be erected on the ground in question, the petitioners are not entitled, to the objector Park's hurt and prejudice, to erect buildings other than cottages costing at least £300

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each. (4) In respect of the condition of the titles, the mutual obligations which they contain, the nature of the properties, and the relation of the various proprietors and feuars of the lands of Crosshill to one another, the objectors are entitled, on the principle of *jus quæsitum tertio*, to insist on the said restrictions being observed.

The petitioners in their answers to the objections denied that the expression above quoted included anything beyond the line of building stances immediately to the north of Hunter's feu, *i.e.*, the southern side of Albert Road. This construction would exclude the petitioners' feu, which, as already explained, was on the north side of Albert Road.

The petitioners pleaded;—(1) The objections stated, involving as they do questions of heritable title, are incompetent in this Court. (2) The objector James Hamilton not being a conterminous proprietor, and having therefore no interest or right to oppose the prayer of the petition, his objections ought to be repelled, with expenses. (4) The buildings proposed to be erected by the petitioners being entirely in accordance with the terms of their titles, the objections stated ought to be repelled, with expenses, and they are entitled to authority as craved. (5) The restrictions referred to by the objectors not being in their favour, but in favour of the petitioners' predecessors, by whom they have been discharged, the objectors have no right to found upon them, and the objections stated ought to be repelled, with expenses. (6) The interdict referred to by the objectors not being in their favour, but in favour of the petitioners' predecessors, by whom it has been discharged, the objectors have no right to found upon it, and their objections ought to be repelled, with expenses. (7) All the restrictions, the observance of which the objectors are entitled by their titles or otherwise to insist upon, having been observed, and the pursuers' proposed buildings not being in contravention thereof, and the objections stated being *quoad ultra jus tertii* of the objectors, the objections ought to be repelled, with expenses.

A proof was allowed. The evidence was mainly directed to shew the condition of the estate in 1862 (when most of the streets above mentioned were unformed), with the view of construing the expression "ground immediately adjoining to the north" in Hunter's feu-contract. At the date of Hunter's feu-charter his ground was part of a field which ran north as far as a road called Malsmyre Road, which was a little to the north of the petitioners' ground. This road was an old statute labour road, which was subsequently closed in consequence of the feuing operations. There was no attempt to prove that either Allan's trustees or the petitioners were aware of the terms of Hunter's feu-contract before the date of the petition. Park in his evidence could not say that in taking his feu he had relied on the clause of restriction in Allan's feu-disposition of 1855, though he deponed that he understood villas only were to be erected on the estate. It did not appear that any feuing plan of the estate was shewn to him, or was in use to be shewn to feuars. Hamilton was not examined as a witness.

On 26th August 1887 the Dean of Guild Court pronounced an interlocutor in which, after a variety of findings in fact, including one to the effect that the ground immediately adjoining Hunter's feu to the north comprehended the petitioners' ground, they found in law "(1) that the respondents Hamilton and Park, on the principle of *jus quæsitum tertio*, acquired a right to enforce the obligation by the superior William Johnston contained in the said disposition [of 1855]; (2) that, as in a question with the respondents, the mutual discharge and assignation [of 1883] does not discharge the said obligation, but that the same subsists and is binding on Dixon's trustees; (3) that the obligation by the superior in the feu-charter of Hamilton's feu to restrict the ground now belonging to the petitioners to villas and cottages is still subsisting and binding on Dixon's trustees, the superiors of the ground, and the respondent Hamilton, as the successor of the original feuar, Hunter, has a right to enforce that obligation; (4) that in accordance with the obligation undertaken by William Johnston in the foresaid disposition [of 1855], and in the feu-charter to Hunter [of 1862], Dixon's trustees had no power to feu the ground belonging to the petitioners with liberty to erect thereon tenements of flatted houses and shops, as proposed by the petitioners: Therefore refuse the prayer of the petition: Find the petitioners liable to the respondents Hamilton and Park in expenses," &c.

The petitioners appealed, and argued;—I. The Dean of Guild had no jurisdiction to entertain the question raised on record. He ought to have taken the titles as they stood. The petitioners' title was unambiguous; it gave rise to no question of construction; what the Dean of Guild had in effect done was to reduce, or at least reform, that title. That was outwith his jurisdiction. The objection was not a technical one, leading merely to the useless expense of another action. The question could not effectually or competently be determined except in an appropriate action, to which the superior was a party. II. But apart from that, the objectors' case failed on the merits. (1) In the first place, it failed in so far as based on the deed of 1855. That deed imposed no real burden on the lands of Crosshill—merely a personal obligation on Dixon's trustees—the sole creditors in which were Allan's trustees. The superior might contract for all future feuars, and so give them, when they came into existence, an independent right to enforce the restrictions on the principle of *jus quæsitum tertio;* the case here was the converse—that of the first vassal taking the superior bound to impose restrictions on future vassals, and the effect of that, according to the objectors, was that the creditor in the obligation, the vassal, was himself bound to future vassals, and could not discharge the obligation in his own favour at pleasure; but there was no authority for that extension of the principle of *jus quæsitum tertio.* Allan's Trustees were entitled to discharge the obligation in their favour, and had effectually discharged it by the deed of 1883. The authorities[1] shewed that in order to confer a right on co-feuars the following conditions were essential—(*a*) The restrictions must appear expressly or by clear implication in all the titles; but the petitioners' title was unrestricted. (*b*) There must be mutuality of obligation; but the objectors' own titles, and Park's in particular, were fatal to the application of the doctrine of mutuality. (*c*) The feuar objecting must in taking his feu have proceeded on the faith of the restriction. Here, on the contrary, both the objectors' titles and the evidence shewed that neither of the objectors had proceeded on the faith of the deed of 1855. Lastly (*d*) the feuar must have an interest to enforce the restriction, and here Hamilton at least had not. (2) The objectors' case on Hunter's feu-contract of 1862 was more favourable to them, for Hamilton was undoubtedly entitled to enforce the clause of restriction in that deed. The question was whether he could do so against the petitioners. Now, in the first place, the clause did not apply to the petitioners' ground. A heavy *onus* lay on one who sought to apply a clause of restriction to his neighbour's ground, and even if the proof admitted of the view maintained by the objectors, it did not necessitate it, and consequently they

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[1] Allan's Trustees v. Dixon's Trustees, Dec. 9, 1868, 7 Macph. 193, 41 Scot. Jur. 124, aff. July 12, 1870, 8 Macph. (H. L.) 182, 42 Scot. Jur. 461; Hislop v. MacRitchie's Trustees, June 23, 1881, 8 R. (H. L.) 95; Thomson v. Alley & M'Lellan, Dec. 22, 1882, 10 R. 433.

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failed. Then secondly, assuming the clause to apply to the petitioners' ground, it (like the clause of 1855) created merely a personal obligation on the superior, not a real burden on the lands. The petitioners' title therefore was unimpeachable. The superior had complete power to grant it, although by granting it in the terms he did it might be that he had made himself liable to Hunter in damages for breach of contract. But whether he had done so or not was obviously a question that ought not to be determined in his absence. That, however, was the real issue on this branch of the case, and it was an issue with which the petitioners had nothing to do. Had they known the terms of Hunter's contract, they might have been barred *personali exceptione* from taking an unrestricted title, but there was no suggestion that they knew, either on record or in the evidence. (3) Park's case on his title was hardly stateable, and not worth considering. His only advantage over Hamilton was that his feu was nearer the petitioners' than Hamilton's was, and consequently his interest was more obvious.

Argued for the objectors;—I. The Dean of Guild had jurisdiction. He had two interests to consider—the public interest, and the interest of the neighbouring feuars, and in considering the second of these interests he had in practice frequently dealt with the terms of feu-contracts, his jurisdiction being ousted only when a distinct conflict of heritable rights emerged, which there was not here. The authorities shewed that he had inquired into titles so as to free proprietors from burdens,[1] and an inquiry with the result of imposing a burden was in principle indistinguishable. II. On the merits the Dean of Guild's judgment was right. (1) The effect of the deed of 1855, coupled with the subsequent feuing of the estate and the state of the objectors' titles, was to confer on them a *jus quæsitum* to enforce the restriction. There could be no doubt about the intention of parties in 1855, and that the lands were burdened was also the opinion of the framers of the deed of discharge of 1883, for that deed relieved not only Dixon's trustees but the lands of Crosshill. The title of the petitioners being unfeudalised they must be taken as in this question identical with their authors Allan's trustees, and Allan's trustees as feuars of the 1883 lot must be taken as identical with Allan's trustees as feuars of the 1855 lot, to this effect, at least, that if the restriction of 1855 ought to have been inserted in the deed of 1883 they could not plead that it in fact had not, and neither consequently could the petitioners. Now, when a feuar stipulated that a restrictive condition imposed on himself should be imposed on his co-feuars, he was to be held as having had in contemplation that the restriction was for the mutual benefit of all the feuars, and to be mutually enforceable by them. This stipulation was made by Allan's trustees in 1855. Of course the same conditions must occur in the charter of the feuar seeking to enforce, but both Park and Hamilton were under the same obligation as to building villas only. They certainly had an interest to enforce, as it would undoubtedly lower the value of their property, which they had erected on the understanding that villas only should be built. (2) Hamilton's case at all events was clear. His title gave him an express right to have villas only erected on the ground immediately to the north of his feu. The evidence shewed that that expression included the petitioners' ground. If the petitioners' title had been in terms restricted, Hamilton's title to enforce could hardly have been questioned, but it was not in terms restricted and what the petitioners said was that Hamilton's only remedy was an action of damages for breach of contract against the superior. That was not his only remedy, for Allan's trustees, who were identical with the petitioners, were also in bad faith in taking an unrestricted title to the lot of 1883. The restriction was, as already stated, to be read into Allan's title, and into the petitioners'. The objectors, therefore, could proceed directly against the petitioners, although they were quite willing that the superior should be made a party to this process if that were thought desirable. A declarator was certainly unnecessary.

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[1] Smellie v. Thomson, July 9, 1868, 6 Macph. 1024, 40 Scot. Jur. 583; Pitman v. Burnett's Trustees, July 7, 1881, 8 R. 914; Calder v. Merchant Company of Edinburgh, Feb. 26, 1886, 13 R. 623.

At advising,—

LORD JUSTICE-CLERK.—This case from the Dean of Guild Court of Crosshill raises questions of a somewhat unusual nature, which in some aspects are of considerable importance.

The state of the facts out of which these questions arise is this—Messrs Walker & Dick proposed to build certain houses and shops on ground belonging to them in Crosshill, and they presented a petition to the Dean of Guild praying for a lining authorising them to erect the buildings which they proposed. The petition proceeds upon the title of the petitioners to the ground in question, which title is not disputed. They obtained the ground from Allan's trustees under a title which is wholly unrestricted. Two neighbouring feuars—Messrs Park and Hamilton—appear to oppose the petition, and they state this,—that although it is perfectly true that there is in the title of the petitioners no restriction against the erection of the houses and shops which the petitioners propose to build—yet there ought to be; that the title by which they hold the ground, as well as that of their authors, which is also unrestricted, was obtained by a substantially fraudulent proceeding; and that the superiors attempted by an incompetent mode to discharge certain obligations in regard to the land as building ground which were imposed upon it before. The Dean of Guild after hearing parties, and acting, as I suppose he did, by the advice of his assessor, sustained the pleas in law on which the compearers proceeded, and refused the petition. In his interlocutor he has a variety of findings about the feudal titles to this ground, which are against the manifest operation of these titles as they stand—findings that the ground is burdened as the compearers maintain, and that the houses proposed to be built on it are prohibited by what ought to have been the terms of the titles, although the titles in their actual terms do not express these restrictions.

I am of opinion that the procedure in the Dean of Guild Court was wrong from first to last. I doubt whether it was competent. I think it is erroneous in point of law, and I think the whole proceeding was beyond the scope of the Dean of Guild.

Shortly told, the history of these titles is simply this. Mr Dixon, the proprietor of the lands of Crosshill in the neighbourhood of Glasgow, began to feu out that estate shortly before his death in 1855. In that year he feued a portion of the ground to Allan's trustees, and Mr Johnston, as his trustee, inserted certain restrictions as to the nature of the buildings to be erected upon the ground. The restrictions were to the effect that the ground should be used for the building of villas and cottages only, and Mr Johnston undertook when the rest of the land came to be feued to insert in the titles of the feuars clauses to a similar effect. That went on until the year 1868, when a question arose between Allan's trustees and Johnston as to whether the restrictions so imposed

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were binding. They were held to be binding by this Court, and on appeal that judgment was sustained. That was in 1870. But some years later, in 1883, the superior and his vassal came to an understanding and a deed was executed by which they mutually discharged each other of those inconvenient restrictions. Immediately afterwards Dixon's trustees feued out another piece of ground to the same vassals, namely, Allan's trustees, on a charter from which the restrictions were absent. Then in 1887 Allan's trustees feued a part of that ground to the present petitioners Walker & Dick. So that upon that narrative it is manifest that when the case came before the Dean of Guild, and the feuars Walker & Dick presented their petition, their authors, Allan's trustees, were entirely free of the restriction which had originally burdened the title. But, as I have already indicated, the compearers maintain that the superiors, Dixon's trustees, were not entitled to liberate Allan's trustees from this burden, because there was an obligation in regard to other feuars of the lands of Crosshill by which it is contended that there is a *jus quæsitum* in those other feuars entitling them to object to the buildings which the petitioners propose to erect.

Now, my opinion is that the Dean of Guild was bound to take the title as he found it. He had no power to go behind the title, or to judge of an alleged personal exception against the feuars, Allan's trustees, or the feuars from them—the petitioners—the title disclosing no burden upon the lands. Even on the footing that in a proper proceeding such a question might be decided in favour of the compearers, it is, I think, wholly and absolutely incompetent to raise it in the Court of the Dean of Guild. It is settled—and there can be no question about it—that while from the very nature of the jurisdiction of the Dean of Guild, many questions may be raised incidental to the immediate objects of proceedings before that Court, a competition between heritable rights, or burdens on heritable rights, or variations from the feudal title on which the rights stand until they are set aside, are matters entirely beyond the competency of the Dean of Guild. My opinion is, if there was nothing more to be said about the case, that whatever may be the foundation of the objection taken, it is one that could not competently be taken cognisance of by the Dean of Guild, much less competently decided by him.

It must be manifest that the question here raised is a very important one, not only to the feuars Walker & Dick, but to the superior, and the superior is not here, yet the Dean of Guild has gone resolutely to work, and decided upon questions in which the superior has the deepest interest, without the superior being a party to the proceeding, or being heard for his interest. That would of itself be quite sufficient to render these proceedings entirely inept, and therefore I should have been disposed to hold, first, that the question raised by the compearing feuars Park and Hamilton is irrelevant as long as these titles stand as they are, and in the second place, that the question raised could not have been considered or decided in the absence of the superior—amounting, as the allegation in truth does amount, to a statement or charge of a breach of contract against the superior himself, for they say,—"You the superiors were in bad faith in entering into this contract with Allan's trustees"; and they say that against Allan's trustees also.

But I do not think it necessary that I should put the conclusion at which I have arrived exactly on that ground. I think it is sound; but I am of opinion still farther that these compearers have shewn no right whatever to interfere in the Dean of Guild Court, and object to parts of the lining prayed for by the petitioners being granted. Their case is, that they also are feuars of the lands of Crosshill—one of them a feuar from Dixon's trustees, and the other from a person of the name of Hunter,—that they in the titles so derived have been put under similar restrictions, and in that way that they have an interest to appear in this matter, especially as it is unjust that they should be restricted while the obligation on the superior in the original title to Allan's trustees remains unimplemented. I am of opinion that there is no foundation for that allegation. I am not, however, going to give an absolute opinion upon that matter, because I should in so doing be putting myself into the same position as the Dean of Guild by deciding upon the superior's rights in his absence. But I do say, as far as it is necessary to decide the matter for the purposes of the Dean of Guild case, that neither the title of Moses Park, who is one of the compearers, nor the title of Hamilton, who is the other, affords material for raising the question that has been decided by the Dean of Guild. Park feued from William Dixon, and although it is quite true that in his title these restrictions have been recapitulated and imposed there is a clause at the end of the title which entirely neutralises it as far as this matter is concerned, for the superior reserves to himself the power to discharge these restrictions whenever he chooses without regard to the other feuars, the deed being declared to be entirely for the purpose of regulating the relations between the superior and the vassal. That reservation was as much in breach of those original restrictions as the discharge granted by Allan's trustees, on which the petitioner's title proceeds. In short, Moses Park is not in the position of a coterminous feuar entitled to appeal to the restrictions, because the clause in his own title enables the superior to discharge that obligation, which is inconsistent with the very ground of his contention. The title of the other opposing feuar, Hamilton, is equally unavailing. There a feu was given off by Johnston, as Dixon's trustee, not direct to Hamilton but to Hunter, who is thus the author of Hamilton. In Hunter's title similar, but not the same clause or clauses of restriction were imposed, or sought to be imposed. The clause is this,—"And further, when the said William Johnston or his foresaids shall come to feu or sell the remainder of the ground belonging to them, fronting the said road, of fifty feet in breadth, and the ground immediately adjoining the ground hereby disponed on the north, to take the feuars or purchasers thereof bound to build villas or cottages only," and so on. Now, I am of opinion that this clause is so indefinite—it is difficult to tell what the ground is to which the restrictions apply—that, without some further proceeding by way of declarator or otherwise, it is not a title on which the Dean of Guild should have stopped proceedings on the petition before us.

I am therefore of opinion on the whole matter that we should recall the Dean of Guild's interlocutor, and remit the petition to the Dean of Guild to repel the objections stated for the compearers, and to proceed.

LORD CRAIGHILL.—I have come to the conclusion which your Lordship has reached. It appears to me that the respondents have shewn no cause why the prayer of the petition should not be granted. The petitioners produced what upon the face of it was a perfectly good title. They hold a disposition to the subjects from Allan's trustees which *ex facie* discloses no burden. It is said that it is a mere minute of agreement, but it is operative. The subjects are described as unburdened, and their author's title was equally free from burden.

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Now, if there is nothing more than that, I do not think the objectors could pretend that they had a case to which effect could be given by the Dean of Guild, or by this, or by any Court. But they try to get the better of the express words of the title by reading into the title which was granted by Dixon's trustees all the burdens and obligations which are to be found in the disposition granted in 1855. It is quite true, they say, that there was an arrangement between the superior and the vassals, who are represented by Allan's trustees, by which the restrictions in that title on the one side and on the other were discharged. But they contend that Allan's trustees were in bad faith in entering into any such arrangement. They say that Allan's trustees ought to have looked to the title granted in 1855, and because there was a burden to be found in that title they ought in their own minds to have held that that burden was to continue for ever; and that therefore Allan's trustees are to be regarded as violating some obligation incumbent upon them if they took a disposition of property which formed any part of the lands of Crosshill in which no such burdens were mentioned. But it is not said, and it could not be said, that there is any real burden on the lands. From first to last in all the transactions between the superior and the vassal there was no real burden constituted over the lands. The whole thing depended on the personal undertaking or obligation of Dixon's trustees. Well, when that is so, how has it been made to appear that Allan's trustees, just as much as anybody else, were not entitled to take an unburdened disposition? I do not see any reason for such a contention at all. They were not bound to assume—and I do not think with reference to the rights of others that they were called upon to assume—that there was anyone whose interests were in the least affected by the discharge granted in 1883, and the subsequent feu-contract entered into on the footing that that was a good discharge. I do not see that they were so called upon at all. The objectors referred to the process that existed between Allan's trustees and the superior. That process was begun sometime in 1868 and ended in 1870. In that process it was found that the superior was all wrong, and that the vassals, Allan's trustees, were all right. But why? Because there was a contract between the two. The thing with regard to the rights of Allan's trustees was as plain as if the superior, their antagonist, had bound himself to pay a certain sum of money to them. They simply asked for fulfilment of a contract which they said existed between Dixon's trustees and themselves. Dixon's trustees were continuing to violate the contract which existed. They asked for interdict to prevent them from violating the contract, and the Court of Session here, and the House of Lords upon appeal, found them entitled to that interdict. They held that Dixon's trustees were in breach of the contract to which I have referred. The House of Lords did not say that in seeking to vindicate that right for themselves the vassal was vindicating any right secured to any other party. That might or might not be. That never was decided; it never was argued. We know nothing about that up to this moment. Therefore to say that Allan's trustees, because they believed that they were the only parties interested in the matter of the discharge granted to Dixon's trustees, and because they took a disposition in the terms that have been referred to, are therefore in bad faith, is, in my view, entirely out of the question. It seems to me as if the objectors had looked about them to try to find where it was that their rights lay. If they had borne in mind that there was no real burden on the lands, it appears to me that they would not have made the foolish stand they did in urging their objections in the Court below.

I have thus ventured to express an opinion on what has been very properly called the merits of the case; but I am not sure that I am right in following the course that was desired by both parties. That was indicated to us in the course of the debate. But I was much disposed to adopt the view which your Lordship has proceeded upon, and to say that, even though we might be entitled, we are not bound to consider and determine the merits of the controversy that has been raised. All the same, it is always well when we can express an opinion on the merits of a controversy to do so. And I think we have warrant for doing it here, for the simple reason that our judgment will not bind any other than the parties to this process. It will bind the objectors and the petitioners, but nobody who is not a party to the process. The objector and the petitioner cannot say that our observations are not within the scope of the case, and that we have no jurisdiction to make such remarks. They have expressly asked for judgment on the merits. I venture to express my opinion on that matter. I am as thoroughly satisfied on the merits as on the preliminary question of jurisdiction. At all events, the objectors are quite wrong on that matter which is the most important, namely, that they have shewn no cause whatever why the decree of lining as prayed for in the petition ought not to be pronounced.

Lord Rutherfurd Clark.—The petitioners are not infeft, they have only an agreement for a feu-contract. It follows that they are to be identified with Allan's trustees, their authors.

It is admitted that in the title of the latter there are no restrictions which prevent the erection of the proposed buildings; consequently on the face of the title the petitioners are entitled to the decree of lining which they ask for. But the respondents urge that the superior had not the power to grant such a title to Allan's trustees, and that they were not in good faith to take it.

As the superior was the unrestricted owner of the ground, there can, I think, be no doubt of his power. The objection of the respondents therefore takes this shape. They say that the title was granted in breach of an obligation to them, and that they are entitled to plead against Allan's trustees a personal exception which debars them from availing themselves of the title as it stands.

The superior is not a party to the record. It follows that we cannot decide any question between him and the respondents. Nor are we entitled to express any opinion adverse to his rights. But we may—and indeed we must—examine the case to see whether it be necessary that the superior should be called.

In 1855 the superior feued to James Allan a part of his estate under certain building restrictions, and he bound himself to insert similar restrictions in the other lots which might be subsequently feued. In 1862 he feued another portion to William Hunter, and in implement of the obligation he inserted the restrictions which occur in Allan's title. Further, he came under an obligation to Hunter, which is thus expressed—"Declaring that the said William Johnston, as trustee foresaid, shall be bound and obliged, . . . when he or his foresaids shall come to feu or sell the remainder of the ground belonging to them fronting the said road of 50 feet in breadth, and the ground immediately adjoining the ground hereby disponed on the north, to take the feuars or purchasers thereof bound to build villas or cottages only with suitable offices thereon in all respects similar to those to be built by the said William Hunter on the plot or area of ground hereby disponed, in terms of the stipulations to that effect after written."

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In 1883 Allan's trustees discharged the obligation which the superior had granted in favour of their author, and they thereafter feued another lot. The feu-contract did not contain the original restrictions, so that so far as this title goes Allan's trustees are entitled to erect the proposed buildings. It is to a part of this feu that the petitioners have acquired right.

It was argued that because the original feu to Allan was placed under restrictions, and because Allan had taken the superior bound to insert the same restrictions in subsequent feu-contracts, neither he nor his trustees could acquire from the superior any unrestricted ground. I see no foundation for this argument. That they possess restricted ground is no reason why they should not acquire unrestricted ground. Nor did the obligations which Allan had taken from the superior impose any restraint upon himself or his trustees. It was taken for his own benefit, and he or they might enforce or discharge it as they pleased. It was argued that he took it for the benefit of subsequent feuars, who acquired a right to it as they obtained their feus. No authority was cited in support of this view, and I see no principle for it. The obligation was personal to Allan, and was not in any way communicated to the other feuars.

Again, it is argued that the feu-contract to Allan's trustees is in breach of the obligation granted by the superior to Hunter. As I have already said we cannot decide that question when the superior is not a party to the record, and we are not entitled to express any opinion adverse to him. But if there be any breach of obligation the rights of Allan's trustees are not affected by it. They are entitled to exercise the powers competent to them as owners of their feu, and the superior can only be sued in damages.

But it is said that there is a personal exception which bars Allan's trustees from the exercise of their powers. If there be, it could only arise from their taking their feu-contract in the knowledge that it was granted by the superior in breach of his obligation to Hunter. But it is not alleged that they were in the knowledge of any such obligation, and therefore they could not be aware of any breach of it. There is thus an end of the plea of personal exception, for the conditions on which alone it could be raised are absolutely wanting. I may add that in my opinion it is extremely doubtful whether the obligation of the superior extends to the feu granted to Allan's trustees in 1883. It applies to the ground "immediately adjoining the ground hereby disponed on the north." The ground feued to Allan's trustees does not immediately adjoin it, and it is not clear what area these words would be held to cover. And so it follows that even if Allan's trustees had been in the knowledge of the obligation, they could not have been in the knowledge that their feu-contract was in breach of it. Their rights as owners cannot be controlled by a personal exception, said to arise from an obligation conceived in so vague and doubtful terms.

I have confined my attention to the case of Hamilton, who derives his title from Hunter, and as this fails it is not necessary to examine the much weaker case of Park.

For these reasons I am of opinion that the pursuers are entitled to the decree of lining which they ask for.

Lord Young was absent.

The Court sustained the appeal, recalled the judgment of the Magistrates appealed against, and remitted the cause to the Magistrates with instructions to repel the objections for the respondents, and to proceed as accords.

J. & J. GALLETLY, S.S.C.—SMITH & MASON, S.S.C.—Agents.

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ALEXANDER CAMERON, Pursuer (Respondent).—*Darling—Forsyth.*
THE HONOURABLE ARTHUR DRUMMOND, Defender (Reclaimer).—
Sir Charles Pearson—Dundas.

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Cameron v.
Drummond.

Lease—Fences—Wire-netting—Landlord's right to remove—Game damage.—The landlord of a farm was bound by the lease to repair the fences, and on that being done the tenant accepted the fences "as in sufficient tenantable condition and repair, and binds and obliges himself to uphold them in tenantable condition during the currency of the lease, and to leave them in the like condition at the expiry thereof, . . . and the tenant shall also be at half the expense of upholding plantation and march-fences."

At the beginning of the lease the lands let were separated from a plantation (which also was the landlord's property, and was full of ground game) by a fence lined with wire-netting. The landlord sometime after the beginning of the lease removed the netting. *Held* that the tenant was entitled to have the netting restored, and to recover damages for injury done to his crops by ground game coming out of the plantation after the removal of the netting.

1ST DIVISION.
Lord Fraser.
M.

IN November 1887 Alexander Cameron, farmer, tenant of the farm of Hutcheson, Dunblane, raised an action in the Court of Session against his landlord, the Honourable Arthur Drummond of Cromlix, concluding that the defender should be ordained "to bring back and restore to its original position the wire-netting removed by the defender from the wire-fence which runs from the north end of the farm of Hutcheson, on the estate of Cromlix, . . . tenanted by the pursuer, in a south-westerly direction, and forms the march-fence between a plantation belonging to the defender and the said farm, thereafter for a short distance in a north-westerly direction, and which forms a part of said march-fence, and then south-west to the farm of Crofts, on said estate, partly through the hill pasture on said farm of Hutcheson, and which lies on the west thereof, and partly separating the said hill pasture from the remainder of said farm of Hutcheson, which wire-netting lined the said wire-fence, and formed a portion thereof, or otherwise to line the said wire-fence with new wire-netting of the same height, quality, and dimensions," and for payment of £150 of damages.

He averred (cond. 3) that before offering for the farm "he examined the fences, and observed that on the west side the farm was bounded by a plantation belonging to the defender, which was closely preserved for game, but that the farm was effectually protected from inroads of ground game therefrom by a wire-fence lined with wire-netting, which ran from the north end of said farm tenanted by the pursuer in a south-westerly direction, and formed the march-fence between said plantation belonging to the defender and the said farm, thereafter for a short distance in a north-westerly direction, and which formed a part of said march-fence, and then south-west to the farm of Crofts, also belonging to the defender, partly through the hill pasture of said farm of Hutcheson, tenanted by the pursuer, and which lay on the west thereof, and partly separating the said hill pasture from the remainder of said farm tenanted by the pursuer. The said wire-fence so lined with wire-netting extended to about 1000 yards or thereby." (Cond. 4) "After making all necessary inquiries regarding the farm to enable him to estimate its value, the pursuer made a written offer on 23d September 1885 for a lease of the same for fifteen

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years at a yearly rent of £180 sterling for the first five years, and £190 sterling for each of the remaining years. . . ." (Cond. 5) "The said offer was accepted by the defender, and at Martinmas 1885 the pursuer entered into the possession of the farm. A formal lease was thereafter executed between the pursuer and defender, in which the said farm is described as follows, viz.:—'All and Whole the farm of Hutcheson, as presently possessed by Malcolm Macfarlane, with the exception of the field lying next the wood and adjoining the farm of Crofts, which farm hereby let lies in the parish of Dunblane and county of Perth, and is delineated and enclosed by a red line in the plan or tracing hereto annexed, and subscribed as relative hereto.'"

Under the lease the landlord was bound to "repair the fences where necessary, and subdivide the forty acre field with one fence; on these things being done the said Alexander Cameron hereby accepts of the buildings, fences, hedges, gates, roads, drains, ditches, and water-courses on the said farm as in sufficient tenantable condition and repair, and binds and obliges himself and his foresaids to uphold them in tenantable condition during the currency of this lease, and to leave them in the like condition at the expiry thereof, . . and the tenant shall also be at half the expense of upholding plantation and march-fences."

The pursuer further averred;—(Cond. 6) "The said wire-netting lined the said wire-fence not only when the farm was examined by the pursuer with a view to becoming an offerer therefor, but when he entered into possession. As the plantation on the west side of the farm was full of ground game it was thus the most important part of said fence, and its existence formed an important consideration affecting his becoming an offerer." (Cond. 7) "On or about 9th September 1886, the defender unwarrantably, illegally, and wrongously removed the wire-netting from said fence, to the loss and damage of the pursuer. The said wire-netting was about three feet high, and the mesh thereof about two inches wide, and formed an effectual protection against hares and rabbits getting access to his farm from the said plantation, where they exist in thousands. The pursuer on said date wrote to him asking him to replace it, and failing his doing so, intimating that he would be held responsible for all damage done to his crops and grass by vermin."

The defender answered to cond. 7;—"Admitted that about the date here mentioned the wire-netting was removed from said fence by the defender's orders or with his authority. It was rabbit-netting of the ordinary kind and dimensions. *Quoad ultra* denied. Explained that the said netting belonged to the defender, and was put on the said fence by him in a temporary manner and for a temporary purpose, and that the defender was perfectly entitled to remove it at his pleasure. The said netting formed in no sense a part of the fence, which has been erected years before, and was an ordinary plantation fence."

The pursuer averred further;—(Cond. 8) "The pursuer's crops and grass have since the removal of said wire-fence suffered seriously, as hares and rabbits in great numbers from the said plantation have since been feeding thereon, there being no fence left to prevent their getting access to his farm. The loss which the pursuer has sustained thereby amounts at the date hereof to the sum of £150 sterling. In reference to the answer hereto, it is explained that the great increase of ground game, which the removal of said wire-netting has occasioned, could only be kept down at great expense to the pursuer, who would require to keep at least two men constantly employed for the purpose. Further, the said ground game are bred on the adjoining plantation, to which the pursuer has no right of access."

The defender answered;—(Ans. 8) "Denied. Explained that in virtue of the provisions of the Ground Game Act, 1880, the pursuer was and is entitled to protect his crops by taking and killing hares and rabbits as therein provided. If his crops have been damaged as here mentioned (which is denied), he is himself to blame for not efficiently protecting them, either by destroying the hares and rabbits or putting up wire-netting at his own expense. Explained further that the landlord is not bound by the lease to fence the farm to the exclusion of ground game, and that the amount of ground game existing in the said plantation has not increased since the pursuer became tenant of the farm, and is not in excess of an average and usual stock."

The pursuer pleaded;—(1) The defender having unwarrantably, illegally, and wrongously removed the wire-netting in question, ought to be ordained to restore the same. (2) In any view, the removal thereof constitutes a breach of the lease by the defender, and he ought to be ordained to restore it. (3) The pursuer having sustained loss and damage in consequence thereof, the defender is liable in reparation therefor. (4) Further, the defender is, in any view, liable for the damage done by the excess of ground game complained of, the pursuer not having the same in view when he entered into the lease.

The defender pleaded;—(1) The pursuer's statements are irrelevant, and insufficient to support the conclusions of the summons. (2) The defender should be assoilzied, in respect that he was perfectly entitled to remove the said wire-netting, and is under no obligation to restore or replace it. (3) The pursuer having suffered no loss or damage for which the defender is responsible, the defender should be assoilzied, with expenses. (4) Any loss or damage which the pursuer may have suffered having been caused by his own neglect to take measures for the protection of his crops, the defender should be assoilzied, with expenses.

On 15th January 1888 the Lord Ordinary (Fraser) pronounced this interlocutor:—"Decerns and ordains the defender, within fourteen days, to bring back and restore to its original position the wire-netting removed by him from the wire-fence which runs from the north end of the farm of Hutcheson on the estate of Cromlix in the parish of Dunblane and county of Perth, tenanted by the pursuer, in a south-westerly direction, and forming the march-fence between a plantation belonging to the defender and the said farm, thereafter for a short distance in a north-westerly direction, and which forms a part of the said march-fence, and then southwest to the farm of Crofts, on said estate, partly through the hill-pasture on said farm of Hutcheson, and which lies on the west thereof, and partly separating the said hill pasture from the remainder of said farm of Hutcheson, which wire-netting lined the said wire-fence and formed a portion thereof; or to line the said wire-fence with new wire-netting of the same height, quality, and dimensions: Further, in regard to the claim of damage made by the pursuer, allows to both parties a proof of their averments, and to the pursuer a conjunct probation." *

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* "OPINION.—The defender leased to the pursuer, for a period of fifteen years from Martinmas 1885, 'All and Whole the farm of Hutcheson, as presently possessed by Malcolm Macfarlane.' By the lease the proprietor was taken bound to 'repair the fences where necessary, and subdivide the forty acre field with one fence; on these things being done the said Alexander Cameron hereby accepts of the buildings, fences, hedges, gates, roads, drains, ditches, and water-courses on the said farm as in sufficient tenantable condition and repair, and binds and obliges himself and his foresaids to uphold them in tenantable condition during the currency of this lease, and to leave them in the like condition at the expiry thereof, . . . and the tenant shall also be at half the

The defender reclaimed, and argued;—(1) The netting was not under the contract of lease at all. It was admitted that the netting was on the fence when the tenant entered, but it was not covered by the words "as presently possessed by Malcolm Macfarlane." Such words in leases had always been held to refer to the boundaries of the farm, the subdivision of the fields, and such general features of the subject let, but they had never been held to apply to *minutiæ* of this kind.[1] By removing the netting the landlord was not adding to but lightening the tenant's burden, as, on the assumption that the landlord had to leave it standing, the tenant would, under the lease, be bound to keep it up. (2) If the netting

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expense of upholding plantation and march-fences.' Now, at the time when the pursuer entered upon his farm there was on the west side of it a wire-fence lined with wire-netting, which bounded the farm on that side from a plantation belonging to the defender. This wire-fence and wire-netting were there when the farm was in the possession of Macfarlane. It was intended as a barrier against the inroads of ground game from the plantation. Now, this was a material and important safeguard for the pursuer's crops, and he was entitled to rely upon the wire-fence and netting being allowed to remain during his lease. He got the farm as it was possessed by the former tenant, and if the wire-netting be taken away he does not get all that that tenant possessed. But the defender, in the month of September 1886, did remove a considerable portion of it, and the result, as stated by the pursuer, is that the ground game have come in large numbers upon his farm, and committed damage. The defender justifies his action by saying that the wire-netting was his property, and consequently he was entitled to remove it at his pleasure. Now, let us see how this view of the relations of the parties would answer. Ordinary fences or palings are intended to keep out the encroachments of cattle or horses. These palings are the property of the landlord, but he dare not touch them, far less carry them away, if the farm was let with these palings upon it. They are a fence against cattle;—and so is wire-netting a fence against ground game, and if he cannot remove the one fence he cannot remove the other; and the very stringent obligations laid upon the tenant in this case to uphold the fences imply an obligation on the part of the landlord to let these fences alone. The Lord Ordinary, therefore, has no hestitation in ordering the defender to replace the fences in the condition they were in when he took them away in September 1886, or if he cannot replace the identical netting, then he must give sufficient new netting.

"As regards the claim for damage, it is said to be irrelevant, because it is not stated that there is an increase in the ground game beyond the number that were upon the farm when the lease was entered into. What is stated is, that whereas the wire-netting kept the ground game entirely off the farm, the removal of it has allowed rabbits to come in great numbers where there were none before. This is a perfectly relevant ground of damage. It is also argued that the claim cannot be insisted in, seeing that the tenant could have protected himself by erecting wire-netting on his farm at the junction between it and the plantation. But why should he go to this expense if he has a right to insist upon the wire-netting being left as it was when he took possession? Nor is the defence available in such a case as this, that the pursuer is entitled under the Ground Game Act to kill all the ground game. The rabbits here are bred in a plantation to which the tenant has no access,—the law as to such a case being 'that a landlord cannot both reserve covers for game preservation within or around the land which he has let for agricultural purposes, and at the same time answer such demands as this in regard to depredations by rabbits by the plea that the tenant had the remedy in his own hand.'—Per Lord Justice-Clerk in *Inglis* v. *Moir's Tutors* (7th December 1871, 10 Macph. 204). The only proper mode of extirpating them is by attacking them in the cover which shelters them, and in such circumstances the tenant's claim will lie, though he has the power of killing them if he finds them in the open."

[1] Rankine on Leases, p. 188, and cases there cited.

did not come under the contract of lease, then there was no relevant averment of damage for which the landlord was liable. Damages for injury done by game were only exigible where it was averred that the stock of game had increased unduly since the lease was entered into.[1] There was no such averment here. (3) The Ground Game Act of 1880 (43 and 44 Vict. c. 47) cut off the tenant's right to claim damages for injury by ground game at common law. It gave him a right to protect himself by killing the ground game which came on to his own ground. It was his duty to protect himself, and a neighbouring proprietor could use his own ground in any way he chose, so long as he did so in a reasonable manner. It was not averred that he was using it otherwise in this case.

Argued for the respondent;—The netting was a part of the fence as it existed when he got possession of the farm. He took the farm on the understanding that the fence should remain. It was useful to him to keep ground game out, and that was as natural a use of a fence on a farm of this class as to keep bestial within the farm, or to prevent them straying into it. If the landlord was bound to leave the netting, then the tenant was entitled to recover any damage he had suffered through the landlord's breach of duty.

At advising,—

LORD PRESIDENT.—In this case the pursuer entered as tenant of the farm of Hutcheson at Martinmas 1885. The subject let was described as "All and Whole the farm of Hutcheson, as presently possessed by Malcolm Macfarlane." The matter of fences is very specially provided for in the lease. The proprietor, on the one hand, is bound to "repair the fences where necessary, and subdivide the forty acre field with one fence," while the tenant, on the other hand, "hereby accepts of the buildings, fences . . . on the said farm as in sufficient tenantable condition and repair, and binds and obliges himself and his foresaids to uphold them in tenantable condition during the currency of this lease, . . . and the tenant shall also be at half the expense of upholding plantation and march-fences." The pursuer avers (and it is admitted by the defender) that when he examined the farm, and also at the time he entered into possession, there was attached to the fence which divided the farm from a certain plantation, and also on another part of the same fence which divided the arable land from the hill pasture, a wire netting three feet high. That netting has since been removed by the landlord. The pursuer complains that the removal was unjust, and was a breach of contract on the landlord's part. The Lord Ordinary has found the affirmative of that contention, and I am of opinion that he is right. I do not attach much importance to the words, "as presently possessed by Malcolm Macfarlane." These words generally refer to extent of the farm and of the fields of which it consists. The question, I think, depends on the clause regulating the matter of fences which I have already quoted. It appears to me that under that clause if this wire-netting on the fence was useful to the tenant for any purpose, and if it was there at his term of entry, and was delivered over to him and accepted by him, then the landlord has no right to interfere with it. Now, I think, there is no doubt that this netting was beneficial to the tenant. It is admitted that the plantation contained a quantity of game, and the netting certainly had the effect of preventing the game from straying into the farm. That settles the question. He got it because it was useful, and he is bound to

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[1] Inglis v. Moir's Tutors, Dec. 7, 1871, 10 Macph. 204, 44 Scot. Jur. 123.

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keep it up. The defender says that it was put up in a temporary manner, and for a temporary purpose. But he does not explain what that purpose was. It is difficult to understand what purpose there could be, except the purpose of keeping the game off the farm and in the plantation. If it was erected for that purpose and is useful, it is in vain for the landlord to say that he was entitled to remove it without cause assigned. The landlord, however, says that the tenant is himself to blame because he does not keep down the game. He says he should destroy it himself or put up a netting at his own expense. He evidently contemplates that if this netting had not been there, the tenant would have put up one himself because it would have been useful to him. I think the tenant was entitled to rely that the netting he saw would not be disturbed. I am therefore of opinion it must be restored, or an equivalent be furnished, and that the pursuer is entitled to such damages as he has sustained.

Lord Adam and Lord Kinnear concurred.

Lord Mure and Lord Shand were absent.

The Court adhered.

James Forsyth, S.S.C.—Dundas & Wilson, C.S.—Agents.

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Sutherland v.
Prestongrange
Coal and Fire-
Brick Co.
Limited.

Charles Sutherland, Pursuer.—*Rhind—Gunn.*
Prestongrange Coal and Fire-Brick Company, Limited, Defenders.—
A. J. Young—Clyde.

Process—Jury—New trial—Reparation—Juryman visiting locus during progress of trial—Act 55 Geo. III. cap. 42, sec. 6.—During a jury trial in an action of damages at the instance of a workman who was injured in a colliery, evidence was led on 21st and 24th January. On the 23d one of the jury went by himself to inspect the *locus* of the accident, and the method of working the colliery. The jury returned a verdict for the pursuer. The defender moved the Court to grant a new trial, in terms of sec. 6 of the Act 55 Geo. III. cap. 42,* on the ground that the conduct of the juryman had rendered it impossible for the jury to return a verdict according to the evidence led before them.

The Court *granted* a new trial.

1st Division.
Lord Fraser.
B.

In November 1887 Charles Sutherland, carter, Tranent, raised an action against the Prestongrange Coal and Fire-Brick Company, Limited, concluding for damages in respect of injuries received by him at the defenders' colliery, near Prestonpans.

The case went to trial before Lord Fraser with a jury on 21st January 1888. The cause was then continued to the 24th, when further evidence was led.

The jury returned a verdict for the pursuer by a majority of seven to five.

The defenders thereafter moved the First Division to grant a new trial on the grounds (1) that the verdict was contrary to evidence, (2) that the foreman of the jury had on Monday 23d January visited the *locus* of the accident, and seen how the operations, through which the accident to the pursuer occurred, were carried out.

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* The Act 55 Geo. III. cap. 42, sec. 6, enacts,—"And be it further enacted . . . it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the division of the Court of Session which directed the issue for a new trial on the ground of the verdict being contrary to evidence . . . or for such other cause as is essential to the justice of the case."

The Court granted a rule, and ordained the defenders to obtain and lodge in process an affidavit from the juryman of whose conduct they complained.

On 2d March the affidavit was lodged. The juryman therein stated that he had visited the *locus* on the day libelled, and had been shewn over the colliery, and had the method of working explained to him by the defenders' manager. He did not speak of the case to him. The affidavit then proceeded,—"On Tuesday morning when I arrived in Court I told the jurymen whom I saw that I had visited the scene of the accident on the previous day, but at this time there was no opportunity of discussing the matter. I am quite willing to state what passed when the jury retired, if desired by the Court to do so."

The defenders argued;—This was such an irregularity that it was in the words of the Act 55 Geo. III. sec. 6, "essential to the justice of the case" that a new trial should be granted. The jury were sworn to return a verdict according to the evidence led before them, and whether this juryman influenced his brother jurymen by relating to them what he had seen, or not, his mind must have been impressed by what he saw, and he at least did not give a verdict according to his oath. Thus, the majority being only seven to five, the defenders may have lost this juryman's vote through his action.

Argued for the pursuer;—This objection should have been stated before the verdict was taken,[1] as it came to the knowledge of the defenders' agents before the jury retired that the juryman had gone to see the *locus*. The defenders were evidently willing to have acquiesced in the verdict if it had been in their favour. Further the defenders were not entitled to assume that this juryman voted against them. There was no evidence or statement that such was the case. This irregularity was not such as to make it essential to the justice of the case that a new trial should be granted; the juryman was not any less likely to give a true verdict because he knew something of the *locus*. If he had happened to know it before, his knowledge would not have disqualified him.

LORD PRESIDENT.—The question for us to consider is whether the defenders have here assigned cause "essential to the justice of the case" for setting aside the verdict of the jury. I am of opinion that they have. There has, I think, been here a gross miscarriage of justice. The irregularity complained of is, so far as I know, entirely without precedent in this Court, and is one which is of the greatest importance to the justice of the cause. The jury are empaneled and sworn to return a verdict according to the evidence led before them. They are not entitled to proceed upon anything else but the evidence given upon oath, and if they do proceed upon anything else they cannot return a verdict according to their oath.

In the present case it is impossible to believe that this juryman when he went to visit the *locus* of the accident, and informed himself how the work at which the accident occurred is carried out, had not some impression made upon his mind by what he saw. In what direction he was influenced we cannot say, very possibly he could not say himself. But if he was influenced in any way he was placed in a position in which no juryman should be placed; and that by his own fault.

Whether he influenced the minds of his co-jurymen we do not know, but it is very probable that he did. He certainly mentioned the fact that he had

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[1] Williams v. Great Western Railway Co., 1858, 28 L. J. Exch. 2.

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visited the *locus* to one of the other jurymen while the case was going on, and it is quite evident, I think, that, though he does not say that he said anything about his visit after the jury retired, he did do so. But whether he did so or not, his mind at all events was so influenced that he could not return a verdict according to his oath. I think therefore it is essential to the justice of the case that we should grant a new trial.

LORD ADAM.—It is impossible to feel satisfied that the verdict in this case was returned according to the evidence laid before the jury. It is impossible to believe that this gentleman who went to see the *locus* of the accident, and the way in which the work was carried on there, was not impressed by what he saw. He therefore gave his verdict upon evidence not obtained at the trial. Whether, or how far, he influenced others by stating the impression made upon himself, it is impossible to state, but it is very probable that he did to some extent influence his co-jurors. I think therefore a new trial ought to be granted.

LORD FRASER and LORD KINNEAR concurred.

LORD MURE and LORD SHAND were absent.

THE COURT made the rule absolute, and granted a new trial.

CHARLES B. HOGG, L.A.—DRUMMOND & REID, S.S.C.—Agents.

No. 91.

Mar. 2, 1888.
Barry's Trustees v. Barry.

JANET SMITH OR BARRY AND OTHERS (Barry's Trustees), First Parties.—*C. S. Dickson.*
JANET SMITH OR BARRY, Second Party.—*C. S. Dickson.*
MARY BARRY, Third Party.—*Crole.*

Trust—Parent and child—Separate maintenance of child.—A truster directed his trustees to pay to his wife, if she survived him, a certain annuity, and to permit her to have the occupation during her lifetime of a dwelling-house and the use of the furniture therein, declaring that she "shall out of the foresaid provisions educate and maintain my children . . . in a way befitting their station in life, until they shall respectively attain the age of twenty-one years or, if daughters, be married." He was survived by his wife and by several sons and daughters of that and of a prior marriage. The settlement left undisposed of part of the income and most of the capital of his estate, which was of considerable amount. *Held* that one of the daughters of the first marriage, who was over twenty-one years of age and desired to live apart from the widow, was not entitled under the settlement to a separate maintenance out of the widow's annuity, it being sufficient implement of the widow's obligation that she offered to maintain the daughter in family with her in the dwelling-house left by the truster.

2D DIVISION.
M.

JOHN BARRY, merchant, Leith, died on 21st May 1884. He had been twice married. He was survived by his second wife and by three children (a son and two daughters) of his first marriage, of whom the eldest was Mary, who was born in 1858, and by three children (two sons and a daughter) of his second marriage.

He left a settlement by which he conveyed his whole estate to trustees for certain purposes.

By the second purpose of the settlement he directed his trustees to pay to his widow a free annuity of £700, and to "permit" her "to occupy and possess my present dwelling-house . . . or any other dwelling-house which may be occupied by me at the time of my death, along with the whole household furniture and plenishing of every description belonging to me that may be in it," declaring that these provisions should be accepted by her in full satisfaction of her whole legal claims against his estate (except mournings and aliment till her annuity commenced to be

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payable), "providing and declaring that my said wife shall, out of the foresaid provisions, educate and maintain my children, born or to be born, in a way befitting their station in life, until they shall respectively attain the age of twenty-one years or, if daughters, be married." By the third purpose the truster provided for the carrying on of his business if it continued profitable, and by the fourth purpose he made a certain provision as to the application of the income, to an extent not exceeding £1000 after the death of his widow, but the settlement left undisposed of the great bulk of the estate.

He also declared it to be his wish that after his widow's death his dwelling-house should be occupied by his unmarried daughters, free of all rents and charges.

The value of the trust-estate at the death of the truster was £7400 of heritage and £11,054 of moveables. The average yearly income, including the business profits, was £2063. The annual value of the house liferented by the widow was £50.

Mr Barry's first wife was a Roman Catholic, and Miss Mary Barry was educated in that faith, and resolved to become a nun. About six months prior to the death of the truster he had placed her in a convent at Rockferry, Birkenhead, as a novice, and paid for her a year's board, £40. She continued after her father's death to reside in that convent.

This special case was presented by the trustees (first parties), Mrs Barry (second party), and Miss Mary Barry (third party), to determine the question whether the board payable for Miss Mary Barry ought to be paid by Mrs Barry out of her annuity, or ought to be charged to the third party's own prospective share of her father's estate.

This question of law was stated,—"Is Mrs Barry bound to pay to Miss Barry a sum of money for her separate maintenance?"

The case stated that the trustees had "offered to pay the sum of £40 per annum to Miss Barry for her maintenance, debiting her share of her father's estate with such payments, if the Court shall be of opinion that they are entitled so to do, but Miss Barry objects to such payments being put to the debit of her share."

Argued for the first and second parties;—The widow's income was intended to be applied to the maintenance of a home for her and the unmarried daughters, and its amount had no doubt been fixed by the truster with that in view. It was not intended to provide a variety of separate establishments. If the third party were right the other daughters could make the same demand, and leave the house intended as the home of all to be the home of the widow only. The third party's board, if she declined the offer of the second party, should come from her own funds.

Argued for the third party;—The provision of the settlement bound the second party to support the truster's daughters till marriage. They might choose their own residence, and need not live with her. In the third party's case the truster must have contemplated that result, for he himself placed her in the convent. A stepmother bound to aliment a stepchild could not discharge that obligation by a mere offer of maintenance in her own house.

LORD JUSTICE-CLERK.—The claim here made by the daughter is one which can only be sustained if the will of the testator will bear out the contention which she has made. Her stepmother, the widow, has an alimentary provision of £700. She is bound out of it to maintain the unmarried daughters, but I think she is not bound to do so except in the house the testator has left her for that purpose. The daughter has gone into a nunnery. I think the stepmother

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is not bound to maintain her there. She offers to receive her into the house the testator left for that purpose and maintain her there out of her alimentary provision of £700, also left for that purpose, and I think she is no further bound.

Lord Young.—I am of the same opinion. I think the question must be answered in the negative. Mrs Barry, the stepmother, has no interest in the estate of her deceased husband except to the extent of a sum of £700 a-year and a residence. That £700 a-year and that residence are given her by the will on the condition that she shall by means of them "educate and maintain my children, born or to be born, in a way befitting their station in life, until they shall respectively attain the age of twenty-one years or, if daughters, be married."

She is to maintain and educate the children till they are twenty-one, being freed earlier if they, being daughters, are earlier married. This daughter, Mary, did not marry before attaining that age. She is now unmarried and about thirty years of age. Fortunately for her, or for those who are now entertaining her in a nunnery at Birkenhead, her father died a man of considerable wealth, and that wealth is not disposed of adversely to her, except to the extent of £700 annually during her stepmother's life. What action she may have against those who are in possession of her deceased father's estate, which *prima facie* is liable to maintain her, I am not in a position to say in this case, and I have not considered. I am of opinion that the widow is not bound to give her a separate maintenance out of her £700 a-year.

Lord Craighill concurred.

Lord Rutherfurd Clark.—I am clear that under the will there is no obligation on the stepmother to support Miss Barry in this nunnery.

The Court answered the question in the negative.

Andrew Wallace, S.S.C.—Tait & Crichton, W.S.—Agents.

No. 92.

Mar. 7, 1888.
Hine Brothers v. Clyde Trustees.

Hine Brothers, Pursuers (Appellants).—*D.-F. Mackintosh*—*C. S. Dickson.*

The Trustees of the Clyde Navigation, Defenders (Respondents).—*Ure.*

Ship—Reparation—Liability for collision.—Where a ship is placed in a position of peril and difficulty by the wrong manœuvring of another ship, and her captain in exercising his best judgment for the safety of his vessel commits an error which causes or contributes to a collision between them, he will not be held in fault.

The steamer "Horatio" going down the Clyde on an outward voyage after sundown kept too much to the south—her wrong side of the channel. A steam barge which was coming up on the south—her proper side—being in danger of coming into collision with the "Horatio," and thinking from her lights that she was going into Greenock on the south side, and that if she herself kept her own course collision would be inevitable, endeavoured to keep outside of her by going to the north. The "Horatio," however, almost at the same time, had changed her course with the view of passing on the north side, and a collision resulted. In an action for damages by the owners of the "Horatio," *held* that the master of the barge having been put in great danger and difficulty by the pursuers' own fault, and having steered as seemed best to avoid the danger so caused, was not in fault, and therefore that the owners were not liable.

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Hine Brothers v. Clyde Trustees.

2D DIVISION.
Sheriff of Lanarkshire.
M.

HINE BROTHERS, steamship owners, Maryport, raised an action against the Trustees of the Clyde Navigation in the Sheriff Court of Lanarkshire, concluding for £215, 19s. 6d. as damages sustained through a collision between the steamship "Horatio," belonging to the pursuers, and a hopper barge belonging to the defenders. The barge was at the time coming up and the "Horatio" going down the river.

The pursuers averred;—(Cond. 3) "Both in the navigation of the 'Horatio' down the river, and the course taken for passing the barge, the 'Horatio' observed the well-known rules of good seamanship, and acted in accordance with the statutory sailing directions, Board of Trade rules, and local rules and practice applicable to the navigation of Cartsdyke Bay, while the barge failed to observe these rules, and was navigated in defiance of them by officers or servants of the defenders who were in charge of the barge. In particular, the defenders' said servants failed to observe Articles 15, 18, 19, 21, and 22 of the Board of Trade Rules for Preventing Collisions at Sea." * (Cond. 4) "The collision which occurred between the said two vessels was owing entirely to the faulty or negligent navigation of the said barge, and, in particular, owing to her course having been improperly altered to port while she was approaching the 'Horatio,' and to her failure to observe the said sailing rules and practice. The counter averments are denied. . . ."

The defenders, in answer, stated;—(Ans. 3) "Denied. At the time of the collision the 'Horatio' was on the wrong side of the channel." (Ans. 4) "Denied. The collision occurred through the fault of those on board the 'Horatio,' and their failure to observe the rules of good seamanship and the Regulations for Preventing Collisions at Sea, and particularly, without prejudice to said generality, articles 15, 18, 19, and 21 thereof. . . ."

The defenders pleaded;—(1) The collision not having been caused by the fault of the defenders, or by those for whom they are responsible, the defenders are entitled to absolvitor.

A proof was led. It appeared that the collision took place on the afternoon of 21st October 1886 after dusk. The "Horatio," a vessel of 261 tons burden, was going down the Clyde on an outward voyage, had rounded Garvel Point, and got into Cartsdyke Bay and was nearly opposite the harbour works of Greenock. She was under the charge of a pilot. She was on the south side of the channel, which was not the proper

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* The Regulations for Preventing Collisions at Sea, dated 11th August 1884, provided,—"Art. 15. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other."

"Art. 18. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary."

"Art. 19. In taking any course authorised or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam-whistle, viz. :—One short blast to mean 'I am directing my course to starboard'; two short blasts to mean 'I am directing my course to port'; three short blasts to mean 'I am going full speed astern.' The use of these signals is optional; but if they are used, the course of the ship must be in accordance with the signal made."

"Art. 21. In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship."

"Art. 22. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course."

"Art. 23. In obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

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side for a vessel which like the "Horatio" was going down the river and was not intending to call at Greenock. A vessel going into Greenock might have been in such a position. The south side was the proper side for a vessel coming up the river. The defenders' barge was at the time coming up the river close to the south side. The "Horatio" saw the lights of the barge just as she got round Garvel Point, and the barge saw her lights. The "Horatio" ported her helm, and whistled.

The proper side for a vessel going up the river to pass another was the south, but the master of the barge believed that the "Horatio" meant to go to the south side, and treated her as a vessel going into Greenock. He therefore, before he had observed that the "Horatio" had ported her helm and was coming to the north, put his helm to starboard so as to keep out to the north side of her, a manœuvre which had the effect of taking his barge somewhat across the course the "Horatio" was taking. The result was that though on finding that by the position of the lights of the "Horatio" she had ported her helm, and that their courses were converging, he stopped and reversed his engines, the vessels came into collision, the barge striking the "Horatio" nearly amidships on the port side, and doing her considerable damage.*

The Sheriff-substitute (Lees) pronounced this interlocutor:—"Finds that on 21st October 1886, while the steamship 'Horatio,' belonging to the pursuers, was proceeding down the Clyde, and the hopper barge No. 4, belonging to the defenders, was proceeding up the Clyde, they came into collision in Cartsdyke Bay, near Greenock: Finds that by article 21 of the Regulations for Preventing Collisions at Sea, issued in pursuance of the Merchants Shipping Act, 1862, it is required that 'in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship': Finds that the place where the collision occurred falls within this rule: Finds that at the time of the collision both vessels were on the southern half of the channel: Finds that by article 15 of said regulations it is required that 'if two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other': Finds that when the master of the barge saw that a collision was imminent, or that his vessel would be driven on shore, he tried to pass on the starboard side of the 'Horatio': Finds that at or about the same time the helm of the 'Horatio' was put to port: Finds that the peril in which the vessels were placed arose from the fault of the 'Horatio' in being on the wrong side of the channel, and would not otherwise have occurred: Finds that the actual occurrence of the collision was caused by the master of the barge trying to pass on the starboard side of the 'Horatio': Finds in these circumstances, as matter of law, that the peril having originated in the fault of the 'Horatio' in being on the wrong side of the channel, the pursuers are thereby barred from obtaining compensation for the injuries received by their vessel through any fault of the defenders' servants in trying to take the barge past the 'Horatio' on her starboard side: Therefore assoilzies the defenders from the conclusions of the action, and decerns." †

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* The evidence of the master of the "Princess Royal," a steamer which was going down river behind the "Horatio," who saw the collision, is quoted in the opinion of the Lord Justice-Clerk.

† "NOTE.—The western boundary of the river Clyde is a line drawn from Newark Castle to the mouth of Cardross Burn. As it is now admitted, in the light of the evidence that has been led, that the *locus* of the collision was west

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The pursuers appealed to the Court of Session.

At the debate the argument turned in part on the "Regulations for Preventing Collisions at Sea" and their bearing on the circumstances of the case. These rules are quoted *supra*, p. 499. The Court being, however, of opinion that the decision did not turn on any construction of these rules, the argument on them need not here be detailed. The

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of this imaginary line, the defenders ultimately abandoned the pleas founded on their own byelaws.

"The general requirement as to how vessels shall pass one another where they meet end on, or nearly end on, is that each is to pass on the port side of the other. The pursuers contend that, as the barge transgressed this rule, the defenders are therefore liable to them in compensation. They found on the well-known case of the *Stoomvart Maatschappy Nederland* v. *The Directors of the P. and O. Steam Navigation Co.*, 1880, 5 App. Cas. H. L. 876, as establishing liability against the defenders. That case, however, did not go quite so far as the pursuers contend, though it did emphatically lay down the rule that disregard of the directions given by the Regulations is not to be based on considerations of discretion and expediency, but on actual necessity. The House of Lords accordingly held, in regard to the claim for compensation made by the owners of each vessel, that both were to blame. In the present instance the only claim made is by the pursuers, and therefore the judgment must be the same, whether they fail to prove fault on the part of those in charge of the barge, or whether they prove it, if they themselves were also to blame.

"The defenders contend in reply that, as matter of fact, the ships were not end on, or nearly so; but I am inclined to believe, on the whole, that they were sufficiently so to let Article 15 of the Regulations apply.

"But the defenders maintain they are entitled to immunity in respect of the provisions in Article 21 of the Regulations, which requires that in narrow channels a steamship is to keep on that side of the fairway or mid-channel which lies on her starboard side. The pursuers say this rule is inapplicable, as the place where the collision occurred was beyond the limits of the river. But, in my opinion, the rule is not limited to the river. It is not a question of where is the mouth of the river, and that all above that is narrow channel, and all below it is not so. As matter of fact, I understand the channel is broader above the spot where the collision occurred than at it or below it. And I should have little hesitation in holding that the rule would apply as regards the Kyles of Bute or Loch Long. The only requirement to make the rule apply is that the place in regard to which it is mooted is a narrow channel, and, therefore, I should think it applicable to a narrow passage between islands anywhere, or between an island and the mainland. Indeed, it would be absurd to say that the rule was to be applicable at a place where measures of precaution were little needed, and not where they were most needed. It is the narrowness of the channel that creates the danger, and therefore requires that, to avoid risk of collision where there is no room to manœuvre, each vessel shall keep to her own side of the channel.

"Now, the 'Horatio' transgressed this rule. And this was the source of the danger. It was the *fons et origo mali*, and if the 'Horatio' had kept to her proper side, as the barge did to hers, nothing that the barge could have done would have brought about the collision.

"It is, therefore, unnecessary to determine whether the master of the barge was right or was wrong in trying to escape injury by passing the 'Horatio' on the starboard side. Possibly the case was one of actual necessity. This, however, is open to argument. But, even assuming that it were held that the barge was wrong in trying to pass on the starboard side, the important point is that her election or adoption of this wrong course could not have occurred if the 'Horatio' had kept to her own side of the channel. The barge was close to the shore on her proper side of the channel, the 'Horatio' was where she had no right to be; and as it was her being there created the danger, I think her owners are barred from obtaining the compensation that they seek."

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pursuers further argued;—It was not proved that the "Horatio" was keeping a course too far to the south, and the finding of the Sheriff that the *causa proxima* of the accident was the act of the barge was entirely in their favour. The idea that the "Horatio" might be about to call at Greenock did not justify the barge in taking her wrong side. Even if the barge had kept on the course she was on when she saw the "Horatio" there would have been no collision, *multo magis* if she had kept further to the south. The barge was therefore alone to blame, and even if the "Horatio" had been originally on her wrong side, must bear the loss.[1] Nothing short of necessity would justify a vessel in taking her wrong side.[2] Even if the "Horatio" were to be deemed in fault, the barge was also in fault, and the loss should be divided.

Argued for the defenders;—It was not maintained on the other side that the barge was wrong before she put her helm to starboard to go to the north. She acted rightly in the circumstances in doing so. The probability was that if she had kept her course, or merely stopped and reversed, she would have been run down, and to the south she could not go when the course of the "Horatio" seemed to be to the south. The "Horatio" did not port her helm in time, or the barge would never have been obliged to starboard her helm and try to pass her on the north. Even if it was an error to try this course, it was an error due not to her own fault but to the fault of the "Horatio," and the defenders were not liable for an error committed in their captain's endeavour to do his best in the position in which the "Horatio" placed him.[3]

Lord Justice-Clerk.—I think the judgment of the Sheriff that the owners of the barge are not responsible for the damage caused to the "Horatio" by the collision ought to be affirmed.

The "Horatio," a steam vessel outward bound, was going down the Clyde and had reached a point near Greenock, at which port she had no intention of stopping, when at 5.30 on an October afternoon a collision took place between her and the defenders' barge. The collision took place after the "Horatio" had passed Garvel Point. The barge ran into her and did the damage complained of. It is said that the barge is responsible, because in the course of the manœuvring which preceded the collision, she acted in breach of the rules for the prevention of collisions between ships at sea. If it were necessary, as I think it is not, to decide any question on these rules, I should be inclined to think the rules were not strictly observed.

But the larger and more important matter is this, that the "Horatio," although outward bound, and with plenty of room, came too near the south shore, and, by doing so, caused the difficulty which arose. I am of opinion that if a large vessel having her own proper course quits it and causes a difficulty, such as that into which "Horatio" put the barge, to a smaller vessel coming towards her, putting her without any good reason, and contrary to good navigation, into a position of difficulty and danger, it is not a good contention for the larger ship to say "You broke this or that rule for the passing of ships at sea." When the confusion has been caused by the vessel which has so acted, allowance must be made for the ship which has been placed in an unexpected difficulty. If in a moment of extreme difficulty so caused, that ship does something contrary to rule that will not render it necessarily liable for the damage caused thereby. It was well observed by James, L.-J. in the case of the *Bywell Castle* which was quoted to us, "I desire to add my opinion that a ship has no right by its own misconduct to put another ship into a situation of extreme peril and then charge that other ship with misconduct. My opinion is that if in that moment of extreme peril and difficulty such other ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men." That passage exactly expresses my view here.

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[1] Cayzer, Irvine, & Co. v. Carron Co., Aug. 1, 1884, L. R., 9 App. Ca. 873; Spaight v. Tedcastle, March 7, 1881, L. R., 6 App. Ca. 217; "The Khedive," July 23, 1880, L. R., 5 App. Ca. 876.

[2] "The Khedive," *supra;* "The Benares," Dec. 3, 1883, L. R., 9 P. D. 16.

[3] "The Bywell Castle," July 15, 1879, L. R., 4 P. D. 219.

Now, an account of the manner in which this accident happened is given by the master of the "Princess Royal," a steamer which was coming down behind the "Horatio." He says,—"I saw the hopper barge and the 'Horatio' in their course before the collision. The 'Horatio' was keeping considerably to the south side of the channel. The 'Princess Royal' was about mid-channel as near as possible. The 'Horatio' was to the south of us. When I noticed the hopper barge first I think she would be about the West India Quay—between that and Steel's yard. She was on the south side of the channel. As near as I can describe it, the two vessels came together somewhere about Steel's slip. When the vessels came into collision the 'Princess Royal' would be nearly her own length distant from the 'Horatio'—about 300 feet. When I saw that a collision was imminent, I backed full speed and put stern way on my ship. The second mate was steering beside me on the bridge. Before the collision happened, when I saw the angle of both vessels, and them so near, I said to the second mate 'There is a collision going to happen here.' The second mate made a remark to me; he said 'I do not think they have struck.' I said 'Yes, they have, because I saw the concussion.' The barge being a little light, I could see her mast giving a little shake. I said something about who was to blame. I did not know the name of the steamer coming down, but I said she was wholly to blame. I thought he had not a leg to stand upon, because if she had been navigated in her proper position in the river there would have been no collision." I think that that evidence (of which there is ample corroboration) shews that the "Horatio" was not keeping a proper course. The course she was keeping caused the crew of the barge to think she was going into Greenock. That impression was not unreasonable or unnatural, and the accident resulted from the course the crew of the barge felt bound to take,—in consequence of it. I give no opinion on the details of the rules, because the other grounds I have stated are sufficient.

LORD YOUNG.—I am of the same opinion, on the same grounds. I think the case involves no legal question on the navigation rules which were cited to us. The central fact is that the ships came into collision at a point shewn on the plan, and which is close in to the harbour works at Greenock. The barge was on her way up the river and the ship was going down the river, having no occasion to call at Greenock. The question is, whether there was fault, and if so, whose fault. I think it was not an unavoidable accident, and, therefore, that there was fault. The first fault at all events was that of the "Horatio," that she should not have been there. She was out of her proper course. I do not mean

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that it was unlawful for her to have steered a course which might take her there. That was not contended. But she was out of her proper course. Then she ought to have gone to starboard, so as not to get to the point to which I have referred. But to it she did get. The barge saw her green light, and she must have seen the red light of the barge. What was the barge to think from seeing her there? It could only be concluded that she was going into Greenock. Her position was proper for a ship going there, but not for a ship going outward down the river. What then was the duty of the barge? It was to do what she did, to keep outside by starboarding her helm so as to go to port, and keep outside the course which the vessel crossing her path would take. I think it is according to the evidence that had the "Horatio" continued in the course she was holding when quite near the barge, and had the barge continued in hers, there would have been inevitably a collision, and therefore the barge had to change her course, unless, indeed, she was bound to act on the belief that the "Horatio" would not continue in hers. The fault therefore imputed to the barge is that those on board of her ought to have had faith that the "Horatio" would alter her course, as in fact she did. But such a belief was not to be looked for on pain of being held a wrongdoer if it was not shewn. I cannot therefore impute blame to the barge for taking such a course as would take her outside the "Horatio." I think the course taken by the barge was reasonable and proper.

If I had to say who was to blame, I should be prepared to place the blame on the "Horatio." But that is not necessary. I am for negativing the averment that the barge was in fault.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—"Find that the collision between the steamship 'Horatio' belonging to the pursuers and the hopper barge belonging to the defenders was not caused by fault of the defenders or those for whom they are responsible: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-substitute appealed against."

R. Bruce Cowan, W.S.—Webster, Will, & Ritchie, S.S.C.—Agents.

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Shaw v. Caledonian Railway Co.

John Shaw, Pursuer (Appellant).—*C. S. Dickson.*
Caledonian Railway Company, Defenders (Respondents).—
R. Johnstone—Clyde.

Process—All parties not called—Company—Action for registration of transfer.—The transferee of stock in a railway company raised an action against the company to have them ordained to register the transfer. The company in defence averred that the transferor had instructed them not to register the transfer, on the ground that the transferee was "illegally disposing of" the transferor's stock; and pleaded "all parties are not called." The Court *held* that it was not necessary to call the transferor as a defender in the action, but in respect that the action had not been formally intimated to him ordained the defenders to transmit to him a copy of the record and a copy of the interlocutor certifying him that if he failed within eight days to state objections to the registration of the transfer, judgment would be pronounced against the defenders.

1st Division.
Sheriff of Lanarkshire.
M.

On 9th November 1887, John Shaw, sharebroker, London, raised an action in the Sheriff Court of Lanarkshire, at Glasgow, against the Caledonian Railway Company, in which he prayed the Court "to ordain the defenders to register in their register of transfers a transfer at present in their hands granted by John Rayner, late of Hoburne, Christ Church,

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Hants, and now of 89 Hugh Street, Eccleston Square, London, S.W., in favour of the pursuer, dated the 26th day of July 1887, whereby the said John Rayner transferred to the pursuer £80 Consolidated Stock of and in the defenders' undertaking, and to ordain the defenders to deliver to the pursuer a certificate or scrip in his favour representing that he is now the holder of the said stock."

He stated that on 26th July 1887 he wrote to the railway company enclosing the certificate for the stock in question in name of John Rayner, and transfer by Rayner in his favour, and requested them to record the transfer, but that the company refused to do so.

The defenders averred;—"On 27th July 1887 the defenders received from the pursuer a transfer of said stock, which, *ex facie*, appeared to be granted by the said John Rayner in favour of the pursuer. The stock certificate in name of the said John Rayner was sent along with the transfer, and the defenders were requested to register the transfer in name of pursuer. At the same time the pursuer sent to the defenders' registrar a transfer of said stock by him to a Mr G. L. Payne, and requested that the registrar should certify this transfer. The said transfer was not executed by the transferee Payne, and the object of the pursuer in asking the registrar to certify the transfer was to enable the pursuer to get payment of the price from the purchaser G. L. Payne." (Stat. 2) "Simultaneously with the receipt of the transfer and stock certificate by the defenders, they received from the said John Rayner, the transferor, a post-card of which the following is a copy,—'S. W., 4 Passmore St., Chester Square, London. The Secretary, &c., Caledonian Ry. Co., Glasgow. Sir,—There is a man named Shaw, an outside broker, illegally disposing of my stock; it is not to be transferred out of my name.—Yours very truly. JNO. RAYNER.'" (Stat. 3) "The registrar of the defenders sent to pursuer a copy of the above post-card on the day it was received, viz., 27th July 1887, and intimated that in the circumstances he must defer doing anything until the matter had been arranged between the pursuer and the said John Rayner." (Stat. 4) "In reply to the above letter the pursuer, on 28th July 1887, wrote to the defenders stating that he need hardly say he should be very unlikely to dispose of stocks illegally. He also intimated that the transfers, &c., were duly completed, and that there could be no question as to his title, and gave notice that Mr Rayner had transferred the £80 stock to him. Subsequently, on 30th September, the pursuer asked the defenders' registrar to return the transfer which he had executed into the name of Mr G. L. Payne, and this was done." (Stat. 5) "A copy of the above letter was, on 4th August 1887, transmitted by the registrar of the defenders to the said John Rayner, and he was asked if he still adhered to the terms of his post-card of 26th July, and to that letter he replied on 6th August in the following terms:—'I have nothing to add to mine of the 26th. Mr Shaw has no claim to my stock.—Yours very respecty. JNO. RAYNER.' The defenders also received from the said John Rayner a post-card in the following terms:—'Gand, Belgium, Oct. 13, 1887.—Sir,—I am surprised you have not sent divd. as usual; the man Shaw has no legal claim on my stock. I suppose I must take proceedings against him for its recovery.—Yours faithfully, JNO. RAYNER.'" (Stat. 6) "It is the practice of the defenders, in common with all other railway companies and other corporations, to issue in the case of every transfer received by them for registration a notice to the transferor of the receipt by the defenders of the transfer, the object of the notice being to give the transferor an opportunity of stopping the registration of the transfer. No such notice required to be issued by defenders about the stock in question, as the objection of the said John Rayner to the regis-

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tration of the transfer was received simultaneously with the transfer itself." (Stat. 7) "The pursuer has not furnished to the defenders any explanation about the acquisition by him from the said John Rayner of the stock in question, nor has he produced any evidence to establish the *bona fides* of the transaction, although asked by defenders to do so."

The pursuer pleaded;—(1) The pursuer being the transferee of the stock formerly held by the said John Rayner in virtue of a valid probative transfer, the defenders are bound to give effect to the said transfer, and to register the same, and issue a certificate or scrip in favour of the pursuer, all in terms of the prayer of the petition. (2) The statements of the defender are irrelevant, and ought not to be admitted to probation.

The defenders pleaded;—(1) All parties are not called. (2) No jurisdiction. (4) The defenders being interpelled by the notices from the said John Rayner from registering the transfer of the stock in question, decree of absolvitor ought to be pronounced. (5) The pursuer having failed to satisfy the defenders of the *bona fides* of the transfer, the action is premature, and the defenders ought to be assoilzied.

No formal intimation of the action was made to Mr Rayner.

On 13th January 1888 the Sheriff-substitute (Guthrie) sustained the defender's first plea in law, and dismissed the action.*

The pursuer appealed to the Court of Session.

Argued for the pursuer;—The company ought not to be allowed to defend a man who neglected to come forward and defend himself. The transfer, which was admittedly granted by Rayner, was *ex facie* good. All the cases relied on by the defenders, in which a company had been found liable for wrongly registering a person as a shareholder, were cases of forged transfers. No such case was averred here. There was no necessity for calling Rayner in this action; the decree sought could only go out against the company.

Argued for the defenders;—The company were not the true defenders here. Possibly it was right to call them for their interest, but the transferor of the shares was the proper defender. The pursuer might have raised his action in the English Courts if there was no jurisdiction against Rayner in Scotland. A company was not bound to register transfers immediately they were sent to them, particularly where the transferor objected to their doing so, as he did here. If they registered wrongly, they would be liable to the extent of the shares.[1] Forgery was not suggested here, but they had averred enough to shew that they had good reason for delaying the transfer till the truth was discovered as to Shaw's dealings with the shares.

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* "NOTE.—. . . I am of opinion that the true question is between the pursuer and his transferor, Mr Rayner, and that the company defending is not bound to register the transfer in the face of his interpellation. Two courses might be open here, viz., (1) to dismiss, or (2) to sist the process until either the question shall be determined in other proceedings between the pursuer and Rayner, or Rayner, on intimation, shall choose to appear in this action and have the issue between him and the pursuer determined. Rayner, however, is out of the jurisdiction, and most probably would not choose to sist himself if called upon to do so. And I do not understand that the pursuer desires to have an opportunity of intimating the dependence of the action to him with that view. I therefore think that the natural result of sustaining the defender's first plea in law is the dismissal of the action.

"If both parties desired that Mr Rayner should be certified of the dependence of the action, and that if he failed to make good his objection to the transfer, registration would follow, there might be convenience so far as they are concerned in adopting that course. But they do not so concur; and even if they did, it might be a hardship for an Englishman to be coerced into a litigation in Scotland about matters which may involve questions very remote from this £80 of railway stock."

[1] Société Générale de Paris v. Walker, 1885, L. R., 11 App. Cas. 20; see

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At advising,—

Lord President.—We are all of opinion that the interlocutor of the Sheriff-substitute cannot stand. There is no necessity for calling any person who is not already in the case, as a defender. The decree requires to go out against the company, and against no one else, and we should therefore have proceeded at once to give judgment for the pursuer, were it not desirable that, as there has never yet been formal intimation of this action to Mr Rayner, that should be done, and we shall therefore make an order to that effect.

Lord Adam and **Lord Kinnear** concurred.

Lord Mure and **Lord Shand** were absent.

The Court pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute of 13th January 1888: Repel the two first pleas stated for the defenders, and appoint the defenders to intimate the dependence of this process to John Rayner, the transferor in the transfer sought to be registered, and that by transmitting to him in a registered post letter a printed copy of the record in the appeal, and a copy of this interlocutor authenticated by the Clerk of Court, certifying the said John Rayner that if he fail within eight days to appear in the cause and state objections to the registration of the said transfer, judgment will be pronounced against the defenders."

David Turnbull, W.S.—Hope, Mann, & Kirk, W.S.—Agents.

No. 94.

Mar. 8, 1888.
Crum Ewing's Trustees v. Bayly's Trustees.

Alexander Dick and Others (Crum Ewing's Trustees), First Parties.—*Mackay.*
John Bayly and Others (Bayly's Marriage-Contract Trustees), Second Parties.—*Murray.*
John Bayly and Others, Third Parties.—*Murray.*
Alexander Crum Ewing and Others (Crum Ewing's Trustees), Fourth Parties.—*Mackay.*

Trust—Election—Provisions of father's settlement in lieu of marriage-contract provision to child.—A father in the marriage-contract of his daughter directed trustees, who held for him a policy for £3000 on his life, to assign it, to the extent of £2000, to the marriage-contract trustees for behoof of the daughter in liferent and her children in fee, and bound himself to pay the premiums during his life, and, failing his doing so, to pay to the marriage-contract trustees the sum of £2000 at the first term after his death. This and other provisions were declared to be in full of all the daughter could claim from her father's estate, except such provisions as he might make of his own free will by deed of settlement or otherwise. The policy was never assigned to the marriage-contract trustees. The father continued to pay the premiums till his death. He died leaving a settlement by which he directed one-third of the residue of his estate to be held for behoof of the daughter in liferent and her children in

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Lord Blackburn, at pp. 35 and 41; Bahia v. San Francisco Railway Company, 1868, L. R., 3 Q. B. 584, see Blackburn J., at p. 596, Mellor J., at p. 597, and Lush J., at p. 598.

No. 94. fee, declaring that the provisions for her should be in full of all his obligations under her marriage-contract remaining unimplemented, "which provisions shall by acceptance of the provisions hereunder be held to have been discharged." *Held* that if the daughter and her husband took the share of the residue, they were not entitled to any part of the policy fund.

Mar. 8, 1888. Crum Ewing's Trustees v. Bayly's Trustees.

2D DIVISION. M.

IN the antenuptial contract of General and Mrs Jane Coventry Ewing Crum or Bayly (executed in July 1854) Mrs Bayly's father, the late Mr Humphry Ewing Crum Ewing of Strathleven, merchant in Glasgow, made, *inter alia*, the following provision:—"Whereas the said Humphry Ewing Crum Ewing has effected an insurance upon his life for the sum of £3000 with the Scottish Widows' Fund and Life Insurance Company, conform to policy, &c., dated 1st December 1847, and granted by the said insurance company at the desire of the said Humphry Ewing Crum Ewing in favour of Alexander Hastie, M.P.," and other persons, "as trustees for such purposes as he, the said Humphry Ewing Crum Ewing, should direct and appoint by a writing under his hand: Therefore the said Humphry Ewing Crum Ewing hereby directs and authorises the said trustees to assign and transfer the said policy of insurance, to the extent of the sum of £2000 sterling thereof, and of the corresponding emoluments and profits, which may have accrued or may accrue thereon, to the trustees hereby nominated and appointed under this contract, or their foresaids, to be held said policy to the extent of said sum of £2000, and corresponding emoluments and profits thereof, by the said trustees in trust for behoof of the said Miss Jane Coventry Ewing Crum in liferent, for her liferent use only, exclusive of the *jus mariti* and the debts and deeds of the said John Bayly as aforesaid, and for behoof of the children of the marriage in fee, in such shares as shall be apportioned among them in manner aforesaid, or failing such apportionment, then equally among them, the issue of any of them deceasing succeeding to their father or mother's share, whom all failing, then for behoof of the said Humphry Ewing Crum Ewing, or his heirs or assignees whomsoever: And in the meantime the said Humphry Ewing Crum Ewing binds and obliges himself to keep the said policy of insurance in force, and to pay the annual premiums due thereon during his life, and that regularly as they become due; and failing his doing so, then he binds and obliges himself and his foresaids to make payment to the said trustees, for the purposes foresaid, of the said sum of £2000 at the first term of Whitsunday or Martinmas succeeding his death, with the lawful interest thereof from the said term until the same is paid."

The deed contained this clause,—"And the said Miss Jane Coventry Ewing Crum and John Bayly hereby accept of the foresaid stipulations and provisions by the said Humphry Ewing Crum Ewing in favour of his said daughter and her children, secured by the foresaid trust, in full of all legitim or bairns' part of gear, and all other claims whatever competent to her against her said father, or his means and estate, except what farther provisions he may of his own free will make in her favour by deed of settlement or otherwise."

The insurance policy referred to did not specify the trusts upon which it was held by Mr Hastie and the other trustees, but by a deed of declaration, executed in 1850, the trustees declared that the policy was held in trust for three sons of Mr Crum Ewing, but it was further declared that notwithstanding the previous declaration the trustees should have full power to dispose of and apply the trust-funds "in such other way, and for such other purposes, as we or our said quorum shall deem proper, and that by any subsequent writing."

In the exercise of this reserved power the trustees, on 1st January 1877, executed a new declaration of trust, which was appended to the former. It bore,—"We, as surviving acting trustees foresaid, do now hereby alter and recall the purposes of the trust specified in said declaration, and declare that we hold the said policy and sum thereby insured, and all the benefits accruing thereon, for behoof of the said Humphry Ewing Crum Ewing, to be disposed of and applied as he may think proper and direct by assignation, deed of settlement, or otherwise."

The trustees holding the said policy of assurance never assigned or transferred to any extent the said policy to the trustees under the said contract of marriage, nor was the direction to assign the policy by Mr Crum Ewing contained in the said contract of marriage ever formally intimated to the trustees holding the policy.

Mr Crum Ewing paid the premiums on the policy down to the date of his death.

Mr Crum Ewing died on 3d July 1887, leaving a settlement dated 8th April 1887, in which he directed one-third of the residue of his estate to be held for behoof of Mrs Bayly in liferent and her children in fee.

The settlement contained this clause,—"And it is also specially provided and declared that the provision hereinbefore conceived in favour of the said Mrs Jane Coventry Crum or Bayly and her children shall be in full to her and them, and to the said John Bayly and their issue, of all provisions conceived by me in their or any of their favours by the antenuptial contract entered into between the said John Bayly and my said daughter, dated 4th July 1854, and particularly in lieu and in place of all obligations in their or any of their favours so far as still unimplemented undertaken by me by the said antenuptial contract, all of which provisions shall, by acceptance of the provisions hereunder, be held to have been discharged."

On the death of Mr Crum Ewing the trustees under the policy of assurance uplifted the sum contained in it. The proportion of that sum falling under the directions in Mrs Bayly's marriage-contract amounted, with profits, to £3723, 17s. 3d.

A special case was presented to the Court by the policy trustees as first parties, Mrs Bayly's marriage-contract trustees as second parties, General and Mrs Bayly and their children as third parties, and the testamentary trustees as fourth parties, for the opinion and judgment of the Court on the following questions:—"Whether the second parties, the marriage-contract trustees of General and Mrs Bayly, are entitled to claim, for behoof of General and Mrs Bayly and their children, the sum of £3723, 17s. 3d., being the proportion of the proceeds of the said policy of assurance provided to Mrs Bayly and her children by her contract of marriage; and the third parties, General and Mrs Bayly and their children, also to claim one-third of the residue of Mr Humphry Ewing Crum Ewing's estate, provided in their favour by his trust-disposition and settlement? Or, whether an election must be made between the two claims?"

The second and third parties maintained that the former were entitled to payment from the first parties of the sum they received under the policy, and that the third parties were also entitled under the settlement of Mr Crum Ewing to one-third of the residue of his estate.

The fourth parties contended that the third parties were bound by the terms of the settlement to elect between the policy fund and the one-third of residue.[1]

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[1] Somervell v. Somervell, June 28, 1884, 11 R. 1004; Bonhotes v. Mitchell's Trustees, May 27, 1885, 12 R. 984.

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LORD JUSTICE-CLERK.—It is of little moment whether this be called a case of election or not. The main fact is that the testator intended his succession to be divided into three equal portions, and the question is whether this obligation for payment of an amount much less than one of these portions to the marriage-contract trustees is to be regarded as a separate and specific obligation which is to be fulfilled to and enjoyed by the daughter who is the recipient of it without being counted as included in her third of residue. Now, I think the testator intended his children to share equally, and that the proceeds of the policy are simply to go *in computo* of the share falling to the daughter, Mrs Bayly.

LORD YOUNG.—I am of the same opinion and on the same grounds. The obligation—for it is a mere obligation—which was undertaken by Mr Crum Ewing by the marriage-contract of his daughter is worthy of attention. It refers to two sums. It is introduced by a narrative that Mr Crum Ewing was desirous of securing to his daughter in liferent, and the children of the marriage in fee certain sums, and then the narrative goes on to state that he is owner of a policy for £3000, which is held by voluntary trustees for him, and he directs these trustees to transfer the policy to the extent of £2000 to the trustees under the marriage-contract so that they may draw it after his death. He obliges himself to pay the premiums, and there is this alternative which is rather significant. After binding himself to keep the policy in force and pay the premiums, "and failing his doing so, then he binds and obliges himself and his foresaids to make payment to the said trustees for the purposes foresaids of the said sum of £2000 at the first term of Whitsunday or Martinmas succeeding his death." That is to say he directs his voluntary trustees to transfer to a partial extent the policy which they hold, with the alternative that he binds himself and his executors on his death to pay £2000 to his daughter's marriage-contract trustees. He could not escape from that obligation except by inducing the creditors in it to abandon it by giving them something more valuable in its place. In that view it may be called a case of election, but the name is not important.

If the marriage-contract trustees chose to enforce the obligation in the marriage-contract there would be no good answer to them. They are entitled to £2000 out of the policy, or to £2000 out of the executry of Mr Crum Ewing, which is the same thing.

But, being under that obligation, he settles his whole estate among his children, on condition that if they take that provision it is to be in lieu of any claims a child might have on his estate. Mr Crum Ewing may escape from the obligation by saying: "If you choose to take one-third of the estate, which is settled in practically the same way as was the marriage-contract funds, you may do so, but will receive nothing else." Now, the marriage-contract trustees must, it is clear, elect to take the larger provision. If they take it they can claim nothing out of the policy.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

THE COURT answered the first question in the negative, and the second in the affirmative.

WEBSTER, WILL, & RITCHIE, S.S.C., Agents for all the parties.

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GEORGE BROWN AND OTHERS, Pursuers (Respondents).—*Asher*—
R. V. Campbell.
MRS MARTHA BARCLAY OR DUNCAN, Defender (Appellant).—
Sol.-Gen. Robertson—*Wallace.*

Writ—Testament—Signature on erasure—Onus.—Where in a testamentary deed the signature bearing to be that of the testator was written on an erasure, but was otherwise *ex facie* duly tested, and the deed was challenged as vitiated *in essentialibus*, *held* that the deed was *ex facie* probative, and that the *onus* was consequently on the party challenging it to prove either that the signature was not genuine, or, if genuine, that it had not been duly tested. The proof on these points having failed, deed *sustained.*

2D DIVISION.
Sheriff of
Ayrshire.
I.

JOHN DUNCAN, ship-carpenter, Saltcoats, died on 22d September 1885, survived by his wife, but leaving no issue. After his death there was found in his repositories a settlement, dated 1st January 1876, by which he left his whole property to his wife, and appointed her his sole executor. This deed was written on a lithographed form, such as may be bought in stationers' shops. Its testing-clause and signatures were as follows:—" In witness whereof, I have subscribed these presents, written (in so far as not printed) by Robert Barclay, ironmonger at Kilwinning, this first day of January eighteen hundred and seventy-six years, before these witnesses, James Hendrie, ironfounder in Kilwinning, and John Anderson Peacock, grocer in Kilwinning. JOHN DUNCAN. James Hendrie, witness; John Anderson Peacock, witness."

The signature " John Duncan " was written on an erasure.

Mrs Duncan having petitioned the Sheriff of Ayrshire to be confirmed executor-nominate, George Brown and others, the representatives of Alexander Duncan, a brother and next of kin of the alleged testator (who had died shortly after him) presented a competing petition to be decerned executors-dative *qua* representatives of John Duncan's next of kin.

The pursuers, Brown and others, averred " that the alleged disposition and settlement is vitiated *in essentialibus*, and is *ex facie* inept, in respect the signature ' John Duncan,' alleged to be that of the deceased, is wholly written on an erasure. Further, it is averred that the witnesses who are alleged to attest the signature did not see the deceased John Duncan adhibit the said alleged signature, nor did he acknowledge the same to be his subscription in their presence."

The pursuers pleaded;—(2) The deed founded on by the defenders being *ex facie* vitiated and invalid, the petitioners are entitled to have the same disregarded or set aside.

The defender, Mrs Duncan, pleaded;—(1) The deed founded on by the defenders being *ex facie* valid and probative must receive effect until it is reduced by an action in the Court of Session.

On 9th June 1887 the Sheriff-substitute (Paterson) pronounced this interlocutor:—" Before answer, allows to the defender, Mrs Duncan, a proof that the deed of settlement, No. 7 of process, was subscribed by the granter or maker thereof, and by the witnesses by whom the deed bears to be attested; and to the pursuers a conjunct probation." *

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* In his note the Sheriff-substitute stated that the defender asked for a proof under the 39th section of the Conveyancing Act, 1874 (37 and 38 Vict. cap. 94). That section enacts,—" No deed, instrument, or writing subscribed by the granter or maker thereof and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was

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The general result of the evidence is given in the note to the Sheriff-substitute's final interlocutor.* There was no doubt that the signature "John Duncan" was in fact the signature of the deceased.

On 7th September the Sheriff-substitute pronounced an interlocutor, in which were, *inter alia*, these findings:—"Finds in fact that the signature 'John Duncan' to the testamentary deed, No. 7 of process, is superinduced on erasure; that the defender Mrs Duncan has failed to prove that the signature 'John Duncan,' at present adhibited to the said testamentary deed, was the signature attested by the two subscribing witnesses: Finds in law that the deed is invalid, and the nomination therein of 'Martha Barclay or Duncan, my wife, to be my sole executor,' is ineffectual."†

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subscribed by the granter or maker thereof and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

* Robert Birkmyre, lithographic writer and engraver, Glasgow, deponed,—"I have carefully examined the paper of the document, No. 7 of process, at the place where the signature 'John Duncan' is adhibited. I can find no trace of a previous signature having been on the paper where the present signature is. I could find no trace of writing of any kind having been at this place before the present signature was adhibited. . . . I consider that the whole signature has been written all at the same time. . . . I do not think the erasure has gone so far up on the paper as the top part of the 'h.' If there was an 'h' there before, it might have been a smaller 'h.' The very top part of the 'D' also does not shew on the paper any erasure beneath it. If there was a 'D' there before, it might not have gone up so far as the present 'D.' . . . . I have examined the paper of the will at the place where the signature 'John Duncan' is adhibited with a magnifying glass. The appearance it presents is, that a name may have been there, or some writing, or blot about the same length as the signature to the will, and that that has been scraped out. . . . My own idea is that the scraping has been done with a penknife. It might have been done with an ink-eraser, but, from the appearance of the paper, I would suppose it had been scraped with a knife. Something has been there before that has been scraped out. The state that the paper is in could not have been its state when it was made. The paper appears as if it had been gone over with something after it had been scraped, in order to smooth the surface. There are no remains of any previous writing at the place where the signature is adhibited. The original printed line for the subscription has only been partly erased at the place where the signature is, and a pencil line has been drawn along the place where the printed line was partially erased."

Another expert gave similar evidence.

† "NOTE.—It would appear from the evidence that the deceased John Duncan signed the testamentary deed in question in presence of the two attesting witnesses, on 1st January 1876, and that the deed remained in his custody from the date it was signed until the date of his death, 22d September 1885, and that he intended the deed to be effectual after his death.

"The presumption, however, is that the signature adhibited by him in presence of the witnesses has been subsequently erased, and the present signature superinduced on the erasure.

"If the present signature is not the signature which was attested by the witnesses, it is thought that the deed is in law invalid, although Mr Duncan may have believed and intended it to be effectual. The signature being on erasure, and no mention being made of this in the testing-clause, the deed is er

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The defender appealed to the Court of Session, and argued;—(1) The preliminary question here was, whether this signature had been written on an erasure. It might be that the paper had been scraped, but the evidence made it probable that this partly lithographed form had been sold in that condition, and if so, there was no erasure from the testator's deed, merely a defect in the paper. But (2) taking it to be an erasure, that circumstance was not conclusive against the defender. It did not amount to a vitiation *in essentialibus*, which could not be cured by parole. *Gibson* v. *Walker*[1] would no doubt be referred to; but there the signature on the erasure was that of an instrumentary witness, and totally different principles applied to the testator's own signature. A testator might sign on an erasure if he chose, and speaking generally there was no way of proving that he had done so except by parole. The opinions of Lord Fullerton and Lord Mackenzie in *Grant* v. *Stoddart*[2] implied that he might, when they sustained the validity of words holograph of the granter written on an

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facie improbative, and it is questionable whether the 39th section of the Conveyancing Act, 1874, applies to such a case, and whether extrinsic evidence is admissible to prove that the present signature on erasure was the signature attested by the witnesses. (See *M'Laren*, 3 Rettie, 1151.)

"Assuming, however, the competency of the proof allowed, the defender, Mrs Duncan, has failed to establish that the present signature was the signature adhibited by the deceased in presence of the attesting witnesses. It is extremely improbable that this printed form, purchased by John Duncan shortly before the deed was signed, on 1st January 1876, should have erasures at the place where the testator was to sign—erasures corresponding respectively in dimensions with the testator's signature, 'John' and 'Duncan,' and made after the form was lithographed, as is shewn by the deletion of parts of the lithograph guiding line and the superinduction of a pencil line below the place of signature.

"The proof that the deceased kept the deed in his own custody, and up till the last regarded it as his settlement, negatives the suggestion that the erasure of the original signature, and superinduction of the present signature, was done by any hand but his own, at least without his authority. What induced him to do this it is unnecessary for the decision of this case to determine.

"The evidence of Mrs Duncan, however, suggested to the Sheriff-substitute a possible explanation. She depones that when he shewed her the deed on the night of the day on which it was signed, 'He said he thought shame of his signature beside the other signatures, as he was not a good writer.' She adds, 'He was not in the habit of practising his signature during the three years after our marriage (12th June 1875). I never saw him practising his signature during that time, but I have seen him practising his signature since he ceased work.'

"It is possible, if not probable, that it was because the deceased was dissatisfied with the appearance of his original signature, adhibited before the witnesses, and thought he might make a better signature when alone and unobserved, that he erased the original signature and superinduced on the erasure the present signature. . . .

"The only case (so far as the Sheriff-substitute is aware) in which a similar question has been raised is the case of *Stirling Stuart* v. *Stirling Crawfurd's Trustees*, 6th February 1885 (12 Rettie, 610), and there it seems to have been assumed that if the signature to the deed, although adhibited by the testator, was not substantially the signature attested by the witnesses, the deed would have been invalid.

"The Sheriff-substitute regrets that the effect of the judgment which he feels bound to pronounce is to frustrate the intentions of the testator."

[1] Gibson v. Walker, June 16, 1809, F.C., aff. April 20, 1814, 2 Dow's App. 270.

[2] Grant v. Stoddart, Feb. 27, 1849, 11 D. 860, 21 Scot. Jur. 241, per Lord Mackenzie, p. 867, and Lord Fullerton, p. 868.

erasure in the body of a tested deed, but not referred to in the testing-clause. The case of the granter's signature was *a fortiori*, for the foundation of the doctrine of erasure—that the words on the erasure had been introduced for the purpose of fraudulently making a change in the terms of the deed after signature—could not possibly apply to the granter's signature. Either the erasure was on the paper when he signed before the witnesses, or he, from whatever motive, had subsequently erased one signature of his own and inserted another also his own. Parole evidence was admissible at common law to set up the signature to a deed just as it was admissible to reduce the deed, and it also was admissible under the 39th section of the Conveyancing Act, 1874.[1] But (3) while the *onus* under the statute was on the party seeking to establish the deed, the *onus* at common law, where the granter's signature to a deed was impugned on the ground that it was on an erasure, was on the party impugning, the principle being that the doctrine of erasure, as already explained, had no application to the signature of the maker of a deed. The party impugning the genuineness of the signature had to prove his case just as he would have had to do if there had been no erasure. The erasure was a piece of evidence, but was not sufficient to shift the *onus*. The defender indeed did not require to put her case so high, for here the signature was admittedly genuine, or at anyrate that was proved beyond question, and it was also admitted that a signature of the testator had been duly tested. The objection therefore came to this, that this signature might not be the signature which the instrumentary witnesses attested. That brought the case within the well-settled rule that where a signature *ex facie* duly tested was challenged on the ground that it had not been duly tested the *onus*, and a heavy *onus*, lay on the party challenging. The most recent illustration of that rule—the case of *Stirling Crawfurd*[2]—was very near the present, for there a signature was challenged on the ground that it had been touched up after attestation. The Court applied the rule, and, on the evidence, rejected the challenger's plea. (4) Here the evidence failed to shew that the original signature had been erased and another substituted. On the contrary, even if the *onus* was on the defender she had made out her case. For it was much more probable that the form had been bought with the erasure on it, than that the testator, a person unaccustomed to penmanship, should have had the mechanical skill to erase his signature without destroying the paper and substitute a new signature. There was no direct evidence that he ever attempted to do so. (5) Admitting, however, the pursuers' view of the evidence on this point, that merely assimilated the case to the case of a deed with the signature accidentally torn off, or of a deed wholly destroyed. There was here no *animus revocandi*. But in that view the defender might have to bring a proving of the tenor.

Argued for the pursuers;—(1) There was here undoubtedly an erasure, and the signature "John Duncan" was written on that erasure. That was fatal to the deed, the presumption of law being that what was written on an erasure was written after attestation (unless mentioned in the testing-clause), and consequently to be held *pro non scripto*.[3] The contention of the defender really came to this, that the signature was not *inter essentialia* of the deed. Parole evidence was incompetent to set up words written on erasure.[4] It had so been held with reference to the

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[1] Quoted *supra*, p. 511, note.

[2] Stirling Stuart v. Stirling Crawfurd's Trustees, Feb. 6, 1885, 12 R. 610.

[3] Erskine's Inst. iii. 2, 20.

[4] M'Laren v. Menzies, July 20, 1876, 3 R. 1151.

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signature of an attesting witness,[1] and no sound distinction could be drawn between that and the signature of the principal. In *Shepherd* v. *Grant's Trustees*[2] the Court had refused to allow a proof that the erasure was on the paper before signature; that rule applied here. The opinions of Lord Mackenzie and Lord Fullerton in *Grant* v. *Stoddart*[3] were *obiter*, and Lord Jeffrey's opinion was the other way.[4] (2) If a parole proof was competent the *onus* was on the defender. She had sought to bring herself within the principle illustrated by *Stirling Crawfurd's*[5] case. But that principle applied only to deeds *ex facie* good. The probative quality of a deed was ascribed to it when it appeared to be *ex facie* good. A deed with a signature written on an erasure could never be called *ex facie* good. If not absolutely null, it was at all events *prima facie* bad. (3) The 39th section of the Conveyancing Act, 1874, did not apply to the present case. If the view of the pursuers was sound, the deed had not, in law, been "subscribed by the granter or maker thereof"; their objection was either unsound, or the defect which they urged was much more radical than a mere "informality of execution." (4) On the proof the defender had failed. The view of the evidence which the Sheriff had taken was the right one.

At advising,—

LORD YOUNG.—This question regards the validity of a will, the testator's signature to which appears to be written on an erasure. It is a regularly attested will. Now, I think the party founding upon such a will would be entitled to prevail by force of the instrument itself, in the case of nothing adverse being established. It is *ex facie* a good deed, and that none the less that the signature of the maker is upon an erasure. The erasure may invite inquiry, but if nothing is established adverse to the deed by that inquiry, beyond the fact which appears without inquiry,—that the signature is on an erasure, which you can see by mere inspection,—I am of opinion that the deed must prevail.

Here the Sheriff very properly allowed inquiry. A proof was taken, and I take the import of that proof to be as is expressed by the Sheriff in his note. I take that the more readily because his judgment is adverse to the deed, and contrary to the view at which I have arrived. I do not take what he says in the first paragraph of his note because it is his opinion but because it is my own. He says—"It would appear from the evidence that the deceased John Duncan signed the testamentary deed in presence of the two attesting witnesses, on 1st January 1876, and that the deed remained in his custody from the date it was signed until the date of his death, 22d September 1885, and that he intended the deed to be effectual after his death." This deed then was signed by the testator in presence of the two attesting witnesses, and it was never revoked by him,—for that is included in the statement that it remained in his custody till the date of his death, and that he intended that it should have effect.

Now, that in my opinion would be a sufficient reason or ground for our judgment —that it was a genuine, well-executed instrument, according to what the Sheriff

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[1] Gibson v. Walker, June 16, 1809, F.C., aff. April 20, 1814, 2 Dow's App. 270.

[2] Shepherd v. Grant's Trustees, Jan. 24, 1844, 6 D. 464, 16 Scot. Jur. 211.

[3] Grant v. Stoddart, Feb. 27, 1849, 11 D. 860, 21 Scot. Jur. 241, per Lord Mackenzie, p. 867, and Lord Fullerton, p. 868.

[4] 11 D. p. 869.

[5] Stirling Stuart v. Stirling Crawfurd's Trustees, Feb. 6, 1885, 12 R. 610.

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has found to be the import of the evidence,—that it was kept by the testator in his custody till the date of his death—and that he never revoked it. In these circumstances, it seems to me that the deed must receive effect. If the instrument itself has gone amissing, so that you require to establish the contents of it, resort may be had to the form of process which our law has established to meet that case—a proving of the tenor. But the very deed, which was well executed, is before us. It was kept by the testator till his death, and was never revoked by him. No proving of the tenor, therefore, is necessary. Why then should not this well-executed deed receive effect? I put the case in the course of the argument, Suppose the signature had been torn off? What, in the absence of any evidence, the law might conclude from the fact of the signature being torn off, I do not need to inquire. But the fact that the signature has disappeared from the deed in any way invites inquiry as to how it disappeared: *quo animo?* If *animo revocandi*, then the deed is revoked: it is gone. But if it be established that it had disappeared without any intention of revoking it, the testator meaning it to have effect in the last moments of his rational existence, then the disappearance of the signature can have no effect at all. If he had scraped it out, torn it off, tried some liquid to see the effect of that in removing writing or stains, that in the absence of inquiry might lead to conclusions as to the *animus* with which the thing was done. But if inquiry is made, and the result is that there is found to have been no intention to revoke, then I think that deed must have effect. That in my opinion is a simple and sufficient ground of judgment—that this deed was well executed and was never revoked. Whatever may have happened to it physically or mechanically, it remained in his repositories unrevoked till the day of his death, and he intended in the last moments of his rational existence that it should be effectual as his testament. I say I think we must give effect to it on that simple view.

But we have had the doctrine of erasure pressed upon us. I confess that I have always regarded our law of erasure as mischievous. I do not think it will prove mischievous here, but it has proved mischievous in a great many cases. It is peculiar to our law, and with all our excellencies we have our peculiarities, which are more or less regrettable. There are peculiarities in every system. This is a peculiarity of ours, and I do not know the equal of it. I know as great and as mischievous peculiarities in other systems, but not exactly anything like this. Did any of us in the course of his practice and experience ever find that doctrine of erasure operate otherwise than mischievously? The result has been to defeat and not to promote justice. Did it ever operate otherwise in any of the cases, except indeed in the case of entails? We know that when entails prevailed to a larger extent than they do now it was almost a profession to hunt up entails and try to find an erasure and then bring a reduction of the deed on the ground that there was an erasure *in essentialibus.* Such things were hailed enthusiastically, and were generally received with great favour.

The doctrine of erasure was founded upon this nervous apprehension—that the party who had possession of the deed had fraudulently vitiated it in his own favour. The fact that a material part of it was written on an erasure was held to raise this presumption, unless the fact was mentioned in the testing-clause. That was the notion on which the doctrine was founded—that the deed was vitiated after its execution in the presence of witnesses. But the testing-clause is always written after execution. It may be written in by the holder of the deed at any time he likes. Deeds have, we know, been sustained with the testing-clause written by the holder in virtue of the power implied in his holding the deed. Therefore the person who vitiates a deed in his own favour is only exercising the power allowed to him by law when he mentions that the vitiation was written on an erasure. And that makes it all right. It is a little ridiculous when you come to think it over that a deed may be set aside on the notion of the fraudulent vitiation of it by the holder, only because he had omitted to put it into the testing-clause,—which he may have written himself, and may have written at any distance of time after the execution of the deed,—that a certain thing has been done. That this is the foundation of the doctrine—that it is not *positivi juris*, but was founded on that rational or irrational consideration—is plain from the exception to it, that exception being that if a part of the deed, longer or shorter, word or words, was proved to be in the handwriting of the maker of the deed, then the erasure was of no effect. Why? Because that fact made it certain—and it might be proved by extrinsic evidence—that there was no fraudulent or improper vitiation by the holder. If the word or words written upon erasure were proved to have been in the handwriting of the maker of the deed,—and that could only be by parole,—that excluded the notion on which the whole doctrine was founded, namely, that there had been fraudulent vitiation. But then the signature of the maker of the deed, if it is admitted to be genuine, must of necessity be in his own handwriting. And the notion of the fraudulent vitiation by the testator in his own handwriting of his own will is the most extravagant supposition I ever heard of. Therefore, when it appears that the foundation of this doctrine of vitiation by erasure is as I have stated, it cannot possibly have any application to a testator's signature.

But then it is said that this is a tested deed. It is not relied on as a holograph deed but as a tested writing; and it is said that it must appear that the signature is not only the signature of the testator, but that it was adhibited by him in the presence of the witnesses, and that if it is established that he erased it and then wrote it in again the deed is gone. Well, any law to that effect would, in my view, be deplorable. But I do not think that that is our law. We were referred to one case, and it is a very instructive one upon this subject, the case of *Grant*, in 1849 (11 D. 860), where there was a deed regularly attested, but some parts of it were in the maker's handwriting, and erasures on those parts where his own handwriting occurred were held as having no effect on the deed itself, it being certain that those alterations in his own handwriting had not been put there improperly by anybody else. So that, if the doctrine of erasure is to have any application to signatures at all, you must take the doctrine as it is applied to other portions of the deed, to the effect that if you have security that the deed is genuine, and has not been vitiated, you must give effect to the deed. Here you have perfect assurance that this will is genuine, if that is the testator's signature, and if so, it is clear that it has not been vitiated to his prejudice, or to the prejudice of his successors, whether the testator wrote the signature on an erasure or not. Even if it were established that the signature when the witnesses signed was not upon an erasure, whereas it is upon an erasure now, so that for some explicable or inexplicable reason the testator scratched out what was there, and wrote his signature over again, I should nevertheless be of the opinion that the deed is a valid deed, and is entitled to have effect. But I think it right to say that it is not in my opinion proved that that signature is not the very signature which was adhibited in the presence of the witnesses to this deed.

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On the whole matter, I am of opinion, and that clearly, that this will is valid, and entitled to have effect given to it.

Lord Craighill.—I am of the same opinion. I am of opinion that the will in question is a probative deed. It is signed by the testator. In regard to that there is no controversy. The party objecting to the will must prove that it is not a genuine signature. There are witnesses who attest the signature, and supposing that it were necessary for the parties founding on the will here to say that the signature which was attested by the two witnesses was the very signature here, I think they would succeed on the evidence brought forward in this case. But in regard to that, I do not think it is on the party founding on the deed to prove that all was regularly done in the execution of the deed by the testator himself and the witnesses. It is for those who object to the will to shew that there was an irregularity sufficient to invalidate it. I think it is a probative deed in the sense of the statute. The issue in such a case is not whether the signature of the maker of the deed is written on an erasure, but whether the signature is the genuine signature of the maker of the will. The ordinary presumption when there are portions of a deed written on an erasure cannot here apply. Once it is established that the testator's name was put to the deed, and that all was done according to law, and that the deed remained in the custody of the maker long after its execution, then I think it is entirely immaterial to enter upon an inquiry as to how the erasure came to be there. There seems to have been an erasure, but the testator put his name upon that erasure. He chose to do so, and he was quite entitled to do so. It was his privilege to put his name anywhere he liked, so far as erasure is concerned. The fact of its being on an erasure does not destroy the effect of his signature.

On the whole matter I agree with Lord Young.

Lord Rutherfurd Clark.—I also am of opinion that this is a good deed. But I think in disposing of the case we must attend to the requisites with respect to the execution of deeds.

This is not a holograph deed, and therefore the signature of the party is of no avail as making the deed a valid deed, unless it be duly witnessed in terms of the statute. Accordingly, I take it that the objection on the part of the pursuers necessarily goes to this, that the signature, although genuine, was not witnessed by the instrumentary witnesses, and if that fact were proved, or if it were to be presumed, then I think the objection would be a good one. The question is whether the fact has been proved, or whether it is to be presumed.

Ex facie, the deed is quite regular and in order, and would receive effect as a probative deed. But our attention is called to the fact that the signature of the testator is written upon an erasure. The signature is so written. If the pursuer were to allege that the signature so appearing on an erasure was not the signature of the testator, then of course he would be allowed to prove it, just as he would be allowed to prove that fact whether it was on an erasure or not. But as he does not allege that the signature that appears on the deed is not the genuine signature of the testator, he virtually admits that it is his genuine signature. Any such proof, then, as I have indicated is out of the question. Then we come to see what is the effect of the deed, with the fact admitted that the signature that appears on the deed is the genuine signature of the testator. The signature so appearing on the face of the deed—and I am speaking of what appears from the face of the deed—is duly witnessed in terms of law, and therefore, although there is an erasure in the deed in the place I have mentioned, we have a probative deed which must receive effect, by virtue of the proof or the admission which comes in place of the proof. Now, the only objection that can be stated in these circumstances is the one I have already mentioned, that the existing signature was not affixed in the presence of the instrumentary witnesses—that there was a previous signature which may have been adhibited in the presence of the witnesses, but that this particular existing signature was affixed by the testator in his own closet, or at all events outwith the presence of these witnesses. As I have said, I think that that, if it were proved, would be a fatal, or a formidable objection—I think probably fatal. But then the question is, on whom is the *onus* of proof? Again, for the reasons I have already given, and from the fact that this is a probative deed, and must receive effect as such, the *onus* necessarily falls on the party objecting to it. Thus the whole question comes to be whether he has proved the fact on which his objection depends. I think we would require very clear proof indeed to enable us to sustain this objection; and I am not in the least disposed to hold that this objector has proved the fact on which his case depends. I do not think the evidence comes near a proof of what he says. As there is no presumption in his favour, the deed must receive effect.

Lord Justice-Clerk.—I entirely concur in the result, and that without difficulty.

That the name of the testator is written on an erasure is admitted, but the question is whether that fact although it is not mentioned in the testing-clause, is necessarily fatal to the authenticity of the signature and the deed. On that matter my view is that the erasure is not fatal to the deed, even although it is not mentioned in the testing-clause. It is an element of proof that may be and has been overruled. I should like to read an extract from the opinion of Lord Mackenzie in the case of *Stoddart*, where there was an erasure, and there was writing upon an erasure. Lord Mackenzie says (11 D. 867),—"It is a narrow case, however, and different from any that has occurred yet, for the deed is not all holograph: part of it only is so, viz., that which is upon erasure. But I think that is enough, for a party may make a deed partly holograph and partly tested and such a deed be valid. All that is holograph of it is just like other holograph writings, and such writings are valid whether written on erasures or not. A man may, if it suit his fancy, scrape other writing from a paper and write his own deed upon the part erased. The part here written on erasure being holograph is in itself probative." Lord Fullerton (11 D. 868) says he adopts Lord Mackenzie's opinion as to erasures in the deed. He adds,—"Those erasures I do not hold to be fatal."

In the present case there are only two alternatives presented. It must be borne in mind that this will is mostly a printed form. It may have had an erasure on it when the testator purchased it. That is suggested, and I think it a probable enough suggestion, for in my view it has not in any way been proved to be untrue. The other suggestion is a good deal more fanciful. There is no doubt that this is the man's signature, but it is said he was very vain about his writing, and afraid of his signature not being sufficiently well written, and that after he had written his signature in presence of the two testamentary witnesses, he erased it, and wrote it over again. I think that is a very fanciful and im-

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probable proceeding, because a man could hardly expect his second signature written on an erasure to be as good as his first written on plain and smooth paper. I think the balance of proof is against that, and consequently that there is fair reason to believe that the erasure may have been on the paper when the signature was made. That, I think, is sufficient for this case, and I am therefore of opinion that the Sheriff's judgment should be recalled.

THE COURT pronounced this interlocutor:—"Find in fact (1) that the deceased John Duncan signed the disposition and settlement mentioned in record on the 1st day of January 1876, in presence of two attesting witnesses, and that the deed remained in his custody from that date until his death on 22d September 1885; (2) that he intended the deed to be effectual after his death: Find in law that the deed is valid and effectual: Therefore sustain the appeal: Recall the judgment of the Sheriff-substitute appealed against," &c.

WEBSTER, WILL, & RITCHIE, S.S.C.—A. KIRK MACKIE, S.S.C.—Agents.

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ROBERT BOWER RITCHIE (William Kerr's Trustee), First Party.—*Gloag.*
THOMAS BUCHAN (James Yeaman's Trustee), Second Party.—
C. N. Johnston.

Property—Completion of Title—Notarial Instrument—Titles to Land Consolidation (Scotland) Act, 1868 (31 *and* 32 *Vict. cap.* 101), *secs.* 3 *and* 19.—By trust-disposition for behoof of creditors, Yeaman the truster conveyed "to and in favour of John Shields" (designed) "and
as trustees, to act in succession as after mentioned; whom failing, to such person or persons as I may appoint by any writing under my hand validly executed, as trustees . . . and to the assignees of the said trustees or trustee, All and Sundry my whole means, estate, and effects, heritable and moveable." Power was given to the trustee, *inter alia*, to take possession of the whole trust-estate, to complete titles thereto, and to sell the whole or any part thereof. Shields accepted, but without having made up a title to any of the truster's heritable properties, he, after having acted for a few months, resigned by minute of resignation endorsed on the trust-disposition. Yeaman thereupon, on the narrative of the trust-disposition and of the minute of resignation, nominated Buchan "as trustee under the said trust-deed, with full power, by himself alone, to manage and execute the trust thereby created, in the same manner and as fully and freely in every respect as if the said trust-deed had been granted in favour of him the said Thomas Buchan as sole trustee, and that for the purposes, and with the powers, and subject to the declarations and provisions contained in the said trust-deed." Buchan's agent made up a title by notarial instruments bearing to be in terms of the Titles to Land Consolidation Act, 1868. The notarial instruments, which were duly recorded, set out the sasine under which Yeaman was infeft, the trust-disposition in favour of Shields, and the deed of nomination in favour of Buchan. Buchan (for the purpose of having the validity of the title determined by the Court) refused payment of his agent's account on the ground that the notarial instruments did not form a valid title in his favour, in respect (1) that Shields had a personal right to the properties and had never divested himself thereof; (2) that the case did not fall within the provisions of the Act of 1868; (3) that the trust-disposition and the minute of appointment did not constitute a valid warrant for completing the title of the second party by notarial instrument; and (4) that even if it were competent to complete Buchan's title by notarial instrument, the notarial instruments were insufficient, inasmuch as the minute of resignation was not set forth as one of the warrants of instruments, such minute being an essential link in the progress of titles. The other party maintained that the titles had been validly completed

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2D DIVISION.
I.

in terms of the 19th section of the Titles to Land Consolidation Act, 1868, as interpreted by the 3d section of the same Act.*

In a special case *held* (*diss.* Lord Rutherfurd Clark) that the titles had been validly completed, and that the agent was entitled to payment of his account.

ON 8th December 1885, James Yeaman, merchant in Dundee, on the narrative that his affairs had become embarrassed, granted a trust-disposition for behoof of his creditors, by which he assigned, disponed, conveyed, and made over "to and in favour of John Shields, manufacturer, Perth, and as trustees, to act in succession as after mentioned; whom failing, to such person or persons as I may appoint by any writing under my hand validly executed, as trustees, for behoof of my whole lawful creditors at the date hereof who shall accede hereto or be assumed into the benefit of this trust, and to the assignees of the said trustees or trustee, All and Sundry my whole means, estate, and effects, heritable and moveable, real and personal, of whatever kind and wherever situated, presently belonging or which may belong or accrue to me during the subsistence of the trust hereby constituted, with the whole writs, titles, and instructions thereof, and all that has followed or can competently follow thereon; and I bind myself to execute all deeds, conveyances, or other writings that may be necessary for more effectually vesting the said trustees or trustee and their foresaids with the trust-estate hereby conveyed: Declaring hereby, that the said John Shields shall in the first place, by himself alone, without the consent or concurrence of the said have the sole power to manage and execute the trust hereby created, in the same manner as if these presents had been granted in favour of the said John Shields as sole trustee; and that in case of the death, incapacity, non-acceptance, or resignation of the said John Shields, then the said shall have the sole power to manage and execute the said trust; and in case of his death, incapacity, non-acceptance, or resignation, then the management and execution of the trust shall devolve upon the trustee or trustees to be nominated and appointed by me as aforesaid (the trustees or trustee acting for the time being hereinafter included under the designation of 'the trustees')." Power was given to the trustees, *inter alia*, "to take immediate possession of the whole trust-estate, complete titles thereto . . . as also to sell the whole trust-estate hereby conveyed, or any part or parts thereof . . . to receive the prices, and to grant dispositions or other conveyances to the purchasers." The blank in the disposition for the name of the trustee who was to act in succession to Shields was never filled up.

Shields accepted the trust by holograph minute subscribed by him, appended to the trust-disposition, and acted as trustee for some time thereafter. The estate was found by him to be insolvent. On 10th March 1886, finding that it was inexpedient for him to continue to act as trustee on account of his residence being at a distance from Dundee, he intimated to Yeaman his resignation of the trust, and on 6th April 1886 he executed a minute annexed to the trust-disposition in these terms,—"I, John Shields, within designed, having as at 10th March 1886 intimated my resignation of the within trust, do hereby confirm as from the said 10th day of March last my resignation of the office of trustee under the foregoing trust-deed.—In witness whereof," &c.

By minute of appointment, dated 5th April 1886, Yeaman, upon the narrative of the trust-disposition, and that Shields after accepting the office of trustee found it inexpedient and difficult from his residing at a distance, and other reasons, to continue to act as trustee, and had re-

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* These sections are quoted *infra*, p. 522.

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signed his trusteeship, nominated and appointed "Thomas Buchan, valuator, Dundee, as trustee under the said trust-deed, with full power, by himself alone, to manage and execute the trust thereby created, in the same manner, and as fully and freely in every respect as if the said trust-deed had been granted in favour of him, the said Thomas Buchan, as sole trustee, and that for the purposes, and with the powers, and subject to the declarations and provisions contained in the said trust-deed."

The trust-disposition, with the two annexed minutes by Shields and the minute of appointment, were recorded in the Books of Council and Session on 10th April 1886.

Buchan accepted the office of trustee under the trust-disposition and minute of appointment, and entered upon the administration of the trust-estate.

Yeaman was proprietor of and infeft in certain heritable properties in or about the town of Dundee. No feudal title to any of these properties was made up in the person of Shields, but after the appointment of Buchan as trustee titles to the whole properties were made up in his person as trustee by William Kerr, solicitor, Dundee, who acted as agent in the trust both for Shields and Buchan. The titles were made up by notarial instruments, ten in number, applicable to the respective properties, proceeding upon the sasine under which Yeaman was infeft, trust-disposition of 1885, and the minute of appointment of Buchan.

R. B. Ritchie, who had been appointed trustee on the sequestrated estates of Kerr (who had died), having rendered to Buchan the accounts (taxed by the Auditor of the Court of Session at £77, 2s. 5d.) incurred in preparing the notarial instruments, Buchan refused to pay them on the ground that the titles were not made up *habili modo* and did not constitute a good title in his favour.

A special case was accordingly presented, Ritchie being the first party, and Buchan the second party.

The foregoing narrative of the facts is taken from the case, which stated further that the validity of the titles had been challenged by the purchaser of one of the properties forming part of the trust-estate, and that several of these properties remained unsold.

The first party maintained that titles to the properties were properly and validly made up in the person of the second party, as trustee, by notarial instruments proceeding upon the trust-disposition and the minute of appointment, in respect (1) that, by the 19th section of the Titles to Land Consolidation (Scotland) Act, 1868, the grantee, under a general disposition, whether by conveyance *mortis causa* or *inter vivos*, was empowered to complete his title by notarial instrument*; and (2)

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* The Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), sec. 19, enacts,—"Where a person shall have granted or shall grant a general disposition of his lands, whether by conveyance *mortis causa* or *inter vivos*, or by a testamentary deed or writing within the sense and meaning of the 20th and 21st sections of this Act, and whether such general disposition shall extend to the whole lands belonging to the granter, or be limited to particular lands belonging to him, with or without full description of such lands, and whether such general disposition shall contain or shall not contain a procuratory or clause of resignation, or a precept of sasine, or an obligation to infeft, or a clause expressing the manner of holding, it shall be competent to the grantee under such general disposition to expede and record in the appropriate Register of Sasines a notarial instrument in or as nearly as may be in the form of schedule (L) hereto annexed; and on such notarial instrument or any similar notarial instrument expede in virtue of any Act of Parliament hereby repealed being so recorded, such grantee shall be in all respects in the same position as

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that, under the 3d section of that Act, the word conveyance was defined as extending to and including "deeds of nomination and other writings annexed to or endorsed on deeds or conveyances, or bearing reference to deeds or conveyances, separately granted."*

The second party maintained that notarial instruments did not form a valid title in his favour, in respect (1) that Shields had a personal right to the properties, and had never divested himself thereof; (2) that the case did not fall within the provisions of the Act of 1868; (3) that the trust-disposition and the minute of appointment did not constitute a valid warrant for completing the title of the second party by notarial instrument; and (4) that even if it were competent to complete Buchan's title by notarial instrument, the notarial instruments were insufficient, inasmuch as the minute of resignation was not set forth as one of the warrants of instruments, such minute being an essential link in the progress of titles.

The questions of law were,—"Do the said notarial instruments constitute a valid feudal title to the said properties in the person of the second party; and is the first party entitled to demand payment from the second party of the taxed amount of the accounts incurred in the preparation of the said notarial instruments? or (2) Is the second party entitled to refuse payment of the said accounts in respect that the said notarial instruments do not constitute a valid feudal title in his person to the said properties?"

The arguments fully appear from the opinions of the Court.[1]

At advising,—

LORD JUSTICE-CLERK.—The first party to this special case is Mr Ritchie, the

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if a conveyance of the lands contained in such notarial instrument had been executed in his favour by the grantor of the general disposition, . . . and as if such conveyance had been followed, . . . by an instrument of sasine of the said lands in favour of such grantee, . . . expede and recorded in the appropriate Register of Sasines at the date of recording such notarial instrument: Provided always, that where such notarial instrument shall be expede by a person other than the original grantee under such general disposition, it shall set forth the title or series of titles by which the person in whose favour it is expede acquired right to such general disposition, and the nature of his right."

* The full text of the 3d section of the Act, in so far as it referred to these documents, was as follows:—"The word 'deed' and the word 'conveyance' shall each extend to and include all charters, writs, and dispositions, whether containing a warrant or precept of sasine or not, and whether *inter vivos* or *mortis causa*, and whether absolute or in trust, feu-contracts, &c., decrees, . . . and all deeds, decrees, and writings by which lands, or rights in lands, are constituted, or completed, or conveyed, or discharged, whether dated, granted, or obtained before or after the passing of this Act, and official extracts of all deeds and conveyances; and all codicils, deeds of nomination, and other writings annexed to or endorsed on deeds or conveyances, or bearing reference to deeds or conveyances separately granted, and decrees of declarator naming or appointing persons to exercise or enjoy the rights or powers conferred by such deeds or conveyances, shall be deemed and taken for the purposes of this Act to be parts of the deeds or conveyances to which they severally relate, and shall have the same effect in all respects as to the persons so named and appointed as if they had been named and appointed in the deeds or conveyances themselves."

[1] *Authorities cited by the first party.*—Mackilligin v. Mackilligin, Nov. 23, 1855, 18 D. 83, 28 Scot. Jur. 25; Gilmour v. Gilmour, July 3, 1873, 11 Macph. 853, 45 Scot. Jur. 521; Marquis of Huntly v. Earl of Fife, July 20, 1877, 14 R. 1091.

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trustee on the sequestrated estate of the late Mr Kerr, who was a writer in Dundee, and the question directly at issue is, whether the second party, Mr Buchan, who is the trustee acting for the late Mr Yeaman, is entitled to refuse payment of an account incurred to Mr Kerr, in respect that the business for which it was charged has not been duly or correctly performed. This question involves a short but important point upon the late Conveyancing Act.

It is necessary in the first place to examine the state of the facts on which the question depends.

Mr Yeaman, who was a merchant in Dundee, found his affairs embarrassed, and in December 1885 he executed a trust-disposition in these terms,—He dispones, conveys, and makes over "to and in favour of John Shields, manufacturer, Perth, and , as trustees, to act in succession as after mentioned, whom failing, to such person or persons as I may appoint by any writing under my hand validly executed, as trustees, for behoof of my whole lawful creditors at the date hereof who shall accede hereto or be assumed into the benefit of this trust, and to the assignees of the said trustees or trustee, All and Sundry my whole means, estate, and effects, heritable and moveable, real and personal, of whatever kind and wherever situated, presently belonging or which may belong or accrue to me during the subsistence of the trust hereby constituted, with the whole writs, titles, and instructions thereof," and then he goes on to bind himself "to execute all deeds, conveyances, or other writings that may be necessary for more effectually vesting the said trustees or trustee and their foresaids with the trust-estate hereby conveyed, declaring hereby that the said John Shields shall in the first place, by himself alone, without the consent or concurrence of the said , have the sole power to manage and execute the trust hereby created, in the same manner as if these presents had been granted in favour of the said John Shields as sole trustee; and that in case of the death, incapacity, non-acceptance, or resignation of the said John Shields, then the said shall have the sole power to manage and execute the said trust; and in case of his death, incapacity, non-acceptance, or resignation, then the management and execution of the trust shall devolve upon the trustee or trustees to be nominated and appointed by me as aforesaid, the trustees or trustee acting for the time being hereinafter included under the designation of 'the trustees.'"

Mr Shields accepted that appointment, and took possession so far of the estate, and proceeded a certain length in the management of it. But he made up no title, and after he had held the appointment for a short time he intimated that he did not consider it desirable that he should longer continue in the trust, and accordingly on the back of the trust-disposition he signed a minute, which is in these terms,—"I, John Shields, within designed, having as at 10th March 1886 intimated my resignation of the within trust, do hereby confirm as from the said 10th of March last my resignation of the office of trustee under the foregoing trust-deed."

Thereupon Yeaman executed a minute of appointment, in which he narrates what he had done before, and goes on, "and considering that the said John Shields, after accepting the office of trustee conferred on him by the said trust-deed, found it inexpedient and difficult, from his residing at a distance and other reasons, to continue to act as trustee, and has resigned his trusteeship, therefore I, the said James Yeaman, hereby nominate and appoint Thomas Buchan, valuator, Dundee, as trustee under the said trust-deed, with full power by himself alone to manage and execute the trust thereby created, in the same manner and as fully and freely in every respect as if the said trust-deed had been granted in favour of him, the said Thomas Buchan, as sole trustee, and that for the purposes, and with the powers, and subject to the declarations and provisions contained in the said trust-deed."

Mr Buchan accepted, and proceeded to discharge the duties of the trust, *inter alia*, by granting dispositions to feuars on the title thus acquired. In making up his title he followed, or professed to follow, the directions of the Titles to Land Act, 1868, in expeding the notarial instrument. The question brought up in the case is whether Mr Buchan had a right to expede a notarial instrument, and whether it is in accordance with the prescribed form.

Now, there are four grounds on which it is said that it is not. The first is that Shields had a personal right to the properties, and never divested himself thereof. In regard to that I do not think that Shields had a personal right. He had two things. He had a good title of possession and administration. He had also a right to obtain a title; and if he had chosen, when the deed was executed by Yeaman, to proceed under the Titles to Land Act, he might have made his right available, but he had no personal title to the property, because the right that is given to him is indefinite,—to all and sundry the lands and heritages of Yeaman, the truster. That did not convey a personal right to the property. It gave him a right of action against the party who had granted that indefinite disposition to get him to make it definite by granting a direct disposition to the lands. Prior to the Act of 1868 that would not have conferred a title at all until supplemented by some proceeding on the part of the grantee. Under the Titles to Land Act he did obtain a power to make that a real right, but he never used it, and in my apprehension when he resigned his trusteeship his right to administration of course came to an end, and any right which he had to make up a title to these lands of course perished with it, and therefore I do not think there is any ground for the first objection that has been taken. The very object of the 19th section of the Titles to Land Act was to provide a mode of making a general disposition to lands where lands are not specially disponed available to the grantee without any action at law, and the mode is by notarial instrument, which was the mode followed by Buchan in this case. But if a grantee has only an indefinite right, and takes no step at all to put himself in the position of a special disponee, he acquires no right whatever. I do not think there was anything which the original trustee could assign, or anything which was available to assign, but independently of that, this is a disposition for a special and specific and temporary purpose. It is very much of the nature of an absolute disposition with a back-bond; the radical right remained with the truster. And I think therefore that, even irrespective of the other ground I have mentioned, if the truster chose to nominate a second trustee, and that trustee used the forms of law to complete his title by notarial instrument or infeftment, there was nothing that required to be taken out of the person of the original trustee. These are the views that have occurred to me. I do not think there is any solidity in the objection.

In regard to the other objections I did not understand that they were seriously maintained, viz., that the case does not fall under the Act of 1868, and that the trust-disposition and minute of appointment do not constitute a valid warrant for completing the title of the second party by notarial instrument. But they fall under the definition of "conveyance" in the Act of 1868, which is as wide as it well can be.

The last objection is, that the minute of resignation is not set forth in the notarial instrument as one of the links in the progress. It would perhaps have been more regular if it had been, but I do not think that in the circumstances it was essential.

Lord Young.—I think we indicated at an early stage of the argument that it was inconvenient, to say the least, to try a question of the validity of titles upon an objection to an agent's account, and that the answer to these objections to the validity of the titles would not necessarily determine that Kerr the agent, or those in his right, were not entitled to payment. But it was explained to us that the real object of the case was to ascertain whether or not Buchan, the present trustee, was in a position to give a good title to purchasers as the now acting trustee in this trust for creditors. We all sympathise with that object. I, for one at least, am disposed to sympathise with it—it being explained to us that the purchasers, or those who have been communicated with, are quite ready to take a title from Buchan, and to pay the price, if we are of opinion that he is in a position to give a good one. I have considered the case in that view, and my opinion concurs with that of your Lordship, that Buchan is in a position to give a good title. It is of course eminently desirable that he should be, for the only alternative is that there shall be further conveyancing and further expense in the administration of this insolvent estate. There is no question of justice or equity, or even reasonable safety to any interests whatever, involved in this case. It is merely a question as to whether the exigencies of our law permit or even require a more severe taxation of an insolvent estate in the course of its administration in the shape of conveyancing.

We are almost daily told now of the very sad state of our conveyancing laws—that they require a multitude of superfluous deeds, and of course superfluous expense, and that they should be revised and remedied so that things may be done more economically than at present. I have often thought that a good deal might be done in that direction by judgment—by judicious consideration as to whether deeds are or are not truly superfluous, and if they are by dispensing with them by judgment as unnecessary. The tendency is towards liberal construction where there is any doubt about the matter, and to prevent the incurring of extra cost, especially where an insolvent estate is in liquidation, which of course is thought a fair feast for a multitude of people.

Here there is no doubt about the late Mr Yeaman's title to the property. He was the owner of a number of properties in Dundee. Under the old law, somehow or other, it would have been necessary to make each of these the subject of a separate conveyance. Yeaman desired to realise them for behoof of his creditors, and he conveyed them together with his whole estate in lump to Mr Shields, to be realised and divided amongst his creditors. I should have thought, and so held if the question had depended on me, that any man being the proprietor of an estate might grant authority to another to ingather it, and if heritable estate, to sell it, and with his authority to convey it to purchasers in order to its being divided amongst his creditors. But that simple view has never prevailed. It has always been thought necessary that a feudal title should be made up in the person of the trustee, and where there were a number of properties the party must be made a feudal vassal in each of them, however numerous the titles may be. They may be all identical, with no more thought or intellect required in the preparation of them than is required in giving out a railway ticket to Dundee or elsewhere, but they are charged as conveyances, and the insolvent estate,—that is, the fund for the creditors,—is so much diminished in consequence. It occurred to me, in support of that simple view, that a trustee well nominated and appointed, with authority to sell and convey such properties to purchasers, and to divide the money amongst the creditors, would be as good as a commissioner to execute deeds who is appointed by people who are too aristocratic to sign their own deeds. There are some people in Scotland who never sign deeds or leases, but grant a commission to somebody else to do it. They execute such conveyances through their commissioner. I should have thought it a case of the same simplicity where a party in necessitous circumstances authorises an individual to ingather his estate and to dispose of it to purchasers. Mr Yeaman gave such authority to Mr Shields. There is authority to Shields, whoever else may be nominated to act under the deed as trustee, to sell the property in such lots as he shall think expedient, and to receive the price, and grant dispositions and other conveyances to purchasers. Mr Shields found it inconvenient to act, because he was not on the spot. After trying it for a short period he thought proper to resign. It had been contemplated that he would not always act, and the deed provided that if Shields failed by death or resignation then the truster should nominate somebody else. Upon Shields' failure Yeaman appointed Buchan as trustee under the deed, with all the powers which Shields had. Mr Kerr was then applied to to make up the title, and I think with great judgment he made it up by notarial instrument. There are a number of properties, as I have stated, and the notarial instruments, identifying the various properties, shops, flats, cottages and gardens, and requiring no more thought or intelligence than so many railway tickets, involve an account of £77. It is thought that that is not enough, but that there should be a conveyance or something else—I do not know what—to Shields.

I am of opinion that these notarial instruments are sufficient under clause 19 of the Act of Parliament. It is certainly eminently desirable that they should be. Where is the risk of it? They are all recorded—all upon the records for the information of everybody—that Yeaman first appointed Shields, and then upon his resignation nominated Buchan in his place, and that under a general conveyance to him there are comprehended these properties which are all enumerated in the notarial instruments, and that he was the trustee administering these properties with a power of sale, and a power to grant dispositions to purchasers. Is it not eminently desirable, upon every reasonable and rational consideration, that this should be so done? I really cannot doubt it for a moment, nor that there is no risk of fraud or error—no risk of the interest of anybody being prejudicially affected in any way by holding this to be sufficient. According to my construction of section 19 of the Act of 1868 it is sufficient. One may be driven by a subtle criticism of the language of the Act of Parliament, or by subtle reasoning to another conclusion, but one would deplore it, and would rather exercise minute criticism and subtle consideration to avoid more conveyancing and more expense. I therefore think that Buchan's title has been well and sufficiently made up. I regret that it was not more economically made up,

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but there is no question raised about that, and I may be wandering into regions of future reform, which I am not warranted in trespassing upon on the present occasion, in alluding to anything else than the instrument. At all events, I think Buchan is in a position to grant a good title to any purchaser.

Lord Craighill.—The circumstances of this case do not here require recapitulation, because they are fully set forth in the special case upon which the opinion and judgment of the Court has been asked. One or two of these, however, must be mentioned in order that the views that I am about to express may be realised.

The late Mr Yeaman in December 1885 granted a trust-deed for behoof of his creditors. The estate which was conveyed in trust was not any specific property or properties. No individual subject was named or described. What was conveyed, quoting from the dispositive clause of the deed, was, "All and Sundry my" (the truster's) "whole means, estate, and effects, heritable and moveable, real and personal, of whatever kind, and wheresoever situated, presently belonging or which may belong or accrue to me during the subsistence of the trust hereby constituted." Some of the properties might be in Dundee, and others might be elsewhere, but whatever their locality, their individuality remained undisclosed. The result necessarily was that, so far as the effect of the conveyance was concerned, there was no relation established between those to whom the conveyance was granted in trust and the properties which were to be put under their administration.

The conveyance was given to and in favour of "John Shields, manufacturer, Perth, and as trustees, to act in succession as after mentioned, whom failing, to such person or persons as I may appoint by any writing under my hand validly executed." This constitution of the trust, however, was followed by a declaration that "in case of the death, incapacity, non-acceptance, or resignation of the said John Shields, then the said shall have the sole power to manage and execute the said trust, and in case of his death, incapacity, non-acceptance, or resignation, then the management and execution of the trust shall devolve upon the trustee or trustees to be nominated and appointed by me as aforesaid." The blank in the trust-deed for the name of the second trustee never was filled up, and so Mr Shields was the only trustee named in the trust-deed. Mr Shields by holograph minute accepted the trust, and for some time acted as trustee. But on 10th March 1886, three months after his appointment, he intimated to Mr Yeaman his resignation of the trust, and on 6th April he executed a minute which is annexed to the trust-disposition, whereby he confirmed his resignation as from the 10th of March.

On 5th April 1886 Mr Yeaman, on the narrative of the trust-disposition, and of the fact that Mr Shields, after accepting the office of trustee, had resigned, nominated and appointed Thomas Buchan, valuator, Dundee, as trustee under the said trust-deed, with full power by himself alone to manage and execute the trust thereby created, in the same manner and as fully and as freely in every respect as if the trust-deed had been granted in favour of him, the said Thomas Buchan, as sole trustee, and that for the purposes and with the powers, and subject to the declarations and provisions contained in the trust-deed.

Mr Yeaman was proprietor of a number of heritable properties in and about

Dundee, but no feudal title to any of these properties was made up in the person of Mr Shields. After the appointment of Mr Buchan, however, titles to the whole of these were made up in his person as trustee by the now deceased William Kerr, solicitor, Dundee, who acted as agent in the trust both for Mr Shields and Mr Buchan. Those titles were made up by notarial instruments applicable to the respective properties, proceeding on the trust-disposition and the minute of appointment. The account incurred by Mr Kerr, who is now dead, and the trustee in whose sequestration is the first party to this special case, is the subject-matter here in dispute. The second party is Mr Buchan, the trustee in whose person the titles had been completed. What the Court are asked to determine is, whether the notarial instruments referred to constitute a valid feudal title to the properties referred to in the person of the second party.

There appear to me to be two questions involved in this inquiry. The first is the right of Mr Yeaman, the truster, to convey his means and estate to Mr Buchan, and the second is, whether, if he was entitled to convey, the course which he followed for this purpose was legally sufficient to effect the end desired.

In judging of the first of these questions the material consideration is that the conveyance was a general conveyance by which there was established no connection between the trustee and the property conveyed in trust. The trust-deed was a title to administer, but when he ceased to be trustee his connection with the property ceased. His trusteeship was the only bond by which they were united. Part of the property was moveables and part heritage, and when he resigned he left behind him the one as much as the other. The difficulty suggested by the second party is that there had been a conveyance to Mr Shields, and that to divest him it was necessary to re-convey. That appears to me to be a proceeding that was unnecessary, and indeed inappropriate. He had himself received no title to any particular subject, and he could give no title to any particular subject. There was never an investiture. He could have made up a title, and had he done so, then it may be that, notwithstanding his resignation, a re-conveyance from him would have been necessary. Even that, however, appears to me to be doubtful, but on that matter I express no opinion. It is sufficient for me to say that when he resigned he left the trust-estate as he found it. If Mr Yeaman's right to convey to Mr Buchan could be held to be derived from him, a re-conveyance would of course be necessary, but Mr Yeaman had all along the radical right, and that was the title upon which, after Mr Shields resigned, the nomination in favour of Mr Buchan was granted.

Mr Yeaman therefore having a right, the next thing for consideration is whether the course he followed was apt for the purpose which was to be accomplished. What was executed was not a conveyance in the ordinary sense of the term, but was a writing by which Mr Yeaman nominated and appointed Mr Buchan as trustee under the said trust-deed, with full powers of administration, for the ends and purposes for which the trust had been created. If the conveyance had been in the ordinary form, Mr Yeaman having the power, there can be no doubt that it would have been a valid and effectual disposition of the trust property, but a nomination was all that was given, and hence the difficulty—or one of the difficulties—which has to be solved on the present occasion. Section 19 of the Titles to Land Consolidation (Scotland) Act (31 and 32 Vict. c. 101), enacts, that "where a person shall have granted or shall grant a general disposition of his lands, whether by conveyance *mortis causa* or *inter vivos*, or

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by a testamentary deed or writing, within the sense and meaning of the 20th and 21st sections of this Act, and whether such general disposition shall extend to the whole lands belonging to the granter, or be limited to particular lands belonging to him, with or without full description of such lands . . . it shall be competent to the grantee under such general disposition to expede and record in the appropriate register of sasines a notarial instrument in, or as nearly as may be in, the form of schedule L hereunto annexed." Thus, if there has been a disposition, the title of Mr Buchan may be completed by notarial instrument in the form of schedule L. Now, section 3 which is the interpretation clause, enacts that the word "deed" and the word "conveyance" shall each extend to and include (subsec. 7) "all codicils, deeds of nomination, and other writings annexed to or endorsed on deeds or conveyances, or bearing reference to deeds or conveyances separately granted." The nomination in question appears to me to answer those conditions. We have a trust-deed, we have a nomination endorsed on the trust-deed, we have reference made in the nomination to the trust-deed; and consequently, in the sense of the Act, and for the purposes of the Act, the reasonable, indeed the only result, seems to be that the materials presented to the notary were all that were required as warrants for him to expede the notarial instrument, the validity of which is now the subject for determination.

On the whole matter I am of opinion that the question put to the Court ought to be answered in the affirmative.

LORD RUTHERFURD CLARK.—In December 1885 James Yeaman granted a trust-disposition in favour of creditors. By that deed he disponed his whole estate in general terms to John Shields, "whom failing, to such person or persons as I may appoint by any writing under my hand." It is hardly necessary to say that any person so nominated is not a disponee. He can only take in succession to Shields, as coming within the destination contained in the disposition.

Shields accepted and acted under the trust, but he was not infeft. Thereafter he resigned, and Yeaman, by a writing under his hand, nominated Mr Buchan to be trustee in his room. In order to make up Mr Buchan's title to the trust property a notarial instrument was expede. It set out the sasine under which Yeaman was infeft, the general trust-disposition in favour of Shields, and the nomination of Mr Buchau consequent on the resignation of the former.

The question is, whether a good feudal title was thereby completed in the person of Mr Buchan.

It was urged that the instrument was defective, inasmuch as it did not recite the writing by which Shields resigned the trust. To say the least, it would in my opinion have been better had it done so, so as to shew that the notary had before him evidence of Shields' resignation under his own hand. But I do not dwell on this point, because there is a much more formidable objection.

The objection is this—the instrument gives infeftment to Mr Buchan as a disponee, though he does not possess that character. It professes to give him infeftment in the trust property conveyed to Shields, though there is no disposition in his favour either by Shields or by the truster, and though the personal fee in Shields was not taken up by Mr Buchan by any legal process whatever. In my opinion it is very plain that the objection is well founded, and that it is fatal to the title.

Before I proceed to notice the statute law under which this instrument was expede it may be well to consider how the title of Mr Buchan could have been made up at common law, the other circumstances being the same. To avoid any difficulty arising from a general conveyance, and from the fact that the nomination of Mr Buchan is contained in a separate deed, I shall suppose that the trust-disposition granted by Yeaman specifically disponed the property belonging to him to Shields, whom failing, to Buchan, and that it contained all the usual clauses. In such a case Mr Buchan could not expede an infeftment under the disposition, because he had neither obtained a disposition from Shields nor had he been assigned to the precept of sasine. So far as I see there were only two ways of completing his title in such circumstances. Disregarding the unfeudalised disposition in favour of Shields, he might have obtained a new disposition from Yeaman as still vested with the radical right, or as the successor of Shields, and as such coming within the destination contained in the disposition he might have raised a declaratory adjudication under which the property would be adjudged to him. In each case he would have had a conveyance to the lands.

This may be more clear if the disposition had been feudalised in the person of Shields, although in substance there is no difference. In that case the precept would have been exhausted, and there could have been no pretence for saying that it could be again used by Buchan. As the mere successor of Shields he could not have made up any title except by taking the estate out of the person of Shields. Whether the original deed be feudalised or not the principle is identical. For it is trite law that there cannot be two disponees in succession. One person, and one only, can make up a title directly under the disposition, and in order to pass on the estate to a successor there must be service or a new disposition or some other equivalent capable of taking up the estate of the original disponee.

I have taken as an example a title in its simplest form, so as to shew that Mr Buchan was under the legal necessity of obtaining a disposition from Yeaman or Shields, or of taking up by some legal process the right which was vested in Shields. Assuredly he cannot be in a better position in the case which has actually occurred. That the trust-deed contained a general disposition only, and that he was nominated as the successor of Shields by a separate deed, would occasion more difficulties in the completion of his title, but could not relieve him of those other necessities to which I have adverted.

It must be kept in view that the estate which by reason of the notarial instrument is said to be vested in Mr Buchan is the trust-fee which was vested in Shields. That trust-fee was created by the conveyance of the subjects to the latter, and it must remain in his person until it is taken out of it either by conveyance or by some legal process. Conveyance there was none, and we shall have to consider whether a notarial instrument is a legal process for the transference of an estate.

The Act of 1868 made many changes in the law relating to the transmission of heritable property. But in this case we are only concerned with the provision which makes it possible to make up a title directly under a general disposition, and without the aid of the feudal executorial clauses. By the 19th section the grantee under such a disposition may expede a notarial instrument in a certain prescribed form, and that instrument, when duly recorded in the register of sasines, will be sufficient to confer on him a feudal title to the subjects of the grant. But it is provided that if "such notarial instrument shall be expede by a person other than the original grantee, . . . it shall set forth the title or series of titles by which the person in whose favour it is expede acquired right to such general disposition, and the nature of his right."

It is to me obvious that such a notarial instrument does not in any sense operate as a conveyance or service or other legal method of transmitting lands. The Act assumes that the right is in the person who expedes the instrument. The instrument in itself is no more than a statement of the titles which confer the right, and on being recorded it will operate as an infeftment. If the right does not otherwise exist it will do nothing. Where the disposition is general it furnishes the means of making it special by setting out the sasine of the granter. It supplies the executorial clauses, or rather it enables the grantee to dispense with them. But as it is a mere statement of the existing titles which are exhibited to the notary, it cannot operate either as a conveyance or as a service or other legal process for transmitting or taking up heritable rights, unless the statute so declares. The statute is silent on this subject. It does not declare that the notarial instrument has any force in conveying or transmitting heritable rights. The instrument therefore remains a mere statement or exhibition of the titles alleged to create a right in the person in whose favour it is expede, having no operation unless the right is vested in that person.

We were referred to the interpretation clause as aiding the argument of the first party. It shews very clearly that the trust-deed granted by Yeaman is a conveyance under which the disponee could have made up his title by expeding a notarial instrument in terms of the 19th section. But it shews nothing more. And observe what is said of deeds of nomination. They "shall be deemed and taken for the purposes of this Act to be parts of the deeds or conveyances to which they severally relate, and shall have the same effect in all respects as to the persons so named and appointed as if they had been named and appointed in the deeds and conveyances themselves." What effect, then, shall we give to the deed of nomination in favour of Mr Buchan? We shall incorporate it in the trust-disposition of Yeaman, which will then run as a disposition to Shields, whom failing, to Buchan. But we can give it no other or further effect. And so we are brought back again to the question whether the titles of a successor can be made up by means of the notarial instrument alone. I have already given my reasons for holding that a notarial instrument has no disponing or transmitting power.

In the case of an absolute disposition to A, whom failing, to B, it would be impossible to dispute—at least as the law stood prior to 1874—that B could not make up a title by notarial instrument or otherwise without expeding a service to A so as to take up the fee which was vested in him. I do not pause to consider whether the Act of 1874 makes any difference on the ground that it vests a fee in B by mere survivance. For whatever may be the effect of that Act, it is plain that it has no application to the present case.

But an argument was founded on the fact that the right conferred on Shields and his successors is a trust-fee, and that the radical right remained in Yeaman. I cannot see how this is material. The trust-fee is created only by a disposition of the lands, and can only be taken up by taking up the lands which are the subject of the trust. Therefore the question is, whether a good title has been made up to the lands, and that can only be decided by the law which regulates the transmission of heritable rights. Mr Buchan is not less a successor than an

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heir of provision though he is a successor in a trust-fee. The only difference is in the legal processes which would be available for the transmission of the respective fees. That the radical right remained with Yeaman is of no consequence. It only shews that Yeaman might have granted a disposition in favour of Mr Buchan. But he did not. He did nothing more than name him as the successor of Shields, and so place him within the destination contained in the trust-disposition.

In my opinion the title is utterly bad, and I do not think the agent has a right to be paid for it.

The Court answered the first question in the affirmative, and the second in the negative, and found and declared accordingly.

Drummond & Reid, W.S.—J. A. Campbell & Lamond, C.S.—Agents.

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Smith & Son v. Waite, Nash, & Co.

William Smith & Son, Pursuers (Respondents).—*Sir Charles Pearson —C. N. Johnston.*

Waite, Nash, & Company, Defenders (Reclaimers).—*M'Kechnie—Salvesen.*

Sale—Warranty—Disconformity to Contract—Description—"*Old Meldrum turnip seed.*"—A firm of seedsmen offered to take from W., N., & Co., a firm of wholesale merchants, 100 bushels of "Old Meldrum green top yellow turnip seed," if "of a really reliable stock." The merchants accepted the offer; the paper on which the acceptance was written bearing this notice:—"Terms of sale.—Messrs W., N., & Co. give no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned."

The seed furnished turned out to be a mixture of Old Meldrum seed and that of another turnip, the two varieties of seed being quite indistinguishable. In consequence of this mixture the crops raised from the seed failed. *Held* (*rev.* judgment of Lord M'Laren), that the notice headed "Terms of sale" was effectual to protect the sellers against the buyers' claim for damages.

1st Division.
Lord M'Laren.
M.

On 3d December 1885, Messrs William Smith & Son, seedsmen, Aberdeen, wrote to the traveller for Messrs Waite, Nash, & Co., seed-merchants, London, stating that they required "100 bushels real true Old Meldrum green top yellow turnip," and that they would give 16s. per bushel "if you can assure us of the quality of the stock."

On 11th December Messrs Waite, Nash, & Co. answered that they could supply the seed required at 18s. per bushel.

This letter was written on paper on which appeared the following notice:—"Terms of sale.—Messrs Waite, Nash, & Co. give no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned."

On 17th December Messrs Smith & Son wrote to Messrs Waite, Nash, & Co.,—"In reply to yours of 11th inst., if the Old Meldrum green top yellow turnips offered are of a really reliable stock, we will take 100 bus. at your original offer, viz., 17s. per bus., f.o.b."

On 19th December Waite, Nash, & Co. wrote saying that they were in receipt of the order, which would receive their earliest and best attention.

This acknowledgment was written on a post-card, which bore the notice above quoted as to warranty.

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In March 1886 the seed was delivered, and an invoice sent, which also bore the non-warranty clause.

In March 1887 Messrs William Smith & Son raised an action in the Court of Session against Messrs Waite, Nash, & Company, concluding for payment of £2500 of damages.

The pursuers, after narrating the correspondence above quoted (which was admitted), and stating that they had received the seed, averred,—"The pursuers took delivery of the seed, and on the faith that it was of the true Old Meldrum green top yellow turnip, in conformity with the contract, they resold the same in various quantities to merchants carrying on business in different districts of Aberdeenshire, and the other northern and north-eastern counties of Scotland. The said seed was sold and delivered to these purchasers in implement of orders given by them to the pursuers for seed variously named or described, but always so as to designate the green top yellow Scotch turnip, and the said seed was nearly all resold and delivered in retail as such by the purchasers to their customers respectively, by whom it was sown on their several farms or other holdings." (Cond. 5) "The said seed, delivered as aforesaid by the defenders to the pursuers, and by them resold as aforesaid, was a mixture consisting, as was subsequently shewn by its growth, to the extent only of from one-half to two-thirds of seed of the Old Meldrum green top yellow turnip. The remainder was the seed of an entirely different species or kind of turnip, viz., of a Tankard species. The seeds themselves were to the eye so much alike as to be indistinguishable, and there was no way in which the mixture could have been detected by the pursuers."

The defenders admitted the delivery of the seed, and stated,—"The defenders exercised the greatest care and caution in selecting and proving the said turnip seed, and they believe and aver that they duly implemented the contract, but the pursuers were aware that no warranty was given."

The pursuers further stated that the Old Meldrum turnip was well suited to the climate in the north of Scotland, but that the Tankard could not withstand the severity of the climate, and that the crops raised from the seed in question had failed. They further averred;—(Cond. 8) "On the nature of the crop, as grown by the ultimate purchasers, becoming apparent, claims of damages were intimated by many of the proprietors, farmers, and others (being the purchasers of about 90 per cent of the whole seed in question) against the merchants who had supplied them with the seeds, on the ground that the seed was a mixture as above stated, and that they had suffered or were about to suffer injury thereby. The merchants in turn intimated claims of damages against the pursuers, and threatened to raise actions against them. The pursuers intimated to the defenders these complaints and claims as they arose, and that they held the defenders liable." (Cond. 9) "After renewed intimation of the several cases to the defenders, so as to give them an opportunity of coming forward and settling the claims themselves, the pursuers proceeded to effect, and succeeded in effecting, settlements of certain of the claims in so far as they considered them to be well founded. The pursuers have already paid in such settlements sums amounting to £172, 5s. 8d. The said settlements were reasonable, and were not above the amount of damage actually suffered. There are still a large number of unsettled and threatened claims."

They averred that they estimated that they had suffered loss, through the loss sustained by them in injury to business reputation, withdrawal of custom, and the settlement of claims against them by buyers of the seed, to the extent of £2500, the sum concluded for.

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The defenders denied that the Tankard turnip, if properly cultivated, was unsuitable to the climate in question.

The pursuers pleaded;—(1) The defenders having contracted to supply 100 bushels real true Old Meldrum green top yellow turnip seed of a really reliable stock, and having supplied a different seed as condescended on, and the pursuers having suffered loss and damage in consequence, the defenders are liable to the pursuers for such loss and damage. (2) The defenders having contracted to sell and deliver to the pursuers a specific article, and having failed to do so, and supplied another as the article contracted for, whereby the pursuers have suffered loss, injury, and damage, the pursuers are entitled to decree, with expenses, in terms of the conclusions of the summons.

The defenders pleaded, *inter alia;*—(2) The defenders ought to be assoilzied in respect they duly implemented the contract between them and the pursuers. (3) In respect the defenders gave no warranty, and stipulated that they should not be responsible for the crop, the pursuers are not entitled to recover damages. (4) The sum concluded for being in respect of remote and consequential damages is not recoverable.

Proof was led in the cause, from which it appeared that there was a considerable percentage (about 25 per cent) of Tankard turnip in the seed sold, or rather in the crop which came up from it. It was impossible to say exactly what the percentage in the seed was, as the seed of Old Meldrum turnip was indistinguishable from the seed of the Tankard turnip, even under the microscope. The defenders bought their seed from a farmer in the country, and were under the belief when they sold the seed in question that it was the seed of the turnip ordered by the pursuers. Evidence was led at great length as to the failure of the crop produced from the defenders' seed, and as to the complaints made to the pursuers by merchants to whom they had retailed the seed. In view of the judgment of the Inner-House in the case, it is unnecessary to enter on this evidence in detail; it is sufficient to state that the complaints of failure of the crop were very general.

On 1st November 1887 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the defenders have failed to perform their contract to supply Old Meldrum green top yellow turnip seed, and that the clause of indemnity founded on in defence does not protect the defenders against liability for damages: Finds that loss and damage has been sustained by the pursuers to the extent of the sum of £600 sterling; and decerns against the defenders for payment of said sum." *

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* "OPINION.—This case has been so long before me that, with the aid of the argument I have just heard, I think I may now dispose of it. The claim is certainly one of general importance to the defenders, because it was pointed out to me that their profit only amounted to £2, 10s. on such a transaction. This summons concludes for damages to the extent of £2500 in respect of breach of contract, but the hardship is really less than it appears, because, in the first place, damages have not been proved, and could not in such a case be proved, to the amount concluded for; and, in the next, it is to be considered that, from the precautions which are taken in the trade, an occurrence of this kind must be very rare, and it may well be that in the course of a long continued and prosperous business very few claims of this magnitude will really arise. However, I am not so much concerned with the hardship as with the question of liability, and the first element of consideration is the meaning of the clause on which the defenders found, and which is intended to protect them against responsibility for loss arising through defects of quality, insufficiency, or description. While I agree with the first part of the argument offered for the defenders, that some effect must be given to each of these words, I cannot treat the protecting clause

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The defenders reclaimed, and argued;—It was not disputed that they were in good faith in selling this seed to the pursuers. They employed a

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as one applicable merely to quality and sufficiency, because it also makes reference to errors of description. It appears to me that, in every case of this nature, one must look to the usage of trade, the nature of the transaction, the whole circumstances of the case, as brought out in evidence, to find out what kind of differences between goods ordered and goods supplied would amount to an error of mere description, and what will amount to an error in substance, such as the supply of one article in place of another. On both sides reference was made to a case decided by Lord Abinger (in 4 M. & W.) as an illustrative case, and a clear case. In the noble Lord's opinion, it was supposed that a seedsman or produce merchant, who has contracted to supply peas, and has delivered beans, could not maintain that that was a mere error of description, and Mr M'Kechnie said that, in such a case where seed of a different plant had been supplied, he could not contend that even this broad clause of indemnity would apply. Now, just let us see whether the rule here pointed to is not sufficient for the decision of the present case. In considering whether the goods supplied were specifically different from the goods ordered, it is quite evident that the test to be applied is not one that can be furnished by pure logic or by natural history. We are dealing with a mercantile transaction. It might very well be that, under such a contract, seed might be supplied of a kind that, in the opinion of a naturalist, was distinct, but which, in the opinion of farmers and practical men, was the exact equivalent of what was ordered, and in such a case the clause of indemnity might apply, the difference might be treated as a mere difference of description, although, from the point of view of the botanist, it might be a difference in kind. And conversely, there may be different kinds of seed, and different kinds of produce, raised from the seeds, which, according to a natural history classification, are the same plant, but which, for commercial and agricultural purposes, are widely different—specifically, or even generically different. In this case, I have to consider upon the evidence whether the seed of the Tankard turnip can be held in a fair and reasonable construction of this clause to be identical with the seed of the Scotch green top yellow, so that the giving of the one seed for the other was nothing more than the giving of the same article under a different description; or whether these two vegetables in the agricultural sense are specifically different, being suited to growth in different climates, used at different periods of the year, and differing to some extent, at least, in their feeding properties. Now, it is useless, in a matter of this kind, to enter upon a review of the evidence. I have stated the principle on which I think this question is to be determined; and I now say that, according to the best opinion I have been able to form of the evidence, the Tankard turnip is, from the farmers' point of view, a thing specifically distinct from the Scotch green top yellow in these particulars that I have named, and that to give the one for the other is not a mere error of description, but a failure to comply with the contract of sale. It is really worse than not delivering the seed at all, because that could be remedied by going into the market; but a seed is supplied which it is impossible by any test to distinguish from that ordered, and which when it is reared turns out to be useless or unavailable in the climate of Aberdeenshire and the neighbourhood, because it will not stand the severity of the winter. It has been proved to my satisfaction that the Tankard turnips that came up from the seeds supplied by the defenders were to a large extent perfectly useless. It was a plant not very well known in the district, and was treated in the same way as other turnips with which the farmers were acquainted, and the greater part of them, after the winter frosts set in, entirely perished. Now, considering the large value of the crop which may be raised from 5000 lbs. of seed, it is to me rather surprising that the claims sent in should not have amounted to a larger sum, and, once the question of liability is reached, I should not be disposed to be critical in examining those claims. But first, I ought to say in passing, dealing with another argument of the defenders, that I cannot look upon the claims which have been sent in to e pursuers as being anything different from damages naturally resulting from

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farmer in the country to supply the seed, and the seeds being exactly alike, it was impossible for them to have discovered that there was an admixture of other seed with the Old Meldrum.[1] The non-warranty note printed on all the letters sent by them to the pursuers was sufficient to protect them against any claim such as this, where the mistake was not wilful.[2] The word "description" in the "terms of sale" meant that the sellers did not warrant that the seed sent was of the description (*i.e.*, Old Meldrum turnip) ordered. The notice was expressly and carefully framed to meet such a case as the present, and had been held to do so in England.[3] If they had sold cabbage seed instead of turnip seed, the terms of sale would not have protected them, but as they had supplied a kind of turnip seed, the clause was broad enough to cover the error.

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the breach of contract. Now, the sums actually paid and vouched amount to £193, 2s. The claims made upon the pursuers, but not yet settled, amount to £488, 15s. I presume with regard to this second sum, that the reason why the claims are not settled is that, in the opinion of the pursuers, they are immoderate—not perhaps very extravagantly overstated, but still more than the pursuers think, in justice to themselves, and in justice to Messrs Waite, Nash, & Company, they ought to pay. I think it is inevitable that this should be the case, and that the pursuers were not bound to wait before bringing their action until every claim against them had been settled. It does not clearly appear what is the acreage or the proportion of seed represented by £193, and what is represented by the £488. But, in dealing with this claim approximately, as one must do, I think I ought to take off twenty per cent from the £488 of unsettled claims, which would reduce the sum by about £90; and allowing £400 for unsettled claims, and adding £193 of settled claims, we have a total sum of £593. There are some other claims for expenses, time, and trouble, which, in a strict view of liability, might be allowed. I think, in the strict view of liability, law expenses and valuators' fees might be allowed. I am not so clear about loss of time and personal expenses, because I think the time expended by a man of business in settling claims ought to go to profit and loss. But then, as to the claim of £1000 for damage to trade and reputation, I shall only say that that claim was not established to my satisfaction. I do not say that such a claim, in other circumstances, might not have been successfully maintained, but in this case all that was shewn was that the profits of the pursuers' business, which had been steadily increasing, had shewn, if not a decline, at all events a stationary aspect during the last twelve months. Considering that there are other causes in operation that have affected the profits of all classes of the mercantile community, and considering further, that this was a mistake incident to such a business as the pursuers carry on, that it was not their mistake, and that the circumstances were all explained to the buyers, it seems to me very unlikely that any sensible effect could be produced upon the business or commercial reputation of the pursuers, such as I ought to take into account in estimating damages. I think, in cases of this kind, where there is no fault, but simply such a mistake as all men, being fallible, are liable to, and where the loss is very large in proportion to the amount of the original contract, that it has always been the practice, in fairness to the defending party, to estimate damages on the lowest scale possible, and even to allow some share of the loss to fall upon the person whose contract has been broken. In all the circumstances, I think justice will be done to the pursuers for the damage which they have sustained, and may yet sustain, if I award, as the consequence of this breach of contract, the sum of £600 of damages. I shall accordingly give decree for that sum, with expenses."

[1] Carter v. Campbell, June 12, 1885, 12 R. 1075.

[2] Nichol v. Godts, 1854, 23 L. J. Exch. 314; Taylor v. Bullen, 1850, 5 Welsby, Hurlstone, & Gordon, 779.

[3] Reynolds v. Wrench, 1888, 23 L. J. 27—heard before Mr Justice Denman in the Queen's Bench.

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The respondents argued;—The offer made by them was distinctly conditional. What they bargained for was a "distinctly reliable stock"; that meant that the seed should be Old Meldrum and nothing else. They did not sue on the warranty, but relied on the contract, and sued on a breach of it. The turnip supplied was wholly unsuited for the purpose it was wanted for. The words "Old Meldrum" were words of specification, not of description.[1] Description was not equivalent to "kind"; it pointed at a particular class within a genus.[2] Adulteration to such an extent as there was here was sufficient to change the nature of the article.[3]

At advising,—

Lord Adam.—The pursuers are wholesale seed merchants in Aberdeen, the defenders are wholesale seed merchants in London.

In December 1885 the latter contracted to supply the former with 100 bushels of turnip seed.

The contract between the parties is to be found in the pursuers' letter of 17th December 1885, and the defenders' answer thereto of the 19th. There had been previous communications between the parties, and replying to a letter of the 11th the pursuers say,—"If the old Meldrum green top yellow turnips offered are of a really reliable stock, we will take 100 bushels at your original offer, 17s. per bushel, f.o.b.," to which the defenders reply,—"We are in receipt of your order, for which we are obliged. The same shall have our earliest and best attention." There were, however, prefixed to the defenders' acceptance certain conditions in these words,—"Terms of sale.—Messrs Waite, Nash, & Company give no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned."

It is proved that the pursuers knew of these conditions, and if the defenders can get customers to deal with them on such conditions, which I should scarcely have expected, I see nothing illegal in them.

I think, therefore, that these conditions formed terms of the contract for the sale and purchase of the turnip seed in question.

The contract accordingly was for 100 bushels of Old Meldrum green top yellow turnips (meaning thereby turnip seeds), on the conditions above specified.

On 11th March 1886, the defenders, professedly in implement of their contract, sent to the pursuers 100 bushels of turnip seed; the seed was accompanied by an invoice, which also set forth the above-mentioned conditions.

It has turned out, however, that the turnip seed so sent was not pure Old Meldrum turnip seed, but a mixture of that seed and of the seed of another kind of turnip called the Tankard turnip, in the proportion of about three of the former to one of the latter. If the mixture of the two kinds of seeds could have been detected by sight or otherwise, the seed would, no doubt, have been returned at once as not being conform to contract, in respect that it was not the description of seed ordered. But unfortunately the two seeds could not be distinguished.

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[1] Shepherd v. Kain, 1821, 5 Barnewall & Alderson, 240.

[2] Josling v. Kingsford, 1863, 32 L. J., C. P. 94.

[3] Carter v. Campbell, 12 R. 1075; Jaffé v. Ritchie, Dec. 21, 1860, 23 D. 248, 33 Scot. Jur. 107; Dickson & Co. v. Kincaid, Dec. 15, 1808, Fac. Coll.

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The seed so sent was accordingly accepted by the pursuers and sold by them in their turn as being Old Meldrum turnip seed. It was not until the crop had been grown that it became apparent that the seed had been mixed, and hence the loss and damage suffered. That a great deal of loss has been suffered is certain—the question is whether this loss is to fall on the pursuers or defenders. It is a hard case either way, as it appears to me that neither party is to blame for the unfortunate occurrence, the blame lying on the original grower.

It appears to me that the turnip seed in question was ordered by description,—the description being Old Meldrum green top yellow turnips,—and the objection to the turnip seed sent is that, so far as it was mixed with Tankard turnip seed, it was not of the description ordered. But the seed was sent to the pursuers and accepted by them on the condition that the defenders did not warrant it to be of the description ordered, *i.e.*, did not warrant it to be Old Meldrum green top yellow turnip. I think, accordingly, that the case which has occurred is just the case which the defenders' "Terms of Sale" were intended to meet, and against which they desired to protect themselves, and I think they have done so successfully.

I cannot follow the reasoning of the Lord Ordinary by which he arrives at an opposite result. It seems to me that if two turnips are identical, as he says, they must be the same description of turnip by whatever names they may be called, and a clause like the one in question could not be required for such a case. While to say that one turnip is specifically distinct from another, appears to me to be just saying, in a different form of words, that they are not the same description of turnip—which is just the case provided for by the "Terms of Sale."

Being of opinion, therefore, that the defenders are not liable, it is unnecessary to consider the question of damages dealt with by the Lord Ordinary.

On the whole matter I think the interlocutor reclaimed against should be recalled, and the defenders assoilzied.

LORD KINNEAR.—The whole argument for the pursuers may be summed up in one sentence, viz., that the defenders have not performed their part of the contract, as they have delivered seed of a different description from that bargained for. That argument would be unanswerable were it not for the stipulation which, I agree with Lord Adam, was specially designed and is fitted to meet the case. The stipulation comes to this, that while the defenders agreed to deliver "Old Meldrum" turnip seed, they did not guarantee the seed they delivered to be Old Meldrum seed, and, if it turned out not to be seed of that description, they would not be in any way responsible for the mistake. I think that stipulation affords an answer to the pursuers' claim.

LORD PRESIDENT.—I am of the same opinion. If it had not been for the conditions expressed in the "Terms of Sale" the case would have been very clear for the pursuers. To a certain extent the defenders have delivered a different article from what they agreed to sell. So they have to that extent committed a breach of contract. But everything depends on the words of the notice, and particularly on the word "description," which occurs there. No doubt that word is susceptible of various meanings. In many cases it means a detailed description as to form, colour, &c. of the article sold—but it is also often used as equivalent to kind or species. Now, it is in that sense, I think, that it is used here. In

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mercantile contracts of this kind there is no description of the article sold except that contained in the order. One party orders a particular article and the other party delivers that article. The specification of the goods ordered constitutes the whole description of the article. I can conceive no other sense in which the word can be meant to be used in such a mercantile contract as this.

THE COURT recalled the Lord Ordinary's interlocutor, and assoilzied the defenders from the conclusions of the summons.

SCOTT MONCRIEFF & TRAIL, W.S.—W. G. ROY, S.S.C.—Agents.

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WILLIAM LOUIS WINANS AND ANOTHER, Pursuers (Respondents).—*Sol.-Gen. Robertson—Sir Charles Pearson—C. J. Guthrie—Macphail.*
RIGHT HONOURABLE LORD TWEEDMOUTH, Defender (Reclaimer).—*Asher—Mackay—Ure.*

Property—Entail—Burden on entailed property—Disentail—Bridge—Acquiescence of subsequent heirs.—The heir of entail in possession of K, an estate situated on the north bank of a river, in 1858 granted permission (not in writing) to M, the proprietor of lands on the other bank and tenant of the shootings on the entailed estate, to build over the river a carriage bridge, one of the abutments of which rested on part of the entailed lands. The bridge was connected by a good road, forty-five yards long, with a public road which ran along the north bank. The succeeding heir of entail, who in 1884 disentailed the estate, did not object to the continued use of the bridge by M. In 1885, after the death of the disentailer, M assigned the remainder of his lease of the shootings over K to W, who shortly thereafter placed a deer fence across the access to the bridge on the north side. In an action against M at the instance of W and the fee-simple proprietor of K, who up to that time had not objected to M's use of the bridge, for declarator that they were entitled to have the use of the bridge discontinued, *held* that M's right to the use of the bridge rested on sufferance only, and that, therefore, the pursuers were entitled to declarator that he was not entitled to continue to use it.

Question whether, if the summons had concluded for removal of the bridge, M would have been bound to remove it.

Road—Public right of way—Public termini—Dedication to public uses—Maintenance of road by road trustees.—A member of the public in 1886 sued for declarator of a right of way, acquired by prescriptive use, for carriages, &c. over a road running westwards from a village, through the avenue of an estate, past a disused mill, which was not averred to be a public place, and on to join another alleged right of way. It was proved that for many years prior to 1858 public money had been expended on the maintenance of the road by the road trustees with the knowledge and occasionally at the request of the proprietor of the estate. After that date no money had been so spent, the road having been closed to the public and maintained by the proprietor on being made the avenue of the estate, and the road was not one of those scheduled and taken over by the road trustees under the provisions of the Roads and Bridges Act, 1878. The Lord Ordinary (M'Laren) negatived any right of way to the west of the old mill, but found that there was a right of way from the village to a point "hereafter to be determined" near the old mill, on the ground that by giving up the road to be maintained by the road trustees the proprietor had dedicated it to public uses. The Court (*reversing* the judgment of the Lord Ordinary) *held* that there was no evidence of prescriptive use of a road from one public point to another, and that, on the assumption that the road had at one time been a district road under the management of the road trustees, on its abandonment by them it reverted to the proprietor free of any public right of way over it.

Servitude—Right of way—Mill.—Opinion (*per* Lord Mure) that where there

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is a servitude right of way to a mill for the purpose of grain being taken there to be ground, the right of way ceases when the use of the mill is discontinued.

Road—Public right of way—Alternative routes.—The pursuer and the defender in an action for declarator of a public right of way maintained alternative routes for a part of the road. It was proved that the route proposed by the pursuer had been closed, without remonstrance by the public, for nearly thirty years, and there was no evidence that the one route was more convenient than the other. The Court *declared* a right of way by the route admitted by the defender, and *negatived* the pursuer's contention.

1st Division.
Lord M'Laren.
M.

The estate of Knockfin is situated on the north or left bank of the river Dhiag, which flows through Glenaffaric, Inverness-shire, in an approximately north-easterly direction. There are very few inhabitants, only about six or eight, on that side of the river, the ground being used as a deer forest.

The river is the boundary between Knockfin (and, generally, the Glen-Affaric shootings) and the estate of Guisachan, which marches with Knockfin for about thirteen miles. The population on the Guisachan side of the river numbers about 200 to 300, but all are connected with the estate in one way or another.

Guisachan House lies about 200 yards to the south of the river, and is surrounded by pleasure-grounds. Within the grounds are the ruins of an old mill, hereafter called the "Old Meal Mill." The ruins are about 250 yards to the south of the house.

About 350 yards above the House the river is crossed by a bridge called the Black Bridge. This bridge is only a foot bridge, and the point at which it reaches Knockfin grounds is about 300 yards from the Strathglass County Road, which runs along the north bank of the river as afterwards described. The bridge is connected with the county road by a footpath.

About 540 yards below the House the river is crossed by the White Bridge. This is a substantial wooden structure, resting on stone abutments on each side, and is suitable for carriage traffic. Its northern end is distant about 45 yards from the Strathglass County Road, with which it is connected by a good road. There is also a carriage road connecting the bridge on the south bank with Guisachan House.

Near the Black Bridge there was formerly a ford, which in 1854, and occasionally later, was in use, but only for foot and horse traffic.

Near the White Bridge there was also a ford, known as Cullessie Ford, which was occasionally used for cart traffic, but little, if at all, after the bridge was built.

About one mile and three quarters below Guisachan House, and also on the south bank of the river, lies the village of Tomich. From this village a road known as the Strathglass County Road runs up the south bank of the river, passing, in about a quarter of a mile, the entrance to the avenue of Guisachan, and crossing the river at a bridge known as Knockfin Bridge, below the White Bridge. The road then runs up the north bank of the river, passes the connections with the White and Black Bridges, and ceases to be available as a carriage road about half a mile above Guisachan House, where it becomes a mere drove road leading out of the glen to the westwards.

From Tomich, as already narrated, this road runs up the south bank of the river till it reaches the avenue gate of Guisachan. The avenue runs up the south bank and (disregarding a short piece of avenue leading to the house) reaches the site of the Old Meal Mill. Thereafter, in about a quarter of a mile, it passes the farm steading of Hilton or Tom-Guisachan, at which point a drove road strikes off southward (hereafter called road

No. 5) leading to Glenmoriston. The road in question then continues westwards up the south bank of the Dhiag to Cougie—many miles off, where there is only a shepherd's or keeper's house. This road from Tomich to Cougie will hereafter be alluded to as road No. 1. From Cougie there were drove roads leading to Kintail and Glenmoriston.

From Tomich a road branches off the Strathglass County Road, close to the village, and runs westwards south of and nearly parallel to the County Road and the avenue of Guisachan for about half-a-mile, and then strikes southwards at a point hereafter called H across country to a point where it meets road No. 5, the drove road to Glenmoriston from Tom-Guisachan. This is a drove road, and will hereafter, from H to the point where it joins the Glenmoriston Road, be called road No. 6.

From a point in the avenue of Guisachan about 200 yards from the gate a road runs off to join No. 6 where it strikes southwards at H, and this short piece of road is also included in road No. 6, which thus extends from a point in the avenue of Guisachan to the point where it joins the Glenmoriston Road (No. 5). It will thus be seen that the point H where No. 6 strikes southwards may be reached from Tomich either by following the road which branches off the Strathglass County Road and runs parallel to the Guisachan avenue, or by going along the Strathglass County Road, through the avenue gate, along the avenue for about 200 yards, and then following road No. 6.

In 1854 Mr Marjoribanks, afterwards Lord Tweedmouth, bought the estate of Guisachan from Fraser of Culbokie. At that date Duncan Chisholm was heir of entail in possession of Knockfin.

In 1858 Lord Tweedmouth, who at that time rented the Glenaffaric Forest as subtenant, erected the White Bridge. About the same time the use of the Old Meal Mill of Guisachan was put an end to, and a new mill was built to supply its place near Tomich, at Guisachan steading.

In 1858 (after the White Bridge was built) Duncan Chisholm died.

In 1869 Lord Tweedmouth obtained a lease (dating from 1870) from Sutherland Chisholm, who had succeeded Duncan Chisholm as heir of entail, for twenty-one years, of the shootings, *inter alia*, of that part of Knockfin on the other side of the Dhiag from Guisachan house and policies. Nothing was said in the lease as to the White Bridge, or its use.

In 1877 Lord Tweedmouth erected the Black Bridge over the Dhiag. This bridge was carried away by a flood and was put up again in 1881.

In 1881 William Louis Winans, an American, became tenant of the grazings of Knockfin.

James Sutherland Chisholm disentailed the estates in 1884, and died in 1885. He was succeeded by his son Roderick D. M. Chisholm.

By deed of assignment Lord Tweedmouth, in June 1885, with consent of Roderick D. M. Chisholm, assigned his right to the Knockfin (and other) shootings to Winans. Under this assignation Lord Tweedmouth made over to Winans certain subjects, "as well as any other buildings or constructions, and the additions and improvements of buildings at Aultbea and other places on or pertaining to the subjects hereby assigned, made by the said first party or his subtenant. And the first party hereby undertakes to put the second party into full and actual possession of the subjects hereby assigned . . . at the date of the assignment, and the whole buildings and other constructions which are to be delivered by the first party to the second party under this assignment are to be received by the second party in the order and conditions in which they may be at the date of this transfer or assignment."

On 30th April 1886 Winans, as tenant of the Knockfin shootings, with consent of Roderick Chisholm, raised an action of declarator in the Court of Session against Lord Tweedmouth.* The summons contained five conclusions with reference to the pursuers' rights in bridges over the river Dhiag, and for public rights of way over roads on the south bank of the river, *i.e.*, through the Guisachan estate.

The conclusions (so far as it is necessary that they should be set forth, certain of them having been abandoned, and the decision of the Lord Ordinary having been acquiesced in with regard to others) were for declarator, "(First), That under and by virtue of a deed of assignment entered into between the pursuer William Louis Winans and the defender, dated 22d and 24th June 1885, there were assigned to the said William Louis Winans the defender's whole right, title, and interest in and to (1), the northmost half of the two bridges erected by him across the river Dhiag, in the parish of Kiltarlity and county of Inverness, . . . or one or more of them, the said bridges over the river Dhiag being situated, the one called the White Bridge, 540 yards or thereby north-east of Guisachan House, belonging to the defender, and the other, called the Black Bridge, 350 yards or thereby south-west of Guisachan House, and the said bridge over the Leth Allt Burn, being situated one mile and a third of a mile or thereby to the west of the bridge over the river Dhiag last above mentioned; and (2), in and to the roads and paths connecting the said bridges on the north with the public roads running through the lands of Knockfin belonging to the pursuer Roderick Donald Matheson Chisholm. (Second), That the northmost half of the said two bridges erected by the defender across the river Dhiag, ... are situated entirely within the said lands of Knockfin, and that the roads and paths connecting the northmost ends of the said bridges with the said public roads running through the lands of Knockfin are also situated entirely within the said lands. (Third), That the pursuers are entitled at any time and without any process of law, to shut up the said bridges, so far as situated on the lands of Knockfin, or one or more of them, and the said connecting roads and paths on the said lands, or one or more of them, by placing a fence or fences across the said bridges and connecting roads and paths, so far as situated on the lands of Knockfin, or one or more of them, so as to prevent the use of the said bridges and connecting roads and paths, or one or more of them, as accesses to or from the said public roads, the pursuers always leaving sufficient openings in any fence or fences which may be placed by them opposite the north end of the ford over the Dhiag, situated 450 yards or thereby north-east of Guisachan House, and opposite the north end of the other ford over the Dhiag, 875 yards or thereby, measuring along the course of the river, to the west of the ford above mentioned, . . . and upon the line of the roads or paths connecting the said fords with the public roads running through the lands of Knockfin; or otherwise, in the event of it being found that the pursuers are not entitled to shut up the said bridges and connecting roads and paths, or one or more of them, it ought and should be found and declared that there exists a public right of way for passengers, both on foot and by horse, and for cart and carriage traffic, and for the passage of cattle and sheep, or, at all events, for foot-passengers over and along the same, or across and along such of the said bridges and connecting roads and paths as it may be found that the pursuers are not entitled to shut up, and also over and along the portions of the said bridges situated on the lands of Guisachan, and along the roads or paths connecting the said bridges, so far as situated on the lands of Guisachan, with the public roads on the south sides of the river Dhiag, . . . and that the pursuers and all others are entitled to use the same for all purposes of passage for which the said bridges and connecting roads and paths are available; and in that event it ought and should be further found and declared that the pursuers are entitled to erect gates across the said bridges and connecting roads or paths on the north side of the river Dhiag . . . (or across such of them as they may not be found entitled to shut up), without any restriction as to the height or method of construction of the same, provided only that the said gates shall be furnished with the same facilities for egress and ingress as exist in connection with the gates at present existing in connection with the said bridges and connecting roads and paths."

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* Before the case was decided by the Lord Ordinary, but after the proof, The Chisholm died, and his mother, Mrs Annie Chisholm, as his general disponee and representative, was sisted as a pursuer in his stead.

The fifth conclusion was for declarator of right of way for cart and carriage traffic, for passengers on foot and horseback, and for cattle and sheep, or, at all events, for foot-passengers, (1) by road No. 1 from Tomich by Guisachan Old Meal Mill and Tom-Guisachan or Hilton to Cougie; (5) by road No. 5 from the point where it leaves road No. 1 near Tom-Guisachan or Hilton to Glenmoriston; (6) by road No. 6 from a point about 200 yards within the avenue gate of Guisachan and joining the road to Glenmoriston from Tom-Guisachan (road No. 5) about 2 miles south of Guisachan House.*

The summons then concluded that the defender should be ordained to remove any gates or other obstructions which interrupted the free use of these roads, which had, it was alleged, been acquired for the public by prescriptive use.

The facts and dates above stated were not disputed.

The pursuers averred with regard to the Black and White Bridges (omitting reference to a third bridge over the Leth Allt Burn which was removed by Lord Tweedmouth before the Lord Ordinary decided the case), —(Cond. 3) "During his tenancy under the said lease the defender erected two bridges [one the Leth Allt Bridge] in order to connect the estate of Guisachan, belonging to him, with the shooting grounds of Knockfin, of which he was tenant. One of these bridges is now known as the Black Bridge, and is situated on the river Dhiag, the *medium filum* of which at that point forms the boundary between the estates of Guisachan and Knockfin. . . . These bridges were erected about the years 1880 or 1881, and were used by the defender and his servants as a means of ingress and egress to and from his Knockfin shootings. Another bridge, popularly known as the White Bridge, had been erected by the defender about 1858 across the river Dhiag to the east of the Black Bridge. These three bridges are all built of wood, and the White Bridge is the only one of them available for cart traffic. When the defender constructed these bridges he, at the same time, formed paths on both sides of the said rivers connecting the bridges with the public roads which run along the north and south sides of the river Dhiag. The northmost half of each of these three bridges is situated entirely within the lands of Knockfin belonging to the pursuer The Chisholm. . . ." (Cond. 5) "Under and by virtue of the said deed of assignment [of June 1885 above narrated] the defender's right, title, and interest in the said three bridges, or at least the Knockfin ends of them, from the *medium filum* of the river Dhiag and the Leth Allt Burn respectively, and the roads and paths connecting them

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* Roads 2, 3, and 4 were branches off road No. 1, and road No. 7 was a road from Tomich to the south-east, but these roads not being ultimately in dispute need not be further referred to.

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with the public roads on the north, were assigned to the pursuer Mr Winans. The said pursuer thereupon became entitled to deal with the said bridges, roads, and paths in such way as he thought fit, saving always such rights, if any, as the public might have acquired over the same. In point of fact the public had not up to the date of the said assignment acquired any right of use or passage over the said bridges, roads, or paths, nor have they done so since. The pursuer Mr Winans is entitled to shut up the said bridges, roads, or paths by running a fence or fences across the same, or in any other way,—openings being left by the said pursuer opposite the fords after mentioned. At all events, if the said pursuer be not entitled to shut up the said bridges, roads, and paths, he is entitled to run a fence or fences across these bridges, roads, and paths, provided only that he leaves gates in the fence or fences opposite the bridges, roads, and paths."

The pursuers further averred that in running a deer fence along the Knockfin side of the Dhiag Winans had left the northern accesses to the fords situated near the White and Black Bridges free.

The defender answered,—(Ans. 3) "Admitted that the bridge now known as the Black Bridge is situated on the river Dhiag, and was erected by the defender after his purchase of Guisachan, but explained that this bridge was erected in place of an old bridge which formerly stood at or near the same site, and had been carried away by a flood. This old bridge was in existence long before the defender purchased Guisachan, and had been erected and used in lieu of a ford road over the river Dhiag, which had been used by the proprietor and tenants of the estate of Guisachan from time immemorial as a means of access to and from the Strathglass County Road on the north side of the river. . . . Admitted that the bridge called the White Bridge, which crosses the Dhiag to the east of the Black Bridge, was erected by the defender about the year 1858. Admitted also that these three bridges are built of wood, and that the White Bridge is the only one of them available for cart and carriage traffic. Explained and averred that the White Bridge was constructed with the consent of Duncan Chisholm of Chisholm, the predecessor of Mr Chisholm in the lands of Knockfin at the date of its erection, and that this bridge was built as a substitute for a ford road for foot-passengers, carriages, and horses, which had from time immemorial existed and been used by the proprietors, tenants, and others, residents on the estate of Guisachan, as a means of access to and from the Strathglass County Road on the north side of the river. Admitted that the defender, in or about the year 1858, made a small piece of carriage road on the lands of Knockfin, with the consent of the proprietor of these lands, in place of the road formerly existing at the ford and connecting the said bridge with the Strathglass County Road north of the Dhiag. The said ford road and the bridge road now substituted for it have been used by the proprietors of Guisachan as a right of way for carts, carriages, and horses, as well as foot-passengers, for much more than the prescriptive period. Explained that from the dates of their construction, and at and after the date of the said deed of assignment, the said three bridges were in constant use by the defender and his servants and tenants on the estate of Guisachan as roads or paths of access to and fro from the estate of Guisachan from and to the north side of the river Dhiag. The road running by the White Bridge was, in particular, so used, as the ford road had been previously, as one of the principal avenues or approaches to and from Guisachan House, and the road to Tomich, on the north side of the river Dhiag. They were so used without interruption or hindrance until quite recently, when the pursuer Winans erected a deer fence along the north side of the

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bridges, so far as situated on the lands of Guisachan, with the public roads on the south sides of the river Dhiag, . . . and that the pursuers and all others are entitled to use the same for all purposes of passage for which the said bridges and connecting roads and paths are available; and in that event it ought and should be further found and declared that the pursuers are entitled to erect gates across the said bridges and connecting roads or paths on the north side of the river Dhiag . . . (or across such of them as they may not be found entitled to shut up), without any restriction as to the height or method of construction of the same, provided only that the said gates shall be furnished with the same facilities for egress and ingress as exist in connection with the gates at present existing in connection with the said bridges and connecting roads and paths."

The fifth conclusion was for declarator of right of way for cart and carriage traffic, for passengers on foot and horseback, and for cattle and sheep, or, at all events, for foot-passengers, (1) by road No. 1 from Tomich by Guisachan Old Meal Mill and Tom-Guisachan or Hilton to Cougie; (5) by road No. 5 from the point where it leaves road No. 1 near Tom-Guisachan or Hilton to Glenmoriston; (6) by road No. 6 from a point about 200 yards within the avenue gate of Guisachan and joining the road to Glenmoriston from Tom-Guisachan (road No. 5) about 2 miles south of Guisachan House.*

The summons then concluded that the defender should be ordained to remove any gates or other obstructions which interrupted the free use of these roads, which had, it was alleged, been acquired for the public by prescriptive use.

The facts and dates above stated were not disputed.

The pursuers averred with regard to the Black and White Bridges (omitting reference to a third bridge over the Leth Allt Burn which was removed by Lord Tweedmouth before the Lord Ordinary decided the case),—(Cond. 3) "During his tenancy under the said lease the defender erected two bridges [one the Leth Allt Bridge] in order to connect the estate of Guisachan, belonging to him, with the shooting grounds of Knockfin, of which he was tenant. One of these bridges is now known as the Black Bridge, and is situated on the river Dhiag, the *medium filum* of which at that point forms the boundary between the estates of Guisachan and Knockfin. . . . These bridges were erected about the years 1880 or 1881, and were used by the defender and his servants as a means of ingress and egress to and from his Knockfin shootings. Another bridge, popularly known as the White Bridge, had been erected by the defender about 1858 across the river Dhiag to the east of the Black Bridge. These three bridges are all built of wood, and the White Bridge is the only one of them available for cart traffic. When the defender constructed these bridges he, at the same time, formed paths on both sides of the said rivers connecting the bridges with the public roads which run along the north and south sides of the river Dhiag. The northmost half of each of these three bridges is situated entirely within the lands of Knockfin belonging to the pursuer The Chisholm. . . ." (Cond. 5) "Under and by virtue of the said deed of assignment [of June 1885 above narrated] the defender's right, title, and interest in the said three bridges, or at least the Knockfin ends of them, from the *medium filum* of the river Dhiag and the Leth Allt Burn respectively, and the roads and paths connecting them with the public roads on the north, were assigned to the pursuer Mr Winans. The said pursuer thereupon became entitled to deal with the said bridges, roads, and paths in such way as he thought fit, saving always such rights, if any, as the public might have acquired over the same. In point of fact the public had not up to the date of the said assignment acquired any right of use or passage over the said bridges, roads, or paths, nor have they done so since. The pursuer Mr Winans is entitled to shut up the said bridges, roads, or paths by running a fence or fences across the same, or in any other way,—openings being left by the said pursuer opposite the fords after mentioned. At all events, if the said pursuer be not entitled to shut up the said bridges, roads, and paths, he is entitled to run a fence or fences across these bridges, roads, and paths, provided only that he leaves gates in the fence or fences opposite the bridges, roads, and paths."

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* Roads 2, 3, and 4 were branches off road No. 1, and road No. 7 was a road from Tomich to the south-east, but these roads not being ultimately in dispute need not be further referred to.

The pursuers further averred that in running a deer fence along the Knockfin side of the Dhiag Winans had left the northern accesses to the fords situated near the White and Black Bridges free.

The defender answered,—(Ans. 3) "Admitted that the bridge now known as the Black Bridge is situated on the river Dhiag, and was erected by the defender after his purchase of Guisachan, but explained that this bridge was erected in place of an old bridge which formerly stood at or near the same site, and had been carried away by a flood. This old bridge was in existence long before the defender purchased Guisachan, and had been erected and used in lieu of a ford road over the river Dhiag, which had been used by the proprietor and tenants of the estate of Guisachan from time immemorial as a means of access to and from the Strathglass County Road on the north side of the river. . . . Admitted that the bridge called the White Bridge, which crosses the Dhiag to the east of the Black Bridge, was erected by the defender about the year 1858. Admitted also that these three bridges are built of wood, and that the White Bridge is the only one of them available for cart and carriage traffic. Explained and averred that the White Bridge was constructed with the consent of Duncan Chisholm of Chisholm, the predecessor of Mr Chisholm in the lands of Knockfin at the date of its erection, and that this bridge was built as a substitute for a ford road for foot-passengers, carriages, and horses, which had from time immemorial existed and been used by the proprietors, tenants, and others, residents on the estate of Guisachan, as a means of access to and from the Strathglass County Road on the north side of the river. Admitted that the defender, in or about the year 1858, made a small piece of carriage road on the lands of Knockfin, with the consent of the proprietor of these lands, in place of the road formerly existing at the ford and connecting the said bridge with the Strathglass County Road north of the Dhiag. The said ford road and the bridge road now substituted for it have been used by the proprietors of Guisachan as a right of way for carts, carriages, and horses, as well as foot-passengers, for much more than the prescriptive period. Explained that from the dates of their construction, and at and after the date of the said deed of assignment, the said three bridges were in constant use by the defender and his servants and tenants on the estate of Guisachan as roads or paths of access to and fro from the estate of Guisachan from and to the north side of the river Dhiag. The road running by the White Bridge was, in particular, so used, as the ford road had been previously, as one of the principal avenues or approaches to and from Guisachan House, and the road to Tomich, on the north side of the river Dhiag. They were so used without interruption or hindrance until quite recently, when the pursuer Winans erected a deer fence along the north side of the

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said river and burn, so as to cut off the access to the estate of Guisachan by these roads or paths."

The defender further denied that Winans had acquired right to these bridges by virtue of the assignation, or that it was contemplated at the date of that deed that any such right should be conveyed to him.

In cond. 11 the pursuers set forth, as members of the public, that there were public rights of way over about twelve roads or paths on the Guisachan side of the Dhiag. Among these roads were roads No. 1, No. 5, and No. 6 above referred to. It was not averred in the condescendence that Guisachan Old Meal Mill was a public place, or that there was any public place near it.

The defender answered,—(Ans. 10 and 11) "Admitted that on the south or Guisachan side the said fords and bridges over the river Dhiag substituted therefor connect with certain roads or paths situated on the estate of Guisachan, and, in particular, with the avenues and private roads or paths leading to the house of Guisachan and the old meal mill of Guisachan. The meal mill has been disused for a long period. Denied that any of the said roads or paths are public. No members of the public have used the said roads and paths on the estate of Guisachan for time immemorial, or, at all events, for much more than forty years, as public roads or paths, and no member of the public now claims right so to use them. The only persons now resident on the Knockfin estate are the keepers, watchers, and other persons engaged in the preservation of game for the pursuer Winans, as he does not allow any agricultural or pastoral tenants or crofters to reside on it. The said keepers, watchers, and persons engaged in game preserving do not in fact use, and have never used, the Guisachan private roads as public roads. The real pursuer of the present action, Mr Winans, does not truly claim to use the said roads as a member of the public. He has inserted alternative and additional conclusions of declarator of public right of way over twelve or thereby different roads or portions of roads, most of which are situtated in or near the policies of Guisachan, in his present action solely *in æmulationem vicini*, and as a means of retaliation against the defender, who has obtained interim interdict in the Sheriff Court of Inverness-shire against him for cutting off, or attempting to cut off, by means of a deer fence, the rights of access which the proprietors of the estate of Guisachan have enjoyed from time immemorial, or at least for more than forty years, leading from the south or Guisachan side of the river Dhiag and Leth Allt Burn to the north side of the said river and burn and the Strathglass County Road."

With reference to the road from Glenmoriston to Tom-Guisachan (No. 5) the defender admitted that it was public from Glenmoriston to the point where No. 6 (the road to Tomich) branched off, but not from that point to Tom-Guisachan; also that road No. 6 was public from the point where it left road No. 5 to the point H where as above described it turned eastwards parallel to the avenue of Guisachan. He also admitted that this last-mentioned road to Tomich was public, but denied that the short piece of road No. 6 from H through the avenue of Guisachan was public.

The pursuers pleaded;—(1) On a sound construction of the said deed of assignment, the pursuer William Louis Winans is entitled to decree in terms of the first declaratory conclusion of the summons. (2) The northmost half of the said bridges being entirely constructed on the lands of Knockfin belonging to the pursuer The Chisholm, and tenanted by the pursuer Mr Winans, and the said connecting ways on the north being entirely situated on the said lands, the pursuers are entitled to decree in terms of the second declaratory conclusion of the summons. (3) The

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defender having no longer any right to the use of the bridges and connecting ways, so far as situated to the north of the said river and stream, and the public not having acquired any rights over the same, the pursuers are entitled to decree in terms of the first alternative of the third declaratory conclusion of the summons, or otherwise to decree in terms of the second alternative. (4) The said fords and connecting ways being public roads or rights of way, the pursuers are entitled to decree in terms of the fourth conclusion. (5) The roads libelled being public roads or rights of way, the pursuers are entitled to decree in terms of the fifth conclusion.

The defender pleaded;—(2) The said deed of assignment not having conveyed or assigned to the pursuer Winans any right or interest in the bridges in dispute, or any part of them, the defender should be assoilzied from the first declaratory conclusion of the summons. (3) The said bridges and connecting ways on the north of the river Dhiag having been made as substitutes for existing rights of way belonging to the proprietor of the estate of Guisachan, the pursuer is not entitled to decree in terms of the second and third declaratory conclusions. (4) The said bridges and connecting ways having been made at great expense by the defender, and consented to and acquiesced in by the successive proprietors of Knockfin from the dates of their formation down to the present time, neither he nor anyone in his right can now object to or interfere with their use as roads of access to the estate of Guisachan. (5) The said bridges and connecting ways having been openly used with the knowledge of the pursuers, both at and after the date of the said deed of assignment, as roads of access to the estate of Guisachan by the defender and his servants and tenants, the pursuers are personally barred from insisting on decree in terms of the third declaratory conclusion. (8) None of the roads libelled, with the exception of the roads admitted to be public in the defender's answer to articles 10 and 11 of the condescendence, being public roads or rights of way, or at all events not being so in so far as they pass over any part of the lands of Guisachan, the defender is entitled to absolvitor from the fifth declaratory conclusion.

Proof was led in the cause to the following effect:—

(1) *The White Bridge*—This bridge was erected at the defender's expense in or about 1858. At that date the defender was tenant of the Knockfin shootings. Before beginning the bridge he asked permission from The Chisholm (Duncan), who held the lands of Knockfin as heir of entail, to build it at his own expense. It appeared from the evidence that the defender built the bridge on a simple authority from The Chisholm (not given in writing, or at least no writing to that effect was produced). At the time of these communications a Mr Robertson was acting for The Chisholm and Mr Brown for Lord Tweedmouth (then Mr Marjoribanks).*

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* Lord Tweedmouth deponed on this subject:—"I became anxious to have a bridge over the Dhiag for the purpose of getting out to the Knockfin Road, which was the only public parliamentary road, and a road which appears in the Highland Roads and Bridges Report from 1817. Duncan Chisholm was proprietor of The Chisholm property at that time. I was acquainted with him for many years before I purchased Guisachan, and after I purchased it he was in the habit of visiting at my house in London. He died in the end of 1858 or beginning of 1859. His factor at that time was Mr Robertson, and Mr Brown was acting for me. I was in communication with Mr Brown on the subject of this bridge, and also with The Chisholm. No. 186 of process is a letter which I received from Mr Brown on the subject of the bridge. I saw The Chisholm in London more than once on the subject of erecting this bridge. My firm impression is that it was by correspondence—but the letter I cannot find, and

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After Duncan Chisholm's death the succeeding heirs, viz., James Sutherland Chisholm and Roderick Chisholm (one of the pursuers) did not take

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I am not going to say positively that it was by letter—but my firm impression is that the request was made by letter to Duncan Chisholm for an excambion. I applied to The Chisholm for permission to erect the White Bridge. (Q.) Did you get his permission in writing? (A.) I believe I did. I have searched my repositories for any written permission, but I have not been able to find any. . . . I have not found any letter from The Chisholm in my repositories. Mr Brown was acting for me at the time. I was frequently in the habit of sending papers to him connected with the estate matters. I have caused examination to be made, through my agent, of Mr Brown's repositories also, but without finding a letter. I am quite positive that I had direct communication with The Chisholm on the subject of the erection of the new bridge. (Q.) Did you receive his permission? (A.) Yes. I am positive of that, and I may also say that The Chisholm was anxious for an excambion. Mr Robertson, the factor, said there were difficulties in the way, and Mr Brown said there were none. I am positive as to these facts. There was some earth taken from the Chisholm side for filling up in making the bridge. (Q.) Was that done with The Chisholm's permission? (A.) Certainly. I would never have thought of putting this bridge on The Chisholm's property without consulting him. I was not present when the bridge was built or earth carted. I have never had any personal communication with Mr Robertson on the subject. My communication was with The Chisholm direct in London. (Q.) Was the bridge in fact built shortly after you obtained The Chisholm's permission? (A.) Yes, it was commenced in the beginning of 1857. There was a road made, connecting the north end of the bridge with the Knockfin Road from 1857 down to the recent dispute. I have used the bridge and road for an access to Guisachan House daily and without objection by anybody."

The letter from Mr Brown, No. 186 of process, referred to in Lord Tweedmouth's evidence was as follows,—"26th February 1858.—My dear Sir,—I went to Guisachan last Monday evening, accompanied by Mr Geo. G. Mackay of Inverness, and Mr William Robertson, The Chisholm's factor, met me there in good time on Tuesday morning. He is under the impression that the entail prevents The Chisholm from conveying any portion (however small) of the estate under a feu-charter, without the consent of the next heirs of entail, and as The Chisholm's next heirs are not known, he believes, or at all events asserts, that it is impossible for The Chisholm to grant a feu of the site for the lodge. I am persuaded that Robertson is wrong, as I know there is an old statute still in force, under which any proprietor in possession of an entailed estate can feu to the extent of half an acre by one deed. But it was quite unnecessary for me to argue the point with the factor, as he seemed confirmed in his own conceit. He, however, expressed his decided opinion in favour of the road and bridge, and assured me that The Chisholm would not only offer you no opposition to the formation and erection of them, but also that he would never think of finding fault with them after they are constructed during his lifetime; and Robertson said that he was certain The Chisholm would give you an obligatory letter to that effect.

"In this case, and seeing that the lodge would answer as well, and might be made to look better if built on your own side of the water, I would advise you not to press for a feu-right, but make the road and build the bridge under a simple authority from The Chisholm. The road must ever after The Chisholm's death appear a necessary connection of your estate with the parliamentary road, which no Court would order to be shut up without your consent. But if you think differently, and wish to have a feu of as much ground as would hold the lodge and make a small garden for the gate-keeper—say half an acre—I shall look into the Acts bearing on the subject, and get the opinion of a lawyer, which will satisfy both The Chisholm and his factor that he has a perfect right to grant you a feu-holding. Meantime, as I found Robertson so well inclined towards you and your improvement, and as Williamson, as tenant of the lands, agreed any steps to have the bridge shut up until Winans blocked up the Knockfin access to the bridge by putting a deer fence across it.

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In the lease to the defender from James Sutherland Chisholm of the Glenaffaric shootings granted in 1869, provision was made for the tenant taking over all bridges, roads, &c. in the shootings, but no special mention was made of the White or Black Bridges.

In 1885, as already explained, Lord Tweedmouth assigned the unexpired portion of the lease to Winans.

(2) *The Black Bridge*—This bridge for foot-passengers was erected by the defender in 1877 at his own expense. It was carried away by a flood, and re-erected in 1881. No permission was obtained from The Chisholm of the day for its erection, but nothing was done by him or by his successor to interfere with its use or maintenance.*

The Lord Ordinary subsequently found, and it was taken as a fact in the case thereafter, that there were no public rights of way to the fords near these two bridges on the Guisachan side of the river. The White Bridge and connecting roads were largely used by the defender for bringing coals, luggage, &c. to the house from Tomich, by the county road, Knockfin Bridge, and north side of the river, recrossing at the White Bridge, so that such heavy traffic did not go along the avenue.

(3) *Road No.* 1—This road may be considered in two sections; section (1) "the Guisachan Road" from Tomich through the avenue gate and ending at or near Guisachan Old Meal Mill; section (2) the "Cougie Road" from Guisachan Old Meal Mill, then past Tom-Guisachan or Hilton, where No. 5 road from Glenmoriston joins it, and so on to Cougie. The Lord Ordinary subsequently found, and this also was thereafter taken as a fact in the case, that the drove roads from Cougie to Glenmoriston and Kintail were not public.

Section (1). There was no dispute as to this road being public from Tomich to the avenue gate, where it was in reality part of the Strathglass County Road. The minutes of the Inverness-shire Road Trustees, extending from 1803-1878, shewed that in 1814-15, 1818, and 1821, the trustees expended public money to a considerable extent on this section of the road. The Strathglass District Road Trustees were constituted by private Act of Parliament in 1830. From that date to 1860, during most of which time Fraser of Culbokie was proprietor of Guisachan, the district road trustees expended public money on and in fact maintained

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most readily to accept of such compensation for the little damages that will be done to his farm by the operations as shall be determined by arbitration, I resolved to contract for making the road on the line you had fixed upon when last at Guisachan."

* With reference to the Black Bridge, Lord Tweedmouth deponed,—"(Q.) With regard to the Black Bridge, has there all along been a ford there? (A.) Yes. I used that for riding as far back as 1851. It was the ford principally used in crossing back and forward from either side. There was a loose plank tied to the Guisachan side which, when any person wanted to cross, was turned over the deep portion, because the stream came rather deeper to our side. That plank was once or twice washed away. It was my understanding that there had been a bridge a long time back at that place. There is at present a bridge there called the Black Bridge. You can ride ponies over it. It was erected in 1877, and was washed away, and the present bridge was put up about 1881. I substituted the Black Bridge for the plank, because one of my daughters did not like to go over the plank. (Q.) Was it done in pursuance of any express arrangements with The Chisholm, or because you understood there had been a bridge there before? (A.) There was no leave or permission of any kind given for that bridge."

the road. The money was occasionally voted on the application of the proprietor, and was sometimes voted at meetings at which he was personally present. The last date at which money was so voted was 1858. From a minute of the trustees of date 17th May 1856, it appeared that Lord Tweedmouth had applied for leave to alter the line of this road slightly, at his own expense, and that leave to do so was granted. In 1860 Lord Tweedmouth converted it into the private avenue of Guisachan House. In 1879 the county adopted the Roads and Bridges Act of 1878. Neither this road nor the other part of it to Cougie was included in the list of roads made under the provisions of sec. 41, and taken over by the trustees under the Act. At Guisachan Old Meal Mill, before it was abandoned, there were only two or three houses. These were pulled down when the mill was given up. There was little evidence of any use being made of the road by the general public, any use that there was being chiefly by farmers driving to the mill to have meal ground there.

With regard to section (2) of the road, it was proved that money had been spent on it by the road trustees in the same way, but to a less extent than on section (1). This road, which led to Cougie, passed only two or three scattered houses on the way, and at Cougie there was only a shepherd's house. The road was much used for shooting purposes by the proprietors of Guisachan, but the evidence of use other than for such purposes was even slighter than in the case of section (1).

Road No. 6—The defender admitted, as before stated, that there was a drove road from Glenmoriston by road 5 and then by road 6, and by the road described above as running from H nearly parallel to the avenue. The only question therefore came to be which of the two alternative roads, that admitted by the defender or that claimed by the pursuers, viz., the short road leading from the avenue to H, the point where the Glenmoriston Road struck southwards after running parallel to the avenue, should be adopted. As a mere matter of convenience it did not appear which line was the more convenient for the public, nor which was formerly the more frequently used. It was, however, proved that the route claimed by the pursuers had been shut up by the defender in 1860, and that no complaints as to that act had ever been made before or since this action was raised by any member of the public. It was not proved that Winans (who did not tender himself as a witness) had suffered from the road he claimed being shut up, or indeed that he had ever used any of the roads claimed as public on the Guisachan side of the river. Lord Tweedmouth further deponed,—and no attempt was made to contradict the statement,—that he had never turned off any person from any of the roads claimed by the pursuers.

On 25th May 1887 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds with reference to the first, second, and third conclusions of the summons, that the right of the pursuers to the northmost half of the bridge sometime erected across the Leth Allt Burn is not disputed, and that the said bridge having been removed it is unnecessary to dispose of the same by decree; and with respect to the two bridges erected by the defender across the river Dhiag, finds that the northmost half thereof, and the roads or paths connecting the said bridges on the north with the Strathglass County Road, are the property of the pursuer Mrs Chisholm, and are within the possession of the pursuer Mr Winans, as her tenant: Finds also that the pursuers are entitled to close the said bridges against traffic, under the conditions and with the reservations as concluded for: Under the fifth conclusion finds that there is a public right of way from points to be hereafter determined, the one between the bridge of Knockfin and the village of Tomich, and the other near Guisachan Old Mill, being a part of the way No. 1 of said conclusion: Finds also that there is a public right of way for passengers, horses, and cattle by the way No. 6 of said conclusion, and by so much of the way No. 5 thereof as connects Glenmoriston directly with No. 6, and ultimately with the Strathglass County Road: Finds of consent that there is a public right of way by the road No. 7 of said conclusion: *Quoad ultra* assoilzies the defender from the conclusions of the summons, and decerns: Finds neither party entitled to expenses."*

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* "OPINION.—This is an action instituted by Mr William Louis Winans, who is tenant of extensive moors and forests in the North Highlands, and the late Mr Chisholm of Chisholm, the proprietor of one of these subjects, against Lord Tweedmouth, who is proprietor of the estate of Guisachan, in Ross-shire.

"The conclusions are twofold—First, the pursuers claim a right to shut up two bridges over the Dhiag, and one bridge over the Leth Allt Burn, which were put up by Lord Tweedmouth at a time when his Lordship was tenant of the lands now occupied by Mr Winans, for the purpose of establishing communications between the two estates. Secondly, the pursuers (suing as members of the public) claim certain rights of way, seven in number, over the estate of Guisachan. Mrs Chisholm has now been sisted as general disponee and representative of her son, whose death took place some time after the proof was led, and while the case was under consideration.

"It may conduce to clearness if I begin by announcing my decision on these points. I find for the pursuers on the matter of the right to close the two bridges which cross the Dhiag. The bridge over the Leth Allt Burn was given up by defender's counsel, and, as I understand, has been destroyed. I find that there is a public right of way from points to be hereafter determined—the one near the bridge of Knockfin, the other near Guisachan Old Mill, being a part of the way claimed as No. 1 in the summons. I also find that there is a public right of way for passengers, horses, and cattle by the road No. 6 of the series, and by so much of the road No. 5 as connects Glenmoriston directly with road No. 6, and ultimately with the Strathglass County Road. I shall define the right of way here found in such a way as will make it clear that it forms a thoroughfare between two public highways. I shall also declare the public right of way by road No. 7, in conformity with the consent which I understood to be given by defender's counsel. In regard to all the other rights of way claimed by the pursuers on behalf of the public, I shall assoilzie the defender, Lord Tweedmouth, from the conclusions of the summons.

"With respect to the two bridges over the Dhiag, the facts are these:—The Dhiag, which flows in a north-easterly direction through Strathglass, is crossed by the county road at the Bridge of Knockfin about a mile and a half below Guisachan House—Guisachan House being situated on the right bank of the stream, while the county road is carried along the left bank from the Bridge of Knockfin to a point about half a mile higher than Guisachan House, where it terminates. Access to Guisachan House is obtained by a carriage road (being one of the roads in dispute) which leaves the county road on the hither side of Knockfin, and leads straight to Guisachan. Soon after Lord Tweedmouth acquired the estate of Guisachan, it was found that it would be for the convenience of those residing in the mansion-house to have a bridge over the Dhiag near the mansion, enabling them to get to the county road without going round by Knockfin. The defender asked permission of The Chisholm (Mr Duncan Chisholm being then the proprietor and head of the family) to form a bridge at his own expense connecting Guisachan with the county road. I am satisfied, on the evidence of Lord Tweedmouth and of Mr George G. Mackay, that The Chisholm did in fact give his permission to Lord Tweedmouth to form the bridge, and the bridge (known as the White Bridge) was built accordingly, at Lord Tweedmouth's expense, in the year 1858. It has since been constantly used for the cart and carriage traffic of Guisachan until its use was challenged

The defender reclaimed to the First Division, and argued;—(1) *The White Bridge*—The right of use of this bridge was conferred by Duncan

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by Mr Winans in a way which is not to be admired, viz., by carrying a deer fence across the approach to the bridge.

"It is for consideration what is the nature of the right acquired by the defender, in virtue of the permission given to erect the bridge, and in considering this question it is to be observed that Mr Duncan Chisholm's right to his own estate was that of an heir of entail.

"There is no evidence that Lord Tweedmouth desired either a right of property in, or a servitude over, the small part of the Chisholm property on which he proposed to form the bridge, and its connection with the county road. If such a right had been desired, the right could not have been acquired except for a valuable consideration, because the Chisholm estates were entailed. But there is no evidence that Lord Tweedmouth desired anything more than that a bridge and approach should be formed for his convenience, he undertaking their formation, because it was for his convenience, and receiving from The Chisholm all the right which he was able gratuitously to confer, namely, a use by tolerance during the granter's lifetime.

"Mr Duncan Chisholm was succeeded in the possession of his estates by Mr James Sutherland Chisholm, a distant relative, who, again, was succeeded by Mr Roderick D. M. Chisholm, one of the pursuers in this action. Neither of these gentlemen took any steps to terminate or interrupt the defender's use of the White Bridge; nor did they or either of them do anything to confirm that right. During the greater part of this time the defender was tenant of the Glen Affaric forest, being the part of the Chisholm estate on which the White Bridge was formed—first as a subtenant holding from Colonel Inge, and later as a tenant under a lease for twenty-one years obtained from Mr James Sutherland Chisholm on the expiration of Colonel Inge's holding.

"In the lease, which provides for the use of bridges made and to be made on the Glen Affaric property, nothing is said regarding the White Bridge over the Dhiag; and I conclude that the use of this bridge was continued, as it had begun, on no higher title than tolerance. In 1885 Lord Tweedmouth sublet the Glen Affaric shootings to Mr Winans, and again nothing is said as to the White Bridge over the Dhiag. But it is evident that the conditions were altered by this arrangement. While Lord Tweedmouth was in the occupation of the lands on both sides of the Dhiag, there were reasons for allowing him the use of the bridge, which ceased to exist when he assigned his interest in the Glen Affaric shootings to Mr Winans. Accordingly, it is not surprising that the late Mr Chisholm, and his successor, Mrs Chisholm of Chisholm, should have thought fit to support Mr Winans in this part of the case. Lord Tweedmouth's use of the bridge being, as I hold, merely tolerance, it could not compete with the right of possession acquired by Mr Winans under the assignment of 1885. It would then rest with Mr Winans, as tenant in possession, to say whether, as a matter of courtesy or good neighbourhood, he would allow Lord Tweedmouth to have the use of the bridge. He is not entitled to pull down the bridge; nor do the pursuers ask a declarator that they are entitled to do so. The bridge was put up with the consent of a former proprietor, who had a right to make improvements on his property. It is partly on Lord Tweedmouth's property, and it is an improvement pertaining to the two estates. It must stand (unless the two proprietors agree to remove it) on the chance that at some future time they may agree to open it. This cannot be done (in my opinion) as long as Mr Winans retains his objection to the use of the bridge. But at the expiration of the lease it will be in the power of Mrs Chisholm, if she chooses, to throw open the bridge, under such conditions as to the use to be made of it as the joint owners may mutually agree on.

"All that I have said about the nature of the occupation of the White Bridge, and the absence of any title or usufruct on the part of the defender applies to the Black Bridge, which is besides only a foot-bridge in connection with a forest-path. It is therefore unnecessary that I should state separately my reasons

Chisholm, who was an heir of entail, but it was never interfered with by Sutherland Chisholm, either when an heir of entail or after he became a

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for making the declaration desired by the pursuer regarding this bridge. This disposes of the first, second, and third of the conclusions of the summons.

"I proceed to the consideration of the second branch of the pursuer's case—that relating to the seven rights of way claimed on behalf of the public over Guisachan estate. I may here remark that the mode of description of these ways followed by the pursuer is somewhat arbitrary, and the division into seven ways does not appear to me to correspond to the natural lines of communication of the estate, but rather to have been selected with reference to the pursuer's own views and claims in this action. I shall, however, endeavour to deal with the questions as nearly as possible in the order in which they are presented in the summons.

"I postpone consideration of the fourth conclusion, which relates to rights of way by certain fords over the Dhiag claimed in connection with the other ways in question, because it is obvious that the fords are merely parts of the ways claimed, and the right to their use cannot be advantageously considered apart from the right to the ways to which they are said to be accessory.

"Under the fifth conclusion of the summons, I consider, first, road No. 1, as there described. For reasons which will immediately be apparent, I must deal separately with the sections of this road, four in number, as to which the evidence and the legal considerations applicable to that evidence are distinct. These are—section 1, from the county road near the village of Tomich (near Knockfin Bridge) to Guisachan Mill; section 2, from Guisachan Mill to Cougie, where the road claimed branches in two different directions; sections 3 and 4, the two branch ways leading respectively to Kintail and Glenmoriston.

"The question is really more simple than it at first appears, because from Cougie, whence the two ways diverge to Kintail and Glenmoriston—(1) there is not, and never was, a made road to either of these places; and (2) there is no evidence (not enough, as I think, to deserve serious consideration) of a public right of way constituted or perpetuated by immemorial use. On this part of the case I find without doubt or difficulty for the defender. The question is thus limited to sections 1 and 2 of the way in question, or the part extending from Tomich or Knockfin by Guisachan Mill to Cougie. Cougie was, before Lord Tweedmouth's acquisition of the property, a shepherd's cottage. It is now, I understand, a keeper's house—not in any view, present or retrospective, a public place whereto a right of way could be acquired by prescriptive use.

"But it is contended that there is a public right of way from Tomich or Knockfin to Cougie, because the road connecting these places, and especially the section from Knockfin to the Mill of Guisachan, is a made road, maintained by and under the administration of the Strathglass District Road Trustees. This is a question to which I have given a great deal of consideration, and I shall state briefly the conclusions at which I have arrived.

"When a claim is made on behalf of the public, whether to a right of way, or to the use of any common or unenclosed ground or other heritable property for purposes of utility or recreation, the public right must, of course, be referable to some known legal category; and in general such a right, if it exists, must be referred either to purchase, to presumed grant as proved by prescriptive use, or to actual grant or dedication to public uses, the evidence of which is not necessarily connected with prescriptive enjoyment. In former cases—one of them relating to the right of the inhabitants of Callander to the square in which the church is situated[1]—I have expressed the opinion that if a superior or proprietor lays out a piece of ground—a road, a square, or a garden—for the use of his feuars or disponees, this is evidence of an appropriation of the subject to their use, which, in conjunction with evidence of actual use, may satisfy a Court of law that the subject was irrevocably appropriated to public uses, so as to disfee-simple proprietor. Neither did the original pursuer of this action, Roderick Chisholm, interfere with the use until some time after he suc-

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[1] Lady Willoughby D'Eresby v. Feuars of Callander, compromised in the Inner-House, and therefore not reported.

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entitle the owner to shut up the subject or convert it to other uses. There is not much authority on this topic; but I think there is none which is contrary to what I have said. The law is stiff on the subject of written titles to heritable property; but it is not of such cast-iron rigidity as to oppose itself to the acquisition of rights of use by the public in the only way in which such rights can be acquired—by *de facto* appropriation of the land to the service of the community. Especially is this the case with respect to the appropriation of land for the purposes of inland communication, because it is matter of general experience that the acquisition of a road by purchase is a very unusual thing, and that the more usual, if not universal arrangement, is that in which the proprietor gives the site of the road in consideration of the benefit to his estate of having a way made through it, while the road trustees undertake the cost of making and maintaining the road, or, as the case may be, of putting in repair and maintaining an existing road. In such cases no deed of conveyance is necessary, because the proprietor of the estate through which the road is carried does not intend to part with the *solum* of the property, but only to make an irrevocable grant of the use of the surface for public purposes.

"Now, taking first the section of road from Knockfin or Tomich to Guisachan Mill, it is my opinion that such an appropriation to public uses was made by Mr Fraser of Culbokie, the former proprietor of Guisachan. The printed excerpts from the minutes of meetings of the Strathglass District Road Trustees prove conclusively that from 1831 to 1861 (a period of thirty years) this road was maintained at the public expense, and that it was treated in all respects as one of the public roads of the county falling within the administration of the district trust. The money voted year by year for the repair of this road was voted on the application of the proprietor, and very often at meetings of the road trustees at which he was personally present. The trustees never disputed their liability to maintain the road, nor, so far as the minutes shew, did the proprietor reserve a right to close the road, or lay claim to any higher interest in it, or any right different from the bare right of property which the other proprietors of the district had in the county roads passing through their respective estates. If this was the position of Mr Fraser of Culbokie, Lord Tweedmouth did not claim any different position after he acquired the property. In a minute, dated 17th May 1856, it is stated that Mr Marjoribanks of Guisachan (Lord Tweedmouth) wished 'to have the line of the Guisachan Road, in so far as it passes through his place, altered.' The minute then describes the alteration in terms which I need not read, an alteration which it is stated had been already made, 'in hopes that when it has been completed to the satisfaction of the trustees or their overseer, they would sanction this alteration on the road, and adopt the same as part of the district road, and allow the present line either to be shut up or made private at Mr Marjoribanks' pleasure.' Nothing can more clearly shew that the defender, on taking over the property, recognised that the road to Guisachan was a public road under the management of the district trustees. The trustees evidently so understood the application, because they took it into consideration, and, recognising that the proposal was 'just and reasonable,' resolved 'to sanction the alteration if satisfied with the execution of the work'—that is, of the substituted road and bridge over the Guisachan Burn.

"Now, the argument against the right of the public is that the administration of the road by the road trustees was not continued for forty years, and that Guisachan Mill is not a public place. To the first objection, I think it is a sufficient answer that immemorial use (limited in proof to forty years) is only required where the public are claiming a right adversely to the proprietor, and when there is no direct evidence of a grant or appropriation of the road to public uses. In a case like the present, where the proprietor is shewn to have consented to the appropriation of his land to the purposes of a public road, a much shorter period of use than forty years is probably sufficient to establish the public right. I do not hold that the obtaining money from the rates in one year would be sufficient ceeded. On a sound construction of the letter of 26th February 1858 it was clear that consent had been given by Duncan Chisholm, which was

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evidence of appropriation, nor do I say that any set period is necessary. There must be evidence to satisfy the Court of the proprietor's consent to make an irrevocable appropriation of land to purposes of public utility; and this, when followed by actual possession on the part of the public, and actual administration by the local authority continued for a reasonable time, will, in my opinion, suffice to constitute the right.

"Then as to Guisachan Mill not being a public place, if this argument were good for anything, there would not be half-a-dozen roads in all the Highland counties from which the public might not be excluded at the pleasure of the proprietors. Very few of the Highland roads are thoroughfares; only the main lines of communication from one county to another cross the watersheds which divide the mountain districts. It is the normal condition of things in these counties that a district road is carried upland through a valley or glen as far as the habitable tract of land extends, and there it comes abruptly to an end. Of course, if it be a private road, the public never can acquire a right of way over it, because it does not terminate at a place of public resort. But if the road is public in the sense that it is made and maintained at the public expense, and is, with the proprietor's consent, placed under the administration of the local authority charged with the duty of providing means of communication for the district, then it appears to me that the law as to public *termini* is not applicable. In such a case the only question is whether the road is one which the trustees may lawfully make and maintain; and it is obvious that they may do so, if one of the *termini* be a public place, and if along the line of the road there are habitations and a population for whose accommodation a road is needed. In the present case the road led to a mill, a place to which the farmers had to drive, and there is evidence of the existence of a village or scattered cottages at Mid-Guisachan, which have since been removed. There was also the mansion-house of Guisachan to which the road led; and I see no reason to doubt that the trustees were properly administering the assessments in so far as these were applied to the maintenance of the Guisachan Road.

"It was explained in the evidence that since 1861 Lord Tweedmouth had improved the road in question, and had formed an entrance to it, with a lodge and gates, and had to some extent altered the direction of the road near Guisachan House. I am thus left in some uncertainty as to the actual limits of the old district road; but if counsel are not agreed as to this, I may make a remit to some person in the locality to suggest a suitable place for the *terminus* of the road in so far as public.

"Nothing that I decree will prejudice the right of the defender to apply to the county road trustees to have the road shut up, as being no longer necessary for the accommodation of the public, should the facts warrant such an application.

"I come now to the section of right of way No. 1, which extends from Guisachan Mill to Cougie. Now as to this section there is evidence that during the period already referred to, 1831-1861, small sums of money were voted by the Strathglass Road Trustees for the repair of the 'Cougie Road.' But it is also clearly proved that there never was a road in the proper sense from Guisachan Mill to Cougie, and that the sums voted were such as would be totally inadequate even to the maintenance of a footpath. There was, moreover, no population whose wants were to be supplied, because the path led only to a shepherd's house, and it is at least questionable whether the sums voted under this head were a proper application of the road trust funds.

"I have already explained that, in my view, the question whether a road has been irrevocably appropriated by a proprietor to public purposes, by making it over to road trustees, is a question of fact in which all the circumstances are to be weighed. In regard to this small portion of a mountain track not leading to any place, and not really required for public purposes, there is not, to my mind, satisfactory and unequivocal evidence of its appropriation to the uses of the public. There is the fact that Mr Fraser of Culbokie received small sums not merely limited to his own lifetime, but was good against succeeding heirs. Consent to mere use need not necessarily be in writing. Here

of public money for its repair during a period of thirty years; but there are no other circumstances of weight, and I rather incline to look upon this as an instance of somewhat lax administration of the road money. With respect to the rights of way claimed under Nos. 2, 3, and 4, I shall say nothing except that paths of this description traversing a private estate are not proper subjects of a public right of way, and that the case relating to them has failed.

"Nos. 5 and 6 taken together constitute a way from the Bridge of Knockfin to Glenmoriston. Starting from the Glenmoriston side there is one way only over the hill; but at a point about 1½ miles distant from Guisachan the path bifurcates—one branch leads directly down a steep descent to Guisachan Old Meal Mill, whence access to Bridge of Knockfin is obtained by the road No. 1, already considered. The other branch or fork leads in a more gradual slope, and in a direct line to Knockfin. The way No. 5 of the summons is the way from Glenmoriston to Guisachan Mill. No. 6 is the branch to Knockfin.

"Now it is clearly established, as is indeed admitted by the defender, that there is a drove road from Glenmoriston to Strathglass in the direction indicated. And having regard to past practice, and the reason of the thing, I am clearly of opinion that the pursuers are not entitled to Nos. 5 and 6 together, but are only entitled to one way from Glenmoriston to Strathglass. The question is, to which of these ways. The defender contends that No. 6, or the straight line to Knockfin, ought to be declared the line of the right of way, urging that the evidence of use preponderates in favour of that way, which is also the nearest and the most convenient. In this view of the evidence, and on all the grounds enumerated, I think the defender's case is well founded. Indeed, I am at a loss to see any reason, except a controversial one, which could induce the pursuers to hunt up evidence in favour of carrying the public way past Guisachan House, after the defender had intimated in the record that he conceded the alternative way leading to Knockfin by No. 6. There is evidence that both ways have been used during the prescriptive period, but in the view I take it is not necessary to analyse the evidence, because the convenience of the proprietor and of the only section of the public who use the way—drovers, with their sheep and cattle—alike point to No. 6 as the preferable route.

"Way No. 7 is admitted on record, and no evidence was led regarding it. If a declaratory finding is desired regarding it, I understand the defender does not object.

"I now return to conclusion fourth, the consideration of which was postponed, because the conclusion has reference to certain fords on the Dhiag to which it is alleged that the public are entitled in connection with the various rights of way claimed under conclusion fifth. Now, the only ways whereby the fords would be accessible to the public are those which I have negatived, being the way (part of No. 1) leading from Guisachan to Cougie, and the way (part of No. 5) leading from the fork in the Glenmoriston Road into a connection near Guisachan House, with the aforesaid way No. 1. The disallowance of these two ways carries with it the disallowance of the claim to the fords, which, besides, have not been shewn to be necessary for the service of the public.

"The pursuer Mr Winans, whose name stands first in the summons, and who is understood to be the chief promoter of the action, did not tender himself as a witness. He has not asserted that he desires to use any of the ways claimed, and it has not been shewn that any of them would be subservient to his convenience as tenant of the adjoining property. He professes to be a suitor on behalf of the public, but there is no evidence that any member of the British public ever asked him to sue on his behalf, or ever complained of being prevented from passing over Lord Tweedmouth's estate. Lord Tweedmouth gave evidence that he never turned any person on his estate, and that no one who asked permission to view it was ever refused. In this general statement, I presume, the pursuers are meant to be included. His Lordship's evidence on this subject is uncontradicted. It therefore appears to me that the action is wholly unneces-

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what was done by Duncan was merely to substitute one burden, viz., the bridge, for another, the ford, which previously existed. The one burden was as great as the other. Vehicular traffic could cross the ford perfectly well. This was not a case of extending the servitude.[1] The defender did not assert a right of property in the ground of Knockfin on which the bridge rested, but merely of use founded on acquiescence continued over thirty years. The law in such cases was well stated in Bell's Principles.[2] The cost of building the bridge was very considerable, and the undertaking was manifestly one which once done could not be undone (the pursuers took that view because they did not ask to have the bridge removed), and in such a case the law, as was stated by Mr Bell, presumed an agreement as a fair ground of right. There were many cases to that effect.[3] The extreme rights of a proprietor were limited by equities rising out of the circumstances.[4] An heir of entail was only bound so far as he was bound by the fetters of the entail, but the law further assumed the power of an heir to do any act, unless an action of irritancy was raised against him by a substitute under the entail, and carried to decree.[5] Here there had been nothing of that kind done either in Duncan's or in Sutherland's lifetime. There could be no declarator of irritancy after the death of the heir who was charged with contravention.[6] For administrative purposes an heir of entail represented his successors, and his consent, with *rei interventus*, to an administrative act would bind the succeeding heirs.[7] Assuming that the erection of the bridge was in contravention of the entail, a plea founded on that circumstance was lost after the date of the disentail. No person could found on an entail except a person in the position of a substitute heir, and if that applied to Sutherland Chisholm after the date of the disentail, much more did it apply to the pursuer Roderick.[8] This use of the bridge was really a right of servitude in substitution for another right, and servitudes could be acquired against an entailed estate.[9] A right of passage by the ford was admitted, and there being no right of way on the south bank, the inference was that the right to rest the bridge on Knockfin was a right of servitude.[10]

(2) *Black Bridge*—The defender, in regard to this bridge, did not found on express consent, but it had been allowed to remain without

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sary in the interests of the public and of the pursuers, and that while on some points the pursuers have had a technical success, they are not entitled to the expenses of the litigation."

[1] Lloyd v. Martin, Feb. 4, 1886, 13 R. 512.

[2] Bell's Prin., secs. 946 and 947.

[3] Duke of Buccleuch v. Magistrates of Edinburgh, Feb. 17, 1865, 3 Macph. 528, 37 Scot. Jur. 266; Sanderson v. Geddes, July 17, 1874, 1 R. 1198; Grahame v. Magistrates of Kirkcaldy, July 26, 1882, 9 R. (H. L.) 91; Macnair v. Cathcart, 1802, M. 12,832.

[4] Kincaid v. Stirling, 1750, M. 8403; Aytoun v. Douglas, 1800, M. App. *voce* Property, 5; Cowan v. Lord Kinnaird, Dec. 15, 1865, 4 Macph. 236, 38 Scot. Jur. 131.

[5] Sandford on Entails, pp. 431-2 and 3; Lothian v. Willyson, 1725, M. 15,554.

[6] Fullarton v. Hamilton, July 26, 1822, 1 Shaw's App. 265.

[7] Earl of Kinnoul v. Small Keir, Jan. 18, 1814, Fac. Coll; More's Notes to Stair, p. 190; Marquis of Huntly v. Nicol, Jan. 9, 1858, 20 D. 374, 30 Scot. Jur. 211; Innes v. Hepburn, May 18, 1859, 21 D. 832, 31 Scot. Jur. 463; Earl of Leven v. Cartwright, June 12, 1861, 23 D. 1038, 33 Scot. Jur. 521.

[8] Earl of Breadalbane v. Jamieson, March 16, 1877, 4 R. 667.

[9] Stewart v. Steuart, July 5, 1877, 4 R. 981.

[10] *Clelland* v. Clelland, 1619, M. 12,769; Stair, ii. 7, 10.

objection just as the White Bridge had. Here, too, there had existed a right of ford close to the bridge, and the bridge was in substitution of that right. There had always been some kind of bridge here.

With regard to both bridges. The Lord Ordinary's judgment was erroneous, in respect that he had found that there was a right of property in the proprietor of Knockfin in the north half of the two bridges, seeing that there was no conclusion to that effect in the summons.

(3) *Road No.* 1—The Lord Ordinary had held that the Cougie section of the road was not public, and that was acquiesced in. With regard to the other section he had found that there was a right of way by the avenue from Tomich to a "point to be hereafter determined" "near Guisachan Old Mill." That finding was incompetent. There was no averment that the old mill was a public place, and its natural description did not shew it to be so. There must be an averment of two public *termini*.[1] There was no averment of that here, and, further, the proof on the point of prescriptive use had failed. Further, the Lord Ordinary had declared a right of way by dedication to public uses. There was no such principle known to the law of Scotland,[2] and there was no conclusion in the summons to warrant the finding. What the road trustees had expended on the Guisachan section did not prove it to be a public road; otherwise, why did the pursuers not insist in their conclusion as to the Cougie branch, on which public money was also spent? That money was spent on the road only proved laxness on the part of the trustees. They were acting *ultra vires* when they gave public money for this road. At all events, the use of the road by the public being so small, if indeed there was any use at all by the general public, the fact that when the Roads and Bridges Act, 1878, was adopted, the trustees did not schedule this road as one of those taken over by them, shewed that they did not consider it a public road, and that they were willing it should revert to the sole use of the defender.

(4) *Road No.* 6—With regard to the small piece of road joining the avenue with H. To shew a right of way over this piece of road it was necessary for the pursuers to shew that road No. 1 was public; else there would be a right of way with one of its *termini* private. This was a drove road, and there was no evidence to shew that the alternative way admitted by the defender was not as convenient as that proposed by the pursuers. In such circumstances, it was competent for the Court to decide which was to be the public route.[3] The pursuer Winans sued as a member of the public, but he did not aver that any of the public objected to the defender's alternative route, or that he or any other member of the public had suffered by the route he proposed having been shut up for many years. The only practical effect of opening this short bit of road would be to spoil the defender's avenue.

Argued for the pursuers;—(1) *The White Bridge*—The bridge ought either to be shut altogether, or open to all, which it could not be held to be, as there were no public roads connecting with it on the south side. What the defender claimed here was a private right over The Chisholm's property. That was a unilateral servitude, and it involved the right to have the accesses on the north bank kept in good repair by the proprietors of the servient tenement. The letter of 26th February 1858 was exclusive of the idea that The Chisholm meant to grant a right in perpetuity over the estate. Lord Tweedmouth's own evidence and that letter negatived the idea that what was asked for or what was given was more than a permission for the granter's life. Such a servitude as was claimed could only be constituted by writing, or acquired by prescriptive possession. There was neither the one nor the other here. The idea that the bridge was in substitution of the ford was quite new, and was not thought of by either of the parties in 1858. There was no evidence even of a servitude of ford before 1858, though there was proof of a certain amount of use by the Guisachan people, not objected to by the proprietor of Knockfin. As to the acquiescence relied on subsequent to 1858, it was to be noticed that until the defender assigned his lease to Winans he was tenant of the Knockfin shootings. It was, therefore, very natural that the owners of the shooting should not object to anything which tended to the convenience of their tenant, but when the defender ceased to be tenant the inducement to allow an unnecessary burden on the estate to remain was taken away. Further, the erection of a bridge to replace a ford, even assuming that there was a servitude of ford prior to 1858, was not a legitimate extension of the servitude, as it made the road available for traffic which could not have used the ford. The class of bridge put up too, viz., a wooden erection, excluded the idea of perpetuity. This, and the fact that the two parties never met to consider the matter when the encroachment first took place, removed the case from the authority of the previous cases, particularly that of *The Duke of Buccleuch* v. *Magistrates of Edinburgh*,[1] the case relating to the Edinburgh Music Hall. Further, if what was done by Duncan Chisholm in 1858 amounted to the constitution of a servitude over the entailed lands, then it was an act of dilapidation, and Roderick, who took as a fee-simple proprietor, could found on the entail, or, at all events, Winans could, as he had been assigned into the position of his principal, who was an heir of entail. It was not the case that the only remedy where there was a contravention of an entail was to irritate the proprietor who committed it. The next heir could reduce the deed.[2] That right was vested in Sutherland Chisholm, and Winans having all the rights of his principal, and Roderick Chisholm having succeeded to all the rights of his predecessor, they could do so too. The only right to the bridge that Lord Tweedmouth had was one founded on tolerance.

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[1] Duncan v. Lees, &c., Dec. 13, 1870, 9 Macph. 274, 43 Scot. Jur. 107; Id. v. Eosd., June 20, 1871, 9 Macph. 855, 43 Scot. Jur. 503; Darrie v. Drummond, Feb. 10, 1865, 3 Macph. 496, 37 Scot. Jur. 245.

[2] Henderson v. Earl of Minto, June 1, 1860, 22 D. 1126, 32 Scot. Jur. 519; Torrie v. Duke of Athole, June 4, 1852, 1 Macq. 65, see Lord Chancellor, p. 77; Dyce v. Hay, May 28, 1852, 1 Macq. 305, Lord Chancellor, p. 311; Brodie v. Mann, June 13, 1884, 11 R. 925, May 4, 1885, 12 R. (H. L.) 52; Cumming v. Smollett, June 17, 1852, 14 D. 885, 24 Scot. Jur. 529.

[3] Mackintosh v. Moir, March 2, 1872, 10 Macph. 517, 44 Scot. Jur. 278.

(2) *The Black Bridge*—This bridge was in precisely the same position as the White Bridge, with this exception that no consent had been obtained to its erection. Any traffic there was over it was merely traffic to facilitate Lord Tweedmouth's use of the shootings.

The pursuers did not claim that the defender should be ordained to pull down either of these bridges, nor did they claim a right of property in them, which the Lord Ordinary had given them, but they maintained that the use of them had only the sanction of tolerance on the part of the proprietor of Knockfin, and that he was entitled to put a stop to it.

(3) *Road No.* 1—With regard to this road, it was evident from the Lord Ordinary's interlocutor that the process was not exhausted. He left over one of the *termini* to be hereafter fixed. It was admitted that the ordinary rule was that a public right of way must have public *termini*

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[1] Feb. 17, 1865, 3 Macph. 528.

[2] Mordaunt v. Innes, July 5, 1822, 1 Shaw's App. 169.

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at both ends. But the rule must suffer relaxation according to the nature of the locality. There were many public roads up glens in the Highlands which simply ended at the head of the glen where there was no village, and the road could, owing to the nature of the ground, go no further. There was no need to use the argument of dedication to which the Lord Ordinary had given effect. The road trustees found a road subserving the public convenience, and spent public money upon it. The owner by allowing and, indeed, on several occasions requesting them to maintain it, shewed that he realised that the road was public. The fact that the trustees had not taken it over in 1879 merely shewed that they thought the use of it by the public was not sufficient to justify their spending more money on it. It did not derogate from its character as a public right of way. With regard to the use, it was proved that there was a certain amount of traffic by this road so long as the mill remained, and that that use had continued for far longer than the prescriptive period.

(4) *Road No.* 6—The road from the avenue to H had undoubtedly once been public, and the mere fact that for a considerable number of years it had been closed did not take away its character as a public road. The proprietor had no business to close it, and the public were entitled to have it opened up. This route was at least equally convenient for the public with the road proposed by the defender, and the public were entitled to the use of both the alternative ways.

At advising,—

LORD ADAM.—The pursuer of this action, Mr Winans, is tenant of the shootings and grazings of the lands of Knockfin. The other pursuer, Mr Chisholm, is proprietor of these lands. The defender, Lord Tweedmouth, is proprietor of the adjoining lands of Guisachan.

The pursuers seek to have it found and declared that they possess certain rights and interests in these bridges, two over the Dhiag river and one over Leth Allt Burn, the river and burn forming the boundary between their respective estates of Knockfin and Guisachan. The pursuers also, as representing the public, seek to have it found and declared that there exist certain public rights of way or roads over the estate of Guisachan, as described in the summons, and shewn on a plan produced. These roads, with their branches, are fifteen in number.

The interlocutor of the Lord Ordinary submitted to review disposes of all these claims. The interlocutor has been acquiesced in by both parties, except as regards three of the findings therein. These have reference (1) to the White and Black Bridges, two of the three bridges above mentioned; (2) to the road marked No. 1 on the plan; and (3) to the road marked No. 6 thereon.

With reference to the White and Black Bridges, I think it is necessary in order to a just appreciation of the rights of parties to ascertain the circumstances and conditions under which they were erected.

The river Dhiag, as I have said, forms the boundary between The Chisholm's lands of Knockfin, which lie on the left or north bank of the river, and Lord Tweedmouth's lands of Guisachan, which lie on the right or south bank.

The Strathglass County Road crosses from the south to the north bank of the river, by the Knockfin Bridge, some distance below the White Bridge, and then runs westwards through the lands of Knockfin, and ends at a point about half a mile higher up the river than Guisachan House, on the opposite side. From the point where the road terminates there is a drove road leading to Kintail. The

White Bridge is about 45 yards distant from this county road, and the Black Bridge about 300 yards.

The population on the Knockfin side of the river is and always has been very sparse, only amounting to half a dozen, more or less. The population on the Guisachan side is more numerous, amounting to 230 or 240, but it is all employed on or connected with the estate. There appears to be no general public on either side.

Lord Tweedmouth purchased Guisachan in 1854. At that time, although the people on the estate crossed the river when it was low wherever they found it convenient, there existed three fords by which they got access to the county road, one called Cullessie Ford, near where the White Bridge now is, another near the Black Bridge, and a third further up, but with it we have no concern. The ford near the Black Bridge seems to have been used only for foot and horse traffic, but the ford at the White Bridge was also occasionally used for cart traffic. But the traffic was small, as the Guisachan people had access to the county road before it crossed to the Knockfin side, by roads on their own side of the river, and so to the south and east, from or to which nearly all the traffic went and came.

The Lord Ordinary has found, and it must be taken as a fact in this case, that there were no public rights of way to or across these fords.

The White Bridge was erected in the beginning of 1858. It is a substantial carriage bridge, constructed of wood, about 72 feet long, and 16 feet 6 inches wide, and resting on stone abutments on both sides. Those on the Knockfin side occupy about 8 or 10 square yards. There is a road, about 15 feet wide connecting it with the county road. It cost Lord Tweedmouth between £200 and £300.

That this road and bridge are of considerable convenience to Lord Tweedmouth there is no doubt. "For what purpose," he is asked, "did you use the White Bridge and the public road down the opposite side? For ourselves. It was a variety. We could walk or ride down one side of the river and up the other. It was also of the greatest importance for Guisachan in this respect that all our coal, luggage, and supplies came that way, by the Knockfin public road, and crossed by the White Bridge. We found that a very great convenience."

It would seem, therefore, that this bridge was erected solely for the benefit of the Guisachan estate. That being so, I think it would be extremely difficult to support a claim to erect and maintain such a bridge, and the road leading from it to the county road, without the consent, express or implied, of the proprietor of Knockfin.

Lord Tweedmouth, accordingly, does not do so. He says,—"I would never have thought of putting the bridge on The Chisholm's property without his consent." Then he says,—"I became anxious to have a bridge over the Dhiagh for the purpose of getting out to the Knockfin Road, which was the only public parliamentary road, and a road which appears in the Highland Roads and Bridges Reports from 1817. Duncan Chisholm was proprietor of the Chisholm property at that time. I was acquainted with him for many years before I purchased Guisachan, and after I purchased it he was in the habit of visiting at my house in London. He died in the end of 1858 or beginning of 1859. His factor at that time was Mr Robertson, and Mr Brown was acting for me. I was in communication with Mr Brown on the subject of this bridge, and also

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with The Chisholm. No. 186 of process is a letter which I received from Mr Brown on the subject of the bridge. I saw The Chisholm in London more than once on the subject of erecting this bridge. My firm impression is that it was by correspondence, but the letter I cannot find, and I am not going to say positively that it was by letter, but my firm impression is that the request was made by letter to Duncan Chisholm for an excambion. I applied to The Chisholm for permission to erect the White Bridge. (Q.) Did you get his permission in writing? (A.) I believe I did. I have searched my repositories for any written permission, but I have not been able to find any. . . . I am quite positive that I had direct communication with The Chisholm on the subject of the erection of the new bridge. (Q.) Did you receive his permission? (A.) Yes, I am positive of that, and I may also say that The Chisholm was anxious for an excambion. Mr Robertson the factor said there were difficulties in the way, and Mr Brown said there were none. I am positive as to these facts."

I have no doubt that, as Lord Tweedmouth says, he obtained the Chisholm's permission to erect the bridge. It is to be regretted that if the permission was given by letter the correspondence has not been recovered, that it might have been seen what were the terms and conditions, if any, on which the permission was granted. Lord Tweedmouth was not asked any questions on the subject—but the letter from Mr Brown, referred to by him (which has been produced), shews what was the state of mind of The Chisholm's advisers,—and presumably his own,—on the subject.

The letter is dated 26th February 1858, and records the result of a meeting between Mr Brown, Lord Tweedmouth's factor, and Mr Robertson, The Chisholm's factor. It appears that Lord Tweedmouth had also desired to obtain a feu of a site for a lodge from The Chisholm, and Mr Brown, after stating Mr Robertson's opinion that it was impossible for The Chisholm, as an heir of entail, to grant a feu, goes on to say,—"He, however, expressed his decided opinion in favour of the road and bridge, and assured me that The Chisholm would not only offer you no opposition to the formation and erection of them, but also that he would never think of finding fault with them after they are constructed during his lifetime, and Robertson said he was certain The Chisholm would give you an obligatory letter to this effect." Then he adds,—"I would advise you not to press for a feu-right, but to make the road and build the bridge, under a simple authority from The Chisholm. . . . Meantime, as I found Robertson so well inclined towards you and your improvement . . . I resolved to contract for making the road on the line you had fixed upon when last at Guisachan."

It would appear, therefore, that Lord Tweedmouth was advised to build the bridge under a simple authority from The Chisholm, with an undertaking that it should not be interfered with during The Chisholm's life. I do not think that there is any evidence that Lord Tweedmouth ever sought or obtained any higher or more permanent right. I concur in what the Lord Ordinary says on this part of the case. "There is," he says, "no evidence that Lord Tweedmouth desired either a right of property in or a servitude over the small part of The Chisholm property on which he proposed to form the bridge, and its connection with the county road. If such a right had been desired, the right could not have been acquired except for a valuable consideration, because the Chisholm estates were entailed. But there is no evidence that Lord Tweedmouth desired anything more than that a bridge and approach should be formed for his convenience, he undertaking their formation because it was for his convenience, and receiving from The Chisholm all the right which he was able gratuitously to confer, viz., a use by tolerance during the granter's lifetime."

If, then, the bridge and road were originally constructed on this footing, the question arises whether anything has since occurred by which Lord Tweedmouth has acquired a right to have them maintained as permanent burdens on The Chisholm's property.

It appears that The Chisholm who granted the permission died in the same year, 1858, as the bridge was built. He was succeeded by Sutherland Chisholm, who died in 1885, and who disentailed the estates in 1884. He, again, was succeeded by Roderick Chisholm, who died in 1887, and was one of the pursuers of this action. And he, again, was succeeded by Mrs Chisholm, one of the present pursuers.

I am not aware that there is any positive act condescended on from which it is to be implied that any of these successive proprietors consented that the road and bridge should become permanent burdens on the Chisholm estate. All that they did was to allow Lord Tweedmouth to use and enjoy the bridge and road as he had done before. I do not see that that conferred on Lord Tweedmouth any different or more permanent right than he had before. But there were special reasons why they should not have interfered with his use of the bridge and road. In 1854 Lord Tweedmouth became tenant of the shootings of Affaric, which included Knockfin, by an assignation to the unexpired period of the lease of the then tenant, Colonel Inge—and on the expiry of this lease he took a new lease of these shootings for twenty-one years from 1870, the unexpired period of which he in 1885 assigned to Mr Winans. There were obvious reasons, therefore, why the proprietors of Knockfin should not interfere with the access of their shooting tenant to the shootings which they had let to him. I think, therefore, that Lord Tweedmouth's right to use the bridge and road remained what it was originally, a right only so long as he had the permission or tolerance of the proprietor of Knockfin.

It was contended, however, by the defender that he was entitled to maintain the bridge as in substitution for the ford. Naturally, the traffic which used to pass by the ford has been diverted to the bridge. The bridge, however, was not originally erected as a substitute for the ford (because as Lord Tweedmouth tells us he did not then know of its existence), but for his own convenience—and I know no authority which suggests that a permanent structure such as this can be maintained on another man's land against his will in place of a ford, which is as practicable and passable as ever it was.

With reference to the Black Bridge, it was erected by Lord Tweedmouth in 1877, afterwards carried away by the river in a flood, and replaced by him in 1881. It was erected by Lord Tweedmouth at his own cost, without any permission from The Chisholm, he being tenant of the Knockfin shootings at the time. The Chisholms are not said to have done anything implying consent to the erecting or maintenance of this bridge, except that they did not interfere with its erection or use—that is, that they have tolerated it. It is also said that this bridge was substituted for the ford near it. It is not disputed that there is this ford, and that, at the ford, there was a plank chained to the Guisachan side, and extending not wholly, but I think partly only, across the river, which was used to facilitate the passage of the ford. I am not of opinion that these facts can justify the retention of the bridge.

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I am therefore of opinion with the Lord Ordinary that Lord Tweedmouth has not instructed any legal right to retain these roads and bridges. But I do not altogether agree with his Lordship's findings on the subject. His Lordship finds that the northmost half thereof, and the roads or paths connecting the said bridges on the north with the Strathglass County Road, are the property of the pursuer Mrs Chisholm, and are within the possession of the pursuer Mr Winans as her tenant. It is said that the finding that half of the bridges are the property of Mrs Chisholm is not within the conclusions of the action, and I think that is so. But I think further that the reasoning of the Lord Ordinary as to these bridges does not lead to the conclusion he has drawn. If, as his Lordship thinks (and I concur with him), the bridges were erected and used by the permission or tolerance of The Chisholm, and that permission or tolerance be withdrawn, the result is not that the property of the bridges, or of any part of them, passes to The Chisholm, but that, if so desired, Lord Tweedmouth must remove them. I think, therefore, that this finding of the interlocutor should be recalled. But I concur in the next finding that the pursuers are entitled to close the bridges against traffic, under the conditions and reservations as concluded for, and that is practically all that they seek.

The next finding in the interlocutor, to which the reclaimer objected, is that in which the Lord Ordinary, "under the fifth conclusion, finds that there is a public right of way from points to be hereafter determined, the one between the bridge of Knockfin and the village of Tomich, and the other near Guisachan Old Mill, being part of the way, No. 1 of said conclusion."

It will be observed that the public right of way, which the Lord Ordinary has thus found, is the first part of the road claimed in that conclusion. That road is therein further defined as leading from Guisachan Old Mill to Cougie, and from Cougie by two branches, one leading to Glen Affaric and Kintail, and the other joining the county road, running through Glenmoriston. On record the right of way is said to have been acquired by the public by prescriptive use, as such rights of way are generally acquired. It is not said to have been acquired by dedication, or in any other way than that of prescriptive use. Now, by the law of Scotland, beyond question, a public road, capable of being acquired by prescriptive use, must be a thoroughfare, a road leading from one public place to another. The claim therefore to the road, as described in the conclusion of the action and on record, was a perfectly relevant claim, because it defined such a road. But if only that part of the road which the Lord Ordinary has found to be a public road had been claimed, it would not have been a relevant claim, because the road does not terminate in a public place, and I do not see how the Court could have done otherwise than dismiss such a claim as irrelevant. The Lord Ordinary, however, has sustained the claim, and it is necessary to consider the grounds on which he has done so, and to ascertain the facts on which he has proceeded.

It appears that the Strathglass District Road Trustees were constituted under a private Road Act obtained in 1830, and their minutes from 1831 to 1861 have been produced.

The names of two roads appear in these minutes—one the Guisachan Road, and the other the Cougie Road—the one being the road in question therein described as leading to a bridge over the burn at Guisachan. On crossing this bridge the road branches, one branch leading to Guisachan House, and the other to the Old Mill at Guisachan, and thence westwards to Cougie. This last branch is the Cougie Road. These roads appear in the minutes generally as separate roads, but sometimes they both pass under the name of the Guisachan Road. It further appears that these roads were treated exactly in the same way as any other district road under charge of the trustees. Money was regularly allocated for and expended upon their maintenance and repair down to the year 1858, after which no money was allocated or expended upon them.

The minutes of the Inverness-shire Road Trustees from 1803 to 1878 have also been produced, and these minutes shew that in 1814-15, 1818, and 1821 considerable sums were expended by the County Road Trustees on the Guisachan Road, and other evidence in process shews that money at these early dates was expended by the trustees on this road. Presumably, therefore, the road has been treated as a road under charge of the Road Trustees from a very early period.

But no money has been expended on the Guisachan Road by the trustees since 1858. Since 1860 it has formed the private avenue to Guisachan House, and has been maintained by Lord Tweedmouth.

In 1879 the Roads and Bridges Act, 1878, was adopted by the county. In the list of roads taken over by the trustees, under section 41 of that Act, this road is not included. If it legally was a district road, it must be held to have been finally abandoned by the trustees, because it is enacted by that section that the roads, highways, and bridges on such list, and no other, shall be maintained and repaired out of the assessments levied under the Act. Presumably the road was not included in the list, because there was no such public use of it as to justify its retention as a district road.

Such being the facts, in my opinion, neither the Guisachan Road nor the Cougie Road was a public road, such as the Road Trustees were entitled to maintain out of the public assessments. The Guisachan Road led only to Guisachan House and the Old Meal Mill, where there were three or four houses only, and the Cougie Road led only to a shepherd's cottage, passing one or two houses on the way. Of this road the Lord Ordinary says that there never was a road, in the proper sense, from Guisachan Mill to Cougie, and that it was a mountain track not leading to any place, and not really required for public purposes. He says again that there was no population whose wants were to be supplied, because the path led only to a shepherd's house. This is all true, and it shews the kind of road on which the trustees considered it consistent with their duty to expend the public assessments. The Lord Ordinary has held, I think rightly, that this Cougie Road is not a public road, and therefore it follows that the expenditure upon it by the Road Trustees was illegal, and that there was no appropriation of it to the public.

But I am unable to see any such difference between this road and the Guisachan Road as can warrant me in coming to a different conclusion with regard to the latter from that at which the Lord Ordinary has arrived with regard to the former.

In the case of the Guisachan Road there was no doubt an existing road, upon which somewhat larger sums of money had been expended than on the Cougie Road, and there were a few more people living at the Guisachan Mill than at Cougie, to whom, and to whose friends when they came to see them, the road no doubt was an accommodation, and there is evidence that a neighbouring farmer occasionally, but only very occasionally, sent grain to be ground at the

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Old Mill. But these do not constitute the public, and there is no other evidence of public use, and that being so, I do not think there is any material difference between the two roads.

To hold such roads to be public roads would be a serious matter, because in that case the Road Trustees would be bound to maintain and repair them at the expense of the public, who would derive no corresponding benefit from the expenditure. I think it is a mistake to say that such roads were maintained for the benefit of the public. They were maintained for the benefit of the Guisachan estate, and the proprietors and tenants thereof, as, apparently, certain other roads in the district, in a similar situation, were maintained for the benefit of the respective proprietors on whose estates they were situated, who paid large assessments themselves, and who, no doubt, were very glad to get, if they could, a contribution from the assessments to assist in their maintenance, or, as appears to have been sometimes the case, to recoup themselves in sums they had previously expended on them. As regards the rights of the public, I do not think the Guisachan Road was any more appropriated to public purposes than the Cougie Road.

But even assuming that the Guisachan Road was a proper district road, and was properly maintained by the trustees, I should not draw from these facts the inference which the pursuers maintain must be drawn. They say that there must be presumed to have been a grant by the proprietor of an unconditional public right of way such as is presumed from prescriptive use. I think that the grant to be presumed is that the road was made over to the Road Trustees to be maintained as a district road, and subject to all the incidents attaching to such a road, including, for example, a right to apply to the trustees to have it closed, if there was no public use of it—a grant irrevocable, perhaps, but not unconditional. The Lord Ordinary remarks,—"It is a matter of general experience that the acquisition of a road by purchase is a very unusual thing, and that the more usual, if not universal, arrangement is that in which the proprietor gives the site of the road in consideration of the benefit to his estate of having a way made through it, while the Road Trustees undertake the cost of making and maintaining the road, or, as the case may be, of putting in repair and maintaining an existing road." That, probably, is a correct representation of what takes place in such cases. But what is to be the result if, as in this case, the Road Trustees abandon the road so given to them? If the consideration in respect of which the proprietor is presumed to give the road is that the Road Trustees are to undertake to repair and maintain the road, and if they, as the representatives of the public, refuse to continue that undertaking, then it appears to me that the road should revert to the proprietor in the like condition in which he gave it, and free from any right of way. It does not appear to me to be consistent with justice or equity that where one of the parties to the contract breaks it by nonfulfilment of the conditions, he should nevertheless enjoy the benefits of it unconditionally. If, therefore, this road was at one time a proper district road, I think that on its abandonment by the trustees it reverted to the proprietor free from any public right of way.

The Lord Ordinary farther says,—"Nothing that I decree will prejudice the right of the defender to apply to the County Road Trustees to have the road shut up, as being no longer necessary for the accommodation of the public should the facts warrant such an application." But the County Road Trustees have now no power to close this road, because it is not on the list of roads taken

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over by them, and it is only these roads, and no others, that are under their control and management.

Moreover, at common law, the Road Trustees have no power whatever over a right of way acquired by the public such as the Lord Ordinary has decerned for in this case. They cannot close a road over which a public right of way has been acquired. Such a right of way, and a district road under statutory management are, in contemplation of law, two entirely different things.

Reference has been made to certain cases in which it has been found that if a superior or proprietor lays out a piece of ground, a road, a square, or a garden, for the use of his feuars or disponees, it is evidence of an appropriation of the subject to their use, which in conjunction with evidence of actual use may satisfy a Court of law that the subject was irrevocably appropriated to public uses so as to disentitle the owner to shut up the subject or convert it to other uses. I do not see, however, that cases between disponees and feuars, or superiors and vassals, in which the public are not concerned, can have any bearing on a question between a proprietor and the public such as this is.

Neither do I think that the class of cases referred to by the Lord Chancellor in *Dyce* v. *Hay* (1 Macq. 305), of village greens and playgrounds, presumed to be dedicated to the public, apply to this case. A different class of considerations arises in these cases from any we have here.

For these reasons I am of opinion that if the claim to this road had been competently raised on the record, it ought to have been repelled and the defender assoilzied from the whole of the fifth conclusion of the summons as regards road No. 1.

The only other question submitted for our consideration was this,—The Lord Ordinary finds that there is a public right of way for carriages, horses, and cattle, by the way No. 6, and by so much of the way No. 5 as connects Glenmoriston directly with No. 6, and ultimately with the Strathglass County Road.

The road thus found by the Lord Ordinary to exist is described in the summons as "a road leading from the road first above described (No. 1) at a point 220 yards or thereby south-west of the gatekeeper's lodge at Tomich, crossing the road No. 7 at a point 550 yards or thereby, north-east of Balcladdich, thence running as therein described."

It is to this part of the finding of the Lord Ordinary as to road No. 6 that the defender objects. The defender's admission with regard to the road is that there is a drove road from Glenmoriston to Tomich by road No. 6, by a line (shewn on a plan produced) which does not materially differ from the line claimed by the pursuers, until it reaches a point marked H on the plan, and then it is described as running "thereafter by the road leading past Guisachan steading to Tomich, also coloured brown on the said plan." This point H, as I understand, corresponds with the point described in the summons as being 550 yards north-east of Balcladdich.

The question therefore is whether the proper line of road No. 6, from this point to Tomich, is round by road No. 1, or by the road leading past Guisachan steading.

This is a question of very considerable importance to Lord Tweedmouth, because road No. 1 is now the avenue to his house, and by the findings in the interlocutor part of the drove road runs along a part of it.

It will be observed that there is no admission by the defender that the part of road No. 6 in dispute is the proper line of the drove road. It is not

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contended that both alternative lines, from the point in question, are to be maintained—and there is little or no evidence as to which of the two is the more suitable line for the drover public. But the road claimed by the pursuers has been closed since 1860, without any objection from the portion of the public chiefly interested—the drovers, or from anyone else. I think it may be safely concluded that the alternative road has been found equally convenient by the public, and I think it may reasonably be supposed that Mr Winans does not altogether represent the public interest with regard to this road.

The question does not seem to have been brought under the notice of the Lord Ordinary; at least there is no allusion to it in his note. On the whole I think that the Court should find that the line of road is that admitted on record by the defender. This exhausts all the questions argued before us.

Lord Mure.—On the question raised as to the bridges, I concur substantially in the result at which the Lord Ordinary has arrived, very much on the same grounds as those which have now been explained by Lord Adam, and subject to the qualification which has been suggested in his opinion.

But as to the rights of way claimed, I cannot altogether agree with the Lord Ordinary. I differ from him in his finding as to right of way No. 1, in so far as he decides that there is a public right of way from Tomich to Guisachan Old Mill; which is not alleged in the record to have been a public place, and is now beyond doubt not a place of that description. The Lord Ordinary has, however, found this road to be a public right of way from Tomich to the Old Meal Mill, while he has negatived the claim to have it declared public beyond that place, and on to Cougie, Glenmoriston, and other places mentioned in the summons. As regards the portion from the Old Mill to Cougie and Glenmoriston, &c., I agree with the Lord Ordinary,—I think that there is no evidence sufficient to instruct the existence of any road beyond the Mill, with any pretentions to the character of a public right of way.

That being so the question as to road No. 1 is reduced to the portion which leads from Tomich to the Old Mill, and upon this I agree in the view Lord Adam has taken of the case. The Old Mill is not now a public place, for it has for long ceased to exist; and, in the view I take of the evidence, it never was a public place, in the sense in which that expression is understood in dealing with questions of this description. There being admittedly no road beyond the mill in the direction of Cougie, it was not a place the general public had anything to do with, or ever required to go to; and the road to it was merely for the use of those who required to go to the Mill—viz., the tenants on the Guisachan property or any other parties who required, or were entitled, to have their grain ground at the mill. There is, as I read the proof, no sufficient evidence of this road having been used for any other purpose; and as there is no public right of way beyond the Old Mill, it is difficult to see who the public were that were to use the road from Tomich to the Mill, except those who required to go to the Mill. In the most favourable view of the case, therefore, for the pursuer, the use, as I conceive, amounted to nothing more than the use of a servitude road to a mill; and when the mill ceased to exist, which it did many years ago, that use necessarily came to an end. That is the view I take of the evidence of use apart from the question raised upon the proof, though not upon the record, as to the effect of the expenditure made by the Road Trustees upon a part of the road for some years prior to 1861. Upon that point I concur in the opinion of Lord Adam.

LORD PRESIDENT.—I have had the advantage of reading, and fully considering the opinion which has just been delivered by Lord Adam, and I entirely concur with his Lordship throughout.

LORD SHAND was absent.

THE COURT pronounced this interlocutor:—"Recall the Lord Ordinary's interlocutor: Find and declare in terms of the second conclusion of the summons, and of the first alternative of the third conclusion of the summons, with the exception of the portions of the said conclusions relating to the bridge erected across the Leth Allt Burn, of which it is unnecessary to dispose, the said bridge having been removed by the defender since the date of the summons: Find and declare, with reference to the fifth conclusion of the summons, and of consent, (1) that there is a public right of way for passengers, horses, and cattle, and sheep from Glenmoriston to Strath Glass by the road marked No. 5 on the plan No. 6 of process, produced by the pursuers, from Glenmoriston to the point where it meets the road marked No. 6, and therefrom by the road marked No. 6 on said plan until it reaches the north side of the burn Allt Bal a Chladaich, and thence by the track or course coloured brown, and marked with the letters G H on the plan produced by the defender, No. 10 of process, and thereafter by the road leading past Guisachan steading to Tomich, also coloured brown on the said last-mentioned plan; and (2) that there is a public right of way for passengers, horses, and cattle, and sheep by the road from Corriemony, marked No. 7, to the point where it meets No. 7 b on the said plan, and thence past the Guisachan steading to Tomich by the road coloured brown on the said plan produced by the defender:* *Quoad ultra* assoilzie the defender from the conclusions of the summons, and decern: Find neither party entitled to expenses," &c.

HAGART & BURN MURDOCH, W.S.—J. & A. PEDDIE & IVORY, W.S.—Agents.

DAVID WILKIE CLARKE, Petitioner.—*D.-F. Mackintosh—C. S. Dickson.*
MRS JANE JACK OR M'NAB AND OTHERS, Respondents.—
Sol.-Gen. Robertson—M'Kechnie.

Inhibition—Trust—Title to sue.—When a heritable bond is granted in favour of certain persons as trustees, the assignation of the beneficial interest to other persons does not affect the title of the trustees to use inhibition in their own names against the debtor in the bond.

Agent and Client—General mandate—Consent to use of inhibition.—Opinion, that an agent was entitled, under a general mandate to recover a debt, to use inhibition.

By bond and disposition in security A, on the narrative that he had borrowed £2000 from B and C, bound himself to repay the same to B and C, "as trustees for the said B and C." In security he disponed to them certain lands. Thereafter D acquired, by assignations in her favour, duly intimated to the trustees, the beneficial interest in the bond. B and C having raised letters of inhibition against A, as "trustees under the bond and disposition in security," and used inhibition thereon, A presented a petition for recall of the inhibition and letters, on the grounds (1) that D was the true creditor in the bond, and that B and C had therefore no title to raise the letters as trustees under

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* The defender had not ultimately contended that the road No. 7 was private.

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the bond; and (2) that D's consent had not been obtained to the raising of the letters. It appeared that D had given to her agent authority to recover the debt, and she concurred with B and C in opposing the petition. The Court *refused* the prayer.

By bond and disposition in security, dated and registered in February 1876, David Wilkie Clarke and David Crabb granted them to have borrowed from Mrs Jane Jack or M'Nab and others the sum of £1600, and from James Cuthbert, Montrose, the further sum of £400, which sums, amounting together to £2000, they bound themselves to repay to Mrs Jane Jack or M'Nab, Martha M'Nab, John M'Nab, and James Cuthbert, as trustees or trustee for themselves, "as the lenders of the said sums of £1600 and £400, for their several interests, . . . and to the assignees of the said trustees or trustee, at the term of Whitsunday 1877."

In security the borrowers disponed to the lenders All and Whole certain heritable subjects in Dundee.

Subsequently Mrs Margaret Scott or Bell, residing in William Street, Blairgowrie, acquired the whole beneficial rights under the bond and disposition in security, and lands and others thereby disponed, and the sums of money thereby due, conform to assignations in her favour, granted by (1) James Cuthbert, dated 13th November 1877, and duly intimated to Jane Jack or M'Nab, Martha M'Nab, John M'Nab, and James Cuthbert, as trustees foresaid, as per minute endorsed thereon, dated 13th and 22d, both days of November 1877; and (2) by the said Jane Jack or M'Nab, Martha M'Nab, and John M'Nab, dated the 19th day of March 1883, and duly intimated on 20th and 21st March 1883.

The bond contained a clause stipulating that the disponees should be fully exonered and secured by receipts, discharges, &c. granted by the trustees.

In March 1883 Clarke and Crabb by another disposition in security disponed to Jane Jack or M'Nab, Martha and John M'Nab, and James Cuthbert, "as trustees or trustee for behoof of the said Margaret Scott or Bell, the party now in right of the beneficial interest in the said bond and disposition in security, lands and sums of money therein contained," additional lands in further security for the loan of £2000 above set forth.

By letters of inhibition, signeted 17th January 1888 (a notice of which was entered in the register the same day), at the instance of Mrs Jane Jack or M'Nab, &c. and James Cuthbert, "as trustees acting under the bond and disposition in security" first above set forth, Clarke was inhibited from selling or affecting his lands to the prejudice of the trustees anent the security and payment to them of the two sums of £1600 and £400. The letters were executed on 19th January, and in consequence of an error in the execution, again on 26th January 1888. The letters and execution were registered in the Register of Inhibitions on 30th January 1888.

On 1st February 1888 Clarke presented a petition to the First Division, in which he prayed for recall of the inhibitions and of the letters of inhibition.

The trustees, Mrs Jane Jack or M'Nab and others, lodged answers, to which Mrs Margaret Scott or Bell was also a party.

The above facts were not in dispute.

The petitioner averred,—"That at the date of the said inhibitions the respondents, other than the said Mrs Margaret Scott or Bell, possessed no right, title, or interest in or to the said bond and disposition in security, the sums due thereunder, or the properties thereby conveyed. The true creditor under the said bond and disposition in security is the respondent Mrs Margaret Scott or Bell, and the said letters of inhibition were taken,

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and the said inhibitions used without her knowledge or consent, and contrary to her wishes. The said inhibitions are therefore inept and illegal, and proceed at the instance of persons who have no right, title, or interest to recover the sums above mentioned from the petitioner, or to grant a discharge therefor upon payment."

The respondents averred,—"It is averred in the petition that the respondent Mrs Margaret Scott or Bell had no knowledge of the registration of the bond and charge thereon or of the letters of inhibition, and it is said that this was done without her knowledge or consent. Mrs Margaret Scott or Bell is an infirm old lady, and her affairs are managed by Mr Cumming, solicitor, Bank Street, Dundee. Mr Cumming has her general authority to act in her interests as he thinks proper. The petitioner called upon the respondents Mrs M'Nab and Mrs Margaret Scott or Bell and endeavoured to persuade these ladies not to call up the loan. The respondent Mrs Margaret Scott or Bell referred him to her law-agent, Mr Cumming, to whom she, on 7th January 1888, sent a letter in the following terms:—'Mr Clarke called upon me on Wednesday, and I just told him you were my man of business, and referred him to you. I quite approve of what you are doing in calling up the money.'"

Argued for the petitioner;—The letters of inhibition were bad, (1) *Ex facie* because from the instance it appeared that the trustees raised the letters as trustees under the bond and disposition in security of 1876. Under that deed they were themselves the creditors, while, from the deeds subsequent to the bond, it appeared that they were in point of fact only trustees for Mrs Bell, who held the beneficial interest. The letters thus proceeded on a misnomer, and were therefore bad.[1] The objection was purely technical, but the rules with regard to diligences were very strict. (2) Mrs Bell did not consent to the raising of the letters. The course adopted by the respondents in proceeding on the personal obligation when they might have called up the bond was unusual,[2] and did not fall under the ordinary mandate to the agent. There ought to be inquiry as to her consent being given or withheld when the letters were raised.

Argued for the respondents;—(1) The trustees under the bond were the proper parties to enforce the diligence. Their right and title to do so was set forth in the bond, and they gave all the information the petitioner was entitled to when they set forth that deed. The petitioner had no concern with the subsequent transmission of the beneficial right among the beneficiaries; he was only concerned to know that under the bond the trustees had a right and title to get the money from him. (2) The petitioner's averments as to Mrs Bell's consent were irrelevant, if the proper creditors were the persons acting as trustees under the bond. No inquiry ought, therefore, to be allowed. Such matters of business as this, particularly as Mrs Bell was old, and not well acquanted with business matters, fell properly under the general mandate to a man of business. Further Mrs Bell had adopted the proceedings and was here as one of the respondents.

LORD PRESIDENT.—I do not think that either of the objections to the letters of inhibition is good. The first is that the letters are *ex facie* bad in themselves because they describe the trustees as matter of fact to be trustees for themselves and not for Mrs Bell. The reason why I think that objection bad is that the trustees use these letters simply as trustees under a certain deed, the bond and disposition in security. That is their title and right as set forth in the instance

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[1] Walker v. Hunter, Dec 17, 1853, 16 D. 226, 26 Scot. Jur. 118.

[2] M'Whirter v. M'Culloch's Trustees, July 9, 1887, 14 R. 918.

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of the letters. They were bound to recite the deed under which they were acting, and they quite accurately did so. They were not bound to give further information than that they were trustees under the deed, and as such were creditors of the party against whom inhibition was sought. No doubt the inhibition proceeded entirely on the personal obligation contained in the bond, but that may be enforced just as well as the heritable security, and both may be enforced at the same time. I cannot then see that the respondents were bound to give any further information than that they were *in titulo* to recover, and to set out their title.

As regards the second objection I do not think that it either can be held to be good. In the first place Mrs Bell is here as a party supporting the inhibition, and the letters therefore are adopted by her as being for her benefit; but in the second place I cannot affirm the proposition of the Dean of Faculty that in using this inhibition the respondents were resorting to such an extraordinary remedy that it required any special mandate from the client to her man of business. The old lady, who was not much acquainted with business matters, would I think have been much puzzled if it had been put to her whether this remedy should be adopted. She would very naturally have answered her man of business, "You are acting for me, and it is a matter for your consideration." It is a matter which, I think, just falls under the general mandate to a man of business. I am therefore for refusing the petition.

Lord Adam.—It seems to me that the petitioner is debtor to the trustees under the original bond, and nothing else. The subsequent transmissions of the beneficial right do not affect the question at all. The trustees have the sole title and right to discharge the original bond, and therefore it was correct to set out that title in the letters of inhibition, and it was not necessary to set forth the subsequent transmissions among the beneficiaries.

On the other point also I concur. Mrs Bell is here as one of the respondents, and that I think precludes the idea of any further inquiry.

Lord Kinnear.—I concur in what your Lordships have said, and think the petition must be refused.

Lord Mure and Lord Shand were absent.

The Court refused the petition.

J. Smith Clark, S.S.C.—Watt & Anderson, S.S.C.—Agents.

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Bertram's Trustees v. Matheson's Trustee.

Alexander Bennett M'Grigor and Others (Mr and Mrs Bertram's Marriage-Contract Trustees), First Parties.—*G. R. Gillespie.*

Alexander Bennett M'Grigor (Mrs Matheson's Testamentary Trustee), Second Party.—*Fleming.*

Mrs Margaret Forrester or Robson and Others, Third Parties.—*Fleming.*

The Glasgow Western Infirmary and Others, Fourth Parties.—*Asher—Napier.*

Mrs Margaret Merry or Forrester and Others (Mrs Bertram's Heirs *in mobilibus*), Fifth Parties.—*Balfour—Low.*

Succession—Testament and subsequent marriage-contract—Revocation.—In 1879 a lady, then a widow, executed a settlement by which she conveyed her

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whole estates to executors, directing them to pay certain legacies, specific and general, and to divide the residue among three charitable institutions named. In 1886 she entered into a second marriage, and by antenuptial contract on the occasion of that marriage she, on her part, conveyed her whole estate, heritable and moveable, then belonging to her, or which she might acquire during the subsistence of the marriage, to trustees, who were directed to hold the estate for her behoof in liferent, and to hold "the capital of the said estate for behoof of such person or persons and on such terms and payable at such periods as the second party may appoint by any writing under her hand, however informally executed, and failing such appointment the trustees shall hold the said capital for behoof of the second party's nearest heirs *in mobilibus* whomsoever." The lady died about a year after her marriage, survived by her husband, and leaving the settlement of 1879, but no other writing except the marriage-contract. The capital of the estate had been delivered to the marriage-contract trustees, but at her death the lady was in possession of a considerable accumulation of income, paid partly before and partly after her marriage, and of some jewellery and personal belongings.

In a question between the beneficiaries under the deed of 1879 and the lady's heirs *in mobilibus*, as beneficiaries under the marriage-contract, *held (diss.* Lord Rutherfurd Clark) that the deed of 1879 was not effectual either as an independent settlement or as an appointment under the marriage-contract, but was absolutely revoked by the marriage-contract, which on a sound construction was to be taken as a settlement of the lady's entire estate as existing at her death, and that her heirs *in mobilibus*, as legatees under the marriage-contract, had right thereto.

2D DIVISION.
M.

ON 5th November 1879 Mrs Jessie Forrester or Matheson, widow of John Matheson, merchant in Glasgow, executed a testamentary settlement by which she conveyed to Mr A. B. M'Grigor and another, as executors, "All and Sundry the whole means, estate, and effects, heritable and moveable, real and personal, which may belong to me at the time of my decease, together with the writs, titles, and vouchers thereof." After directing payment of her debts the testator, in the second place, provided "for payment and fulfilment of such further legacies or bequests, instructions or directions, as I may leave, bequeath, or give by any codicil hereto, or by any writing under my hand (however informally executed or defective) shewing my wishes and intentions." In the third place she left certain articles of jewellery to each of two sisters. In the fourth place she left legacies of £100 each to two charitable purposes, and similar legacies to each of two nephews. She then, in the fifth and last place, directed her executors "to pay over the residue and remainder of my said estate, in equal portions, to and among the Glasgow Western Infirmary, the Glasgow Night Asylum for the Houseless, and the Glasgow Society for the Prevention of Cruelty to Animals."

On 18th September 1886 Mrs Matheson was married to William Bertram of Kersewell, Lanarkshire.

By antenuptial contract executed on the occasion of this marriage Mr Bertram, as first party, made over to his wife in liferent, in the event of his predecease, the mansion-house of Kersewell, the shootings over the lands of Kersewell, and the furniture, plate, and wines in the house, with the option to her of taking an annuity of £300 in lieu of these provisions. Mrs Matheson on her part, as second party, assigned and disponed to Mr A. B. M'Grigor and others, as trustees, "All and Sundry, the whole estate, heritable and moveable, real and personal, of whatever nature or description, or wherever situated, now belonging to her, or to which she may hereafter have right or succeed, or which she may acquire in any manner of way during the subsistence of the said intended marriage, which estate shall be held and applied by the said trustees for the ends, uses, and purposes following, viz.:—In the first place, in payment of the expenses of the trust hereby created: In

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the second place, the trustees shall hold the said estate for behoof of the second party in liferent for her liferent alimentary use allenarly, during all the days and years of her life: And in the third place, the trustees shall hold the capital of the said estate for behoof of such person or persons and on such terms and payable at such periods as the second party may appoint by any writing under her hand, however informally executed, and failing such appointment, the trustees shall hold the said capital for behoof of the second party's nearest heirs *in mobilibus* whomsoever." The foregoing provisions were declared to be in full satisfaction of the respective legal rights of succession of the intended spouses.

Mrs Bertram died on 10th June 1887, survived by her husband.

On her death the question arose whether her settlement of 1879 had been wholly, or to any extent, revoked by the marriage-contract of 1886. A special case was accordingly presented. The parties were (1) the marriage-contract trustees; (2) Mr A. B. M'Grigor, as the surviving executor under the settlement of 1879; (3) the specific and general legatees under that settlement, other than the two charities; (4) the two charities and the residuary legatees under the same settlement; (5) Mrs Bertram's heirs *in mobilibus*.

The case stated (in addition to the foregoing facts),—"The capital of Mrs Bertram's estate was transferred to, and is now held by the parties of the first part in terms of the said contract of marriage. It consists of securities to the value of £13,125, or thereby. Besides this sum the deceased had in bank, or otherwise under her own immediate control, at the date of her death, sums amounting to £1212, or thereby, representing accumulations of income from her said estate, which had been paid to her partly prior and partly subsequently to her marriage with Mr Bertram, and there has accrued certain income on her first husband's estate" (of which she had the liferent), the details of which it is unnecessary here to give. "The deceased was also at her death possessed of a large amount of household furniture and some jewellery of considerable value."

The second, third, and fourth parties maintained (1) that the settlement of 5th November 1879 was effectual and subsisting, notwithstanding the terms of the subsequently executed contract of marriage, or alternatively (2) that a distinction fell to be made between the £13,125 of capital above referred to and the income (or at least so much thereof as was paid to the deceased subsequently to her marriage with Mr Bertram) and accumulations of income, and that the conveyance in the contract of marriage included only the said capital sum of £13,125, and that the settlement was effectual and subsisting *quoad* the other property, or at least *quoad* so much thereof as was acquired or became due to the deceased subsequently to her second marriage.

The fifth parties maintained that the marriage-contract entirely superseded and revoked the previously executed settlement, and that they, either under the marriage-contract or as heirs *in mobilibus ab intestato* of the deceased, were entitled to her whole estate, including the accumulations.

The questions of law (omitting two bearing on details not necessary to be here mentioned) were "(1) Has the settlement of 1879 been revoked by the said marriage-contract, or is the said settlement subsisting and effectual to any, and if so, to what extent? (2) Do the accumulations of Mrs Bertram's income, or at least so much thereof as has been paid to her subsequent to her said marriage, and the income due to her for the period from the last term of payment to the date of her death, or any part thereof, and the household furniture and jewellery referred to, fall under the marriage-contract, and if not who is entitled thereto?"

Argued for the fourth parties;—(1) The primary object of Mrs Bertram's side of the marriage-contract was to protect her estate against her husband. The deed was intended to subsist during the marriage only, and was not, strictly speaking, a testamentary writing of Mrs Bertram's, although it contained a conditional provision in favour of her heirs *in mobilibus*. But (2) taking it to be a testamentary deed, it did not revoke the prior deed of 1879. It did not contain an express revocation, and it could not be construed as containing an implied revocation, for there was no complete inconsistency between the two deeds, inasmuch as the marriage-contract did not deal with Mrs Bertram's entire estate. There was conveyed to the trustees only such estate as already belonged to her, or as she might acquire during the subsistence of the marriage, and it was an accident that she predeceased her husband; but taking it that the conveyance was in the actual event in form universal, similar clauses had been construed not to include life interests and annuities,[1] and the same principle applied to jewellery and similar personal belongings. That construction was a plain inference from the terms of the marriage-contract here, which drew a marked contrast between liferent and "capital." But (3) the deed of 1879 being unrevoked, its provisions were preferable to the destination to heirs *in mobilibus* in the marriage-contract, and the marriage-contract trustees held the estate for the purposes of the prior deed; in the first place, because the provisions of the prior deed were special, and the destination to heirs *in mobilibus* was general;[2] and secondly, because the deed of 1879 was, notwithstanding its date, to be taken as an appointment in terms of the marriage-contract, on the general principle that a testamentary instrument spoke as at the date of the testator's death. "May" appoint did not necessarily imply futurity.[3] (4) In any event, the deed of 1879 regulated the disposal of estate not dealt with under the marriage-contract, *i.e.*, the accumulations of income and the jewellery.

The third parties took no part in the argument, having no substantial interest to contest the claims of the fifth parties, they being themselves of the next of kin of the deceased.

Argued for the fifth parties;—(1) The first question was, Did the marriage-contract revoke the prior deed not only as regarded administration, but also as regarded beneficial right? Now, in the first place, this lady's side of the later deed, though it was a marriage-contract, was plainly testamentary. It professed to dispose of her estate after her death. But if it was a testamentary deed, its fair construction was that it dealt with her entire estate. "Capital" simply meant the whole estate of which she might die possessed. The Court would not construe such a word strictly.[4] If there had been no prior deed, the construction maintained on the other side would never have been listened to, for on that assumption it would have resulted in partial intestacy. The conveyance to the trustees was no doubt only of the estate the lady already possessed or might acquire during the

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[1] Boyd's Trustees v. Boyd, July 13, 1877, 4 R. 1082; Young's Trustees, May 22, 1885, 12 R. 968; *In re* Mainwaring's Settlement, June 1866, L. R., 2 Eq. 487.

[2] Weir v. Steill, Feb. 7, 1745, M. 11,359; Flemings v. Fleming, Dec. 3, 1800, M. App. Implied Will, No. 1; Allans v. Sinclair, Nov. 13, 1776, 2 Pat. App. 403; Dove v. Smith, May 31, 1827, 5 S. 734; Grant v. Stoddart, Feb. 27, 1849, 11 D. 860, 21 Scot. Jur. 241, rev. June 28, 1852, 24 Scot. Jur. 555, 1 Macq. 163.

[3] Hyslop v. Maxwell's Trustees, Feb. 11, 1834, 12 S. 413; Baird v. Jaap, July 15, 1856, 18 D. 1246, 28 Scot. Jur. 626.

[4] Dunsmure v. Dunsmure, Nov. 22, 1879, 7 R. 261.

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marriage, but in the actual event, in consequence of her predeceasing her husband, it was *de facto* a universal conveyance. If, then, the marriage-contract dealt with the entire estate, it, on the ground of absolute inconsistency, revoked the deed of 1879. But (2) if the deed of 1879 was not revoked, it dealt only with such estate as was not conveyed to the trustees. It was said that the trustees must administer the estate conveyed to them according to the prior deed, in the first place, because the provisions of that deed were special, whereas the destination to heirs in the marriage-contract was general; but that doctrine had no place here where the prior deed was a universal settlement. Secondly, it was said that the prior deed was operative as being an appointment in terms of the marriage-contract. If that was what this lady meant, she had taken a singularly unhappy way of expressing herself, for her language could refer only to an appointment to be made in the future, and not to an already existing appointment. It was important to observe that the words were not writing which she "may leave," but terms which she "may appoint." Had the former expression been used there might have been some foundation for the view of the other side, on the authority of *Baird Preston's* case,[1] to which they referred. As it was, the question being one of intention, the intention of this lady was plain.

At advising,—

Lord Justice-Clerk.—This case raises some questions which are not without interest. The substantial question is, whether a settlement executed by the late Mrs Bertram in 1879, when she was a widow, still subsists, notwithstanding the provisions of a marriage-contract, subsequently entered into between her and her second husband.

The facts are very clearly and shortly stated in the case. Mrs Bertram was formerly married to Mr Matheson, a Glasgow merchant, who died prior to 1879. In 1879 Mrs Bertram, or as she then was, Mrs Matheson, executed a settlement which professed to be a universal settlement conveying the *universitas* of her estate to executors, for the purposes mentioned in the deed. These purposes were substantially to pay certain legacies detailed in the deed, and then to divide the residue of the estate among three charities in Glasgow which were named. Six years afterwards she became engaged to be married to Mr Bertram, the proprietor of an estate in Lanarkshire, and upon the occasion of that marriage she executed what is properly speaking not a will but a marriage-contract. It is dated 18th September 1886, and also purports to be a universal settlement conveying the *universitas* of her estate, present or future, to trustees for the purposes therein mentioned. These purposes, shortly stated, were, in the first place, to secure her own liferent of the estate, and secondly, on her death, and failing any appointment in writing under her own hand, the trustees were directed to pay over the residue to her next of kin. The lady did not survive her marriage long, not more than a year I think; and the question now is whether the settlement of her estate in the marriage-contract does or does not supersede or revoke the settlement which she made in 1879 before her second marriage.

My opinion is that the settlement in the marriage-contract does supersede entirely the previous settlement of 1879, and I shall briefly state my reasons for that opinion.

It has been contended by the parties who are interested to maintain that the

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[1] Baird v. Jaap, July 15, 1856, 18 D. 1246, 28 Scot. Jur. 626.

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previous settlement still subsists, in the first place, that there is no express revocation of it in the marriage-contract, and that the dispositions in the previous settlement, being special dispositions, cannot presumably be revoked by a general disposition in a later deed; and, secondly, it is said that the clause in the marriage-contract by which Mrs Bertram reserved to herself a power of appointment contains words which by their construction entitle us to read into it the residuary clause in the settlement of 1879.

In regard to the first point, I do not think that the doctrine contended for is applicable here. This is a case where both the settlements are universal, and where that is so it is an established rule that unless there are some elements to the contrary the second universal settlement revokes the first. They cannot both stand. I do not think, therefore, that this belongs to the category of cases to which the well-known rule regarding prior special destinations applies.

The second point, which was very learnedly argued to us the other day, is, whether the provision in the marriage-contract reserving right to Mrs Bertram to alter the provisions of that deed by any writing under her hand imports into the marriage-contract the provisions of the settlement of 1879. I am strongly of opinion that it does not, and on these grounds—In the first place, the marriage-contract being a universal settlement the result of it must be to recall the prior settlement of 1879. The two deeds cannot stand together, and therefore it is plain that when this lady reserved to herself the right to dispose of the estate to such "person or persons, and on such terms, and payable at such periods as she may appoint by any writing under her hand, however informally executed," she could not possibly intend to import into her deed the very settlement she had by implication just revoked. It is a question of intention, and if I were asked with what intention that clause in the marriage-contract was introduced by this lady I should certainly reply that she plainly intended to hand over her estate to her next of kin, unless in the future she should make some other settlement of her affairs. This is what I infer from the words of the deed, but independently of that I am not unmoved by the facts connected with the case. I think it is impossible to imagine that this lady, when she was about to be married a second time, intended in any way to repeat the provisions of her former will. It is plain that in 1879 the claims of the charities she intended to favour were principally in her mind. She was not then in her first youth, and it was perhaps natural that, not anticipating a second marriage, she should have had her mind directed in that way, but of course when afterwards she became engaged to be married her interests were altered. The interests of her husband had to be consulted, and although she does not in the marriage-contract divest herself of her estate in any way, it is not to be supposed that when she entered into the marriage-contract she intended to make no provision in the future for her husband out of her estate. It is said no doubt that the date of a testament must be taken to be as at the date of the testator's death. That is quite true, but only in a general sense. In this instance, I think, it would be very singular if a settlement which was executed eight years before this lady's death should be taken as later in date than a marriage-contract entered into on the occasion of her second marriage seven years afterwards.

On the whole matter, I am of opinion in the first place that the marriage-contract constituted a revocation of the prior settlement; and secondly, that the provision in the marriage-contract reserving to the lady the right to alter her settlement by any writing under her own hand refers solely to any writing that

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she might make subsequent to her marriage, and is not to be construed to include a settlement she had made previously. I think further that the marriage-contract trustees take everything that belonged to her at the date of her death.

Lord Young.—I am of the same opinion, and substantially on the same grounds.

The questions before us regard the succession to the estate of the late Mrs Bertram, and they depend on a consideration of two deeds. One of these is a proper will executed by her in 1879 when she was a widow, and the other is an antenuptial marriage-contract executed in 1886 on the eve of her second marriage.

I think the first and leading question here is this,—Is the marriage-contract of 1886 to any extent, and if it is, to what extent, also a will or testamentary instrument? If it is not a will or testamentary instrument at all, then whatever else it may effect it does not interfere with the deed of 1879. If it is to any extent a will or testamentary instrument, then to that extent it must supersede the provisions of the former testamentary instrument of 1879.

It is rather a singular marriage-contract taken as a whole. The provision made by the husband—by the gentleman intending to be the lady's husband—in favour of his future wife is of the liferent after his death of his mansion-house of Kersewell in Lanarkshire, and its equipments, including a liferent use of the cellar of wine. That is the only provision by him in favour of his wife, there being an option given to her to take instead of the furnished house and the wine-cellar an annuity of £300. But I need not dwell on that part of the deed, because it never came into operation, as Mrs Bertram died only a few months after the marriage, survived by her husband. By the other part of the deed, with which we have here to deal, the wife on her side conveyed to certain trustees "All and Sundry the whole estate, heritable and moveable, real and personal, of whatever nature or description, or wherever situated, now belonging to her, or to which she may hereafter have right or succeed, or which she may acquire in any manner of way during the subsistence of the said intended marriage." We very properly had an argument addressed to us as to what part of her estate this clause included, whether the whole, or if not the whole, then what part, but it was admitted, and is indeed clear, that at least it included her property to the value of £13,125. Whether it included anything else is a question which I shall afterwards consider. This sum at least, invested and secured, was put into the hands of the trustees. The question is, what were the trustees to do with it? The clause goes on,—"Which estate," of £13,125 at least, "shall be held and applied by the said trustees for the ends, uses, and purposes following,—In the first place, in payment of the expenses of the trust hereby created; in the second place, the trustees shall hold the said estate for behoof of the second party in liferent for her liferent alimentary use allenarly during all the days and years of her life; and in the third place, the trustees shall hold the capital of the said estate for behoof of such person or persons, and on such terms, and payable at such periods as the second party may appoint by any writing under her hand, however informally executed, and failing such appointment, the trustees shall hold the said capital for behoof of the second party's nearest heirs *in mobilibus* whomsoever."

Now, it is to me a startling thing to hear it suggested that such a clause is anything but a will or testamentary instrument. What it applies to is another question, but that it applies to all property put into the hands of the trustees is certain. That was conveyed to them in trust to dispose of according to the purposes specified in the deed, one of which relates to the disposal of the capital after the death of the lady. Suppose that there was no direction to the trustees to hold it for any person who may be named in any writing under the second party's hand, but merely that they were to hold it for the second party's heirs *in mobilibus* whomsoever. She then would give her estate to trustees directing them to pay the estate to herself in liferent, and on her death to her heirs *in mobilibus* whomsoever in fee. Is that not a testament? No doubt it is a marriage-contract in this respect, that her husband contracts that her estate shall not pass to him by virtue of the marriage, but shall remain her property to be dealt with as she pleases. Had that not been its effect it would certainly have put an end to the will of 1879 most effectually. But as it is, I think this is a testamentary direction as to the disposal of this lady's property after her death. I can see nothing in the objection that the beneficiaries are not persons more particularly chosen than "the second party's heirs *in mobilibus* whomsoever." If the direction had been after the lady's death, if she did not otherwise appoint, to hold for behoof of A B, or of one of the charities mentioned in the deed of 1879, would that not have been a testamentary direction? If I had to define the term testamentary direction, I do not think that I could give a better definition than that it is an expression of the owner's will as to how his property is to be disposed of on his death. And that is just what we have here.

This, therefore, is a testamentary instrument with respect to everything to which it applies ; but, and this is an important consideration in this case, it is in different terms from, and is later in date than, the settlement of 1879. Therefore to the extent to which it goes it must necessarily supersede that settlement. But then we have the words in the marriage-contract, to which I have already alluded, that the wife's property is to go to anyone in whose favour she may have made an appointment by any writing under her hand, and it is only failing such appointment that the trustees are to hold the estate for the nearest heirs *in mobilibus*, or as it might have been, for one of the charitable societies, or for a favoured individual. We are asked to construe these words in such a way that the deed of 1879 should be taken as such an appointment by a writing under her hand. The argument is that this testamentary instrument—as I take this clause of the marriage-contract to be—is to be construed in this way,—"In the event of my making no appointment to the contrary, you are to pay the capital to my nearest heirs *in mobilibus* whomsoever, but I forgot to mention that I have already made an appointment to the contrary ; you will give effect to that unless I alter it." I cannot read the deed so. I think that it is a strained and unnatural construction. I should almost say a nonsensical one. In my opinion the plain meaning of the clause is this,—"My mind at present is to give the residue of my property to my nearest heirs *in mobilibus* on my death, but I may change my mind, and if I do, I wish you, my trustees, to pay attention to the alteration, and deal with my estate according to any settlement I may leave, however informal." The conclusion I have come to is that the deed of 1879 is not an appointment, and cannot be regarded as such, under the terms of the marriage-contract.

I now proceed to consider the only other question, which is whether this clause with which I have been dealing applies to the whole of this lady's estate

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or only to part. My opinion is that it applies to the whole. In terms it does literally so apply, and there is in this case no room for the considerations that were of more or less weight in some of the cases that were referred to by Mr Asher, arising from the circumstance that the lady was alienating her estate and putting it beyond her power. Here there is no alienation, she does not contemplate relinquishing her power over her property until her death. I see no inducement to the Court, therefore, to limit the operation of this clause of the marriage-contract. Let us refer to the words again,—"All and Sundry the whole estate, heritable and moveable, real and personal, and of whatever nature or description, or wherever situated, now belonging to her." The word "now" means at the date of the deed in 1886. That includes everything she then had; not that it would lead to the extravagance of the trustees coming and taking possession of her personal belongings or her unexpended income. I daresay the trustees would, upon any proper application, have been restrained from any such interference, as being utterly contrary to the purpose for which this conveyance was granted. But for all that it is a conveyance to the trustees of all the property she then possessed. Then the clause goes on, "or to which she may hereafter have right, or succeed, or which she may acquire in any manner of way during the subsistence of the said intended marriage." Now, everything she died possessed of must either have been her property at the date of the deed in 1886, or must have come to her between that date and her death. If that is so the conclusion is, I think, irresistible that her entire estate is regulated by the marriage-contract. I am not speaking of the power of the trustees to take possession, I am merely considering her will with respect to her property. Her will in regard to that, unless altered by some writing under her own hand, however informal, was that the trustees were to pay it over to her heirs *in mobilibus.* I think that this applies not only to the £13,000, but to her whole property at the time of her death.

On the whole matter I am of opinion that the will of 1879 is altogether superseded by the will of 1886,—I call it a will because I think that it is none the less a will that the clauses composing it are included in what is called a marriage-contract, and is in some respects a marriage-contract.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK.—The question is whether Mrs Bertram's settlement of 1879 was revoked by her marriage-contract in 1886.

I may notice, though in my view it is not very material, that the marriage-contract is not a universal settlement. It only conveyed the estate which belonged to Mrs Bertram at the time of her marriage, or which she might acquire during its subsistence. It is only by the accident of her having predeceased her husband that it can in any sense be regarded as a universal settlement, and it is a question whether in any case it can include the savings from accruing income.

The primary purpose of the marriage-contract is to protect the estate of the wife during the subsistence of the marriage. But for this it would never have come into existence. It is, however, also a will inasmuch as in a certain event Mrs Bertram gives the estate thereby conveyed to her heirs *in mobilibus.* But the direction in their favour is only to take effect if she does not otherwise appoint by a writing under her hand. I regard that as meaning that they are take if

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she does not leave a will. I cannot hold that it indicates any intention of revoking a subsisting settlement.

If the marriage-contract had not contained any direction in favour of heirs, I do not think that it was disputed that the settlement of 1879 would have regulated Mrs Bertram's succession. I fail to see how by reason of the existence of the direction the marriage-contract can be held to have any revoking power when the gift to heirs is expressly postponed to any appointment which she may make, or, as I construe these words, to any will which she may leave.

It was argued that the only appointment which could have legal efficacy was an appointment made after the date of the marriage-contract. I do not think that this view is sound. The words are, as she "may appoint by any writing under her hand." I think that these words apply to and include any writing which she may leave at her death expressive of her will, whatever the date may be. All testamentary writings speak as at death, and unless the words of the marriage-contract necessarily exclude prior writings, which I think they do not, I am of opinion that the settlement of 1879 is the unrevoked will of Mrs Bertram, and that it must receive effect, either apart from the marriage-contract altogether, or as an appointment which takes precedence of the direction in favour of heirs *in mobilibus.*

THE interlocutor, in so far as it answered the questions of law above stated, was in these terms:—"Find (1) that the settlement of 1879 has been revoked by the said marriage-contract between William Bertram, Esq., and Mrs Jessie Merry Forrester or Matheson, dated 18th September 1886; (2) that the accumulations of Mrs Bertram's income and the household furniture and jewellery referred to in the special case fall under the marriage-contract."

MACKENZIE & KERMACK, W.S.—J. & A. PEDDIE & IVORY, W.S.—MACKENZIE & BLACK, W.S. —DONALD MACKENZIE, W.S.—Agents.

No. 101.

Mar. 13, 1888.
Brown's Trustees v. Brown.

DAVID NICOLSON AND OTHERS (Brown's Trustees), Pursuers and Real Raisers (Reclaimers).—*D.-F. Mackintosh—Patten.*
MRS KATHERINE BROWN, Objector (Respondent).—*Rhind—Hay.*

Trust—Administration—Title to sue.—In a multiplepoinding brought by testamentary trustees for the distribution of an estate, one of the beneficiaries stated as an objection to the condescendence of the fund *in medio* that it did not include a sum of £600 said to be due to the estate by one of the trustees. In answer the trustees produced a discharge granted by the truster to the alleged debtor, and explained that they were satisfied they could not prosecute the claim with any hope of success, but they offered to allow the objector to sue in their names on his finding security for the expenses of the proceedings. The Court *repelled* the objection, holding that this was all the trustees could be required to do.

1ST DIVISION.
Lord Fraser.
B.

BY mutual disposition, dated 7th April 1880, Mr and Mrs Thomas Brown disponed their whole estate, heritable and moveable, at the death of the predeceasing spouse, to David Nicolson and two others, as trustees for the purpose, *inter alia,* of paying the liferent to the surviving spouse, and on the death of the survivor for the purpose, *inter alia,* of dividing the residue among the children of the marriage, or their issue. Mrs Brown died on 14th July 1884, and her husband on 18th April 1886, survived by seven children and the family of an eighth child.

In a multiplepoinding brought by the trustees in July 1887, objections were lodged to the condescendence of the fund by Mrs Thomas Brown

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junior, the widow of one of the children, for herself and children. She stated that at Mrs Brown's death a sum of £600 was due to Mr Brown by Mr Nicolson, one of the trustees, and that this sum fell to be included in the estate.

The trustees in answer explained that Mr Brown had been in the habit of depositing money with Mr Nicolson, and that at the date of Mrs Brown's death the sum so deposited amounted to £600, but that in August 1884 a settlement was made between Mr Nicolson and Mr Brown, by which the former discharged a claim he had against Mr Brown under a letter of guarantee, granted by Mr and Mrs Brown on 12th July 1884, for £300, 4s. 8d., and Mr Nicolson paid the balance of £299, 15s. 4d. The trustees produced in process the discharge for the £600 then granted by Mr Brown to Mr Nicolson, and stated that the £299, 15s. 4d. had been invested by Mr Brown in shares subsequently realised by the trustees. There were allegations by the objector that Mr and Mrs Brown had been induced to sign the letter of guarantee of 12th July 1884 under false representations, and there were other averments pointing to a reduction both of that document and of the discharge. It was further denied that the £299, 15s. 4d. was applied as stated by the trustees.

The trustees stated that they had given very careful consideration to the matter, and were satisfied that they had no claim against Mr Nicolson.

The Lord Ordinary (Fraser), on 22d February 1888, allowed the parties a proof of their averments, the objector to lead in the proof.

The trustees reclaimed, and argued;—Even assuming that the objector's averments were relevant, they could not be required to go to proof on a question of the kind with a third party, where they were satisfied they had no good ground of action, and at the expense of the trust-estate. They were willing to give the objector their instance, and let her fight the matter out herself on her finding security for the expenses of such a proceeding.[1] Beyond that they could not be asked to go, especially as the objector's share in the residue was more than swallowed up by her debt to it, composed of advances and interest. The documents which had been produced were *ex facie* quite regular and complete. Further, the objector was the only one of eight beneficiaries who had raised the objection.

The objector argued that she had set forth a relevant case as against the trustees, and that in any view she should not be obliged to pay the expenses of proceeding against Mr Nicolson.

Lord President.—The complaint here is that the trustees have failed to reduce into possession £600 which it is alleged is owing to the trust-estate. That is a perfectly relevant statement, but, without going into detail, I may say that *ex facie* of the documents produced it is plain that the debt was extinguished immediately after the death of Mrs Brown. The trustees are therefore of opinion, and indeed say that they know, that they have no claim for this £600, and decline to sue Nicolson for it. The objector is not satisfied with this answer, and of course if she wishes to try the question at her own expense, she is entitled to do so.

But then the trustees say that the state of the facts is that she is trying to have the question tried at the expense of the trust-estate, that is at the expense of the other beneficiaries. I think she is not entitled to do that, and whether the question is to be tried under this allowance of proof or not, it ought not to be tried at the expense of the estate. The mode in which it is proposed

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[1] Duke and Duchess of Buckingham v. Breadalbane's Trustees, Jan. 17, 1844, 6 D. 403.

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that the question should be tried is to say the least most inconvenient. I can imagine nothing calculated to put the case more out of shape than what is proposed. I do not say that it is absolutely incompetent, but it is certainly most inconvenient, and, therefore, if the question is to be tried at all, it should be tried in an action in the name of the trustees against Nicolson. They cannot be asked to try it themselves at their own expense, but in these circumstances they offer the use of their name, upon the party wishing to raise the action finding security that they and the trust-estate shall not be liable in any part of the expense of an action which they know, or at least say, will end in favour of the defender. I think that we should recall the interlocutor, and, if the objector does not accede to the trustees' offer, there is no other footing on which proof can be allowed.

Lord Adam.—If we should allow this interlocutor to stand, matters would be in the curious position that the objector would be pursuer in an action in which the trustees would be put to prove the non-liability of Nicolson to the trust in this sum of £600. There is no duty on them to do that. The proposal is not incompetent, but when the trustees come forward to say that they are in possession of a discharge of the sum in question, and that they see no reason for thinking that the discharge is bad in any way, I cannot see why they should be compelled at the expense of the other beneficiaries under the trust to sue a claim which they think ill-founded. If, then, the objector is not prepared to accept the trustees' offer, I do not think that she can be allowed to put the trustees to this expense.

Lord Kinnear.—If the documents produced are valid, then the debt alleged to subsist has been extinguished. I do not think it necessary to consider whether the averments on which it is proposed to set aside the discharge are relevant, for I think that if the beneficiary who desires proof wishes to proceed with the case she must take proceedings at her own expense, and not at the expense of the other beneficiaries. I therefore concur.

Lord Mure and **Lord Shand** were absent.

The Court recalled the Lord Ordinary's interlocutor; "and in respect the objector declines the proposal of the trustees that she should sue Mr D. Nicolson in name of the trustees, giving caution to indemnify the trustees and the trust-estate from liability for expenses of such litigation, repel the objections to the condescendence of the fund *in medio*, reserving all questions as to the amount of the objector's claims and the deductions proposed to be made therefrom: Find the reclaimers entitled to expenses since the date of the Lord Ordinary's interlocutor," &c.

J. & A. F. Adam, W.S.—J. B. W. Lee, S.S.C.—Agents.

No. 102.

Mar. 13, 1888. Brash v. Arnott's Trustee.

Alexander Brash, Appellant.—*A. S. D. Thomson.*
D. G. Hoey (Arnott's Trustee), Respondent.—*Goudy.*

Bankruptcy—Statutory examination—Examination of debtor to the estate—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 90 *and* 91.—In the sequestration of a bankrupt, the trustee examined a trader with reference to accounts of sales made by him for the bankrupt on which he had charged commission, and asked how he had disposed of the goods. The trader deponed that he had himself bought the goods. The trustee having further asked, "What did you do with those goods when you took possession of them"? the witness

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objected to the competency of the question. *Held* that the trustee was entitled to put the question.[*]

In the process of sequestration of the estates of William Arnott, corn factor, Glasgow, Mr D. G. Hoey was appointed trustee.

At a diet in the sequestration in December 1887, before the Sheriff-substitute, Alexander Brash, a partner of the firm of Alexander Brash & Company, flour importers, Glasgow and Dublin, was examined. He deponed,—"I am a flour importer in Glasgow and Dublin. I have been doing business with the bankrupt. We have had a good few transactions, amounting to several thousand pounds. The document now shewn me is an account sales of 200 bags of flour.[†] I now exhibit the advice of sale in one of my books. It is as follows:—'Wm. Arnott, Esquire, 17th February 1887.—We beg to advise sales on your consignment as undernoted, 92 Daluth A, 32/6.' There is another entry in the same account sales of 108 bags Daluth A flour, at 29/6. There is also an advice note for that, but it has come out very faintly in the copy. I also exhibit an entry for these goods in my ledger. Being asked to produce the book from which the ledger was posted, depones,—I now exhibit my invoice book. (Q.) To whom did you sell these goods? (A.) I took over the goods at the market price. The document now handed to me is an account sales of 200 bags Daluth A flour, forwarded from Glasgow to Dublin. That was a sale to myself. I took over the flour at the market price, and Mr Arnott never objected to the market price. (Q.) What did you do with those goods when you took possession of them? (A.) I have got some of them yet. (Q.) I want you to shew me the disposal of them in your books? (A.) I have already shewn you a statement of the disposal; that is the custom and method of rendering account sales."

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[*] Sec. 90 of the Bankruptcy Act, 1856, provides that "the Sheriff may at any time, on the application of the trustee, order an examination of the bankrupt's wife and family, clerks, servants, factors, law-agents, and others, who can give information relative to his estate. . . . ."

Sec. 91 further enacts that "the bankrupt and such other persons shall answer all lawful questions relating to the affairs of the bankrupt," &c.

[†] "4. Account Sales of 200 bags Daluth A Flour, forwarded from Glasgow to Dublin, and sold by the undersigned for account of William Arnott, Esq., Hope Street.

1887.			
Feby. 17.	By 92 $^0/_{140}$ bags Daluth A Flour, at 32/6 per 280 lbs., ...	£74 15 0	
May 15.	„ 108 bags Daluth A Flour, at 29/6 per 280 lbs., . . .	79 13 0	
		£154 8 0	
	Less 1¼ per cent of disc., .	1 18 7	
			£152 9 5
	Charges.		
17/2/25/5/87.	To Cartage on 92 bags, . . .	£0 3 5	
	„ Insurance (fire), ...	0 3 10	
	„ Postages and petties, . .	0 3 10	
	„ Commission and guarantee, 2½ per cent, ...	3 16 3	
			4 7 4
	Nett proceeds, ...		£148 2 1
	By Bill, ...		140 0 0
	At Wm. A.'s cr., ...		£8 2 1

E. & O. E.

Glasgow, 8th October 1887. Alex. Brash & Co."

No. 102.
Mar. 13, 1888.
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"Being shewn letter of his firm, dated 25th May 1887, now produced, and marked No. 52,[*] depones—That is an advice of sale. That includes the remainder of the 92 Daluth A,—108 bags Daluth A also mentioned in my former deposition. (Q.) Have you any advice that you took any of these goods over? (A.) No. We did not advise Mr Arnott that we took over the goods, but—(Q.) But what? [No answer.] There is a discount taken off the price in the account sales No. 51, 1¼, and in addition to the discount there is a guarantee commission taken off below, 2½ per cent. The object of the guarantee commission is to guarantee the debt, I suppose. (Q.) To guarantee you against loss? (A.) To guarantee against loss. That is a charge by me for guaranteeing Mr Arnott against loss by the debtor. (Q.) And yet you say that you yourself are the debtor? (A.) That is the usual form. (Q.) You still say that you are the debtor, that is for guaranteeing yourself? (A.) I took over the goods."

The trustee proposed to ask the following question,—"What did you do with those goods when you took possession of them?"

"Mr Paul, for the witness, objected to the question—(1) in respect that it does not relate to the bankrupt's affairs, being with reference to the disposal of the goods after they had been bought in by Mr Brash; (2) that it was urged by Mr Hoey, not in his capacity of trustee, but on the instructions and in the interests of Messrs Kufeke, Morrison, & Barbour, creditors, who were opponents of witness's firm, and with the object of prying into the firm's business and obtaining the names of the customers; (3) that the information had been offered to the trustee for his own use, but declined; (4) that all claims by the bankrupt and by his trustee against witness's firm had been settled, and the documents were in the trustee's possession; and (5) that the question, if of any value, is an attempt to cut down settled claims."

The Sheriff-substitute (Erskine Murray) repelled the objection.

The witness Brash appealed to the Court of Session.

Argued for the appellant;—The question objected to was not a proper question to put in the examination. The debt of Brash to the estate might become the subject of litigation hereafter, and that question ought not to be prejudiced by answers given by the debtor to the estate at this stage. It was settled law that the trustee in a sequestration could not question a creditor of the bankrupt as to the merits of his claim at this stage,[1] and the same rule ought to apply to debtors to the estate. He

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[*] "William Arnott, Esq.,
Hope Street, Glasgow.

Dear Sir,—We beg to advise the sale of the undernoted:—
200 0/140 bags Iroquois, at 28s., store and quay.
108 0/140 „ Daluth A, at 29s. 6d., store and quay.
100 0/280 sks. Sterling, at 25s. 6d., „
100 0/280 „ Royal Rose, at 29s. 6d., „
126 0/140 „ Hertford, at 25s., „

The above prices are all per 280 lbs., less the usual 1¼ of discount. A/c sales will follow in due course. The Shipping Company stored some 150 bags of the Iroquois, being pressed for room.—Yours faithfully,

ALEX. BRASH & Co.
J.M.

P.S.—We have still left to sell for your account
228 0/140 bags Hertford.
250 0/140 „ Socrates."

[1] Redpath v. Forth Marine Insurance Co., July 20, 1844, 6 D. 1438; M'Lea v. M'Lehose, 1786, Bell's Oct. Cases, 75; Paul v. Laing's Trustee, Feb. 21,

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admitted, however, that there was no authority in the books for holding this view.

Argued for the trustee;—A wide discretion ought to be allowed to the trustee in a sequestration, so as to enable him to trace property belonging to the estate. There was no case where a debtor to a bankrupt estate was allowed to refuse to answer questions as to how his debt to the estate was incurred. All the law cited by the appellant applicable to questions being asked as to creditors' claims was conceded, but it was quite irrelevant in the present case. Here the parole evidence of the debtor and the books produced were at variance, and if the line of examination in question was not allowed it might debar the trustee from following up debts or effects which were truly due to or the property of the estate.

Lord President.—This is a very special case, but at the same time it involves an important principle. Observe what Mr Brash's evidence comes to. So far as the account sales exhibit the transaction, it is a transaction of sale and return in the ordinary course of business; 200 bags of flour were sold in February 1887 at 32s. 8d., and 108 in May at 29s. 6d. The usual charges were made on the proceeds of the sale, and among others there is the *del credere* or guarantee, which is properly charged at 2½ per cent. Now, that if it represents the transaction truly is nothing but a sale of goods consigned for sale and return, in which the consignee does not become purchaser, but only the agent and representative of the seller. Mr Brash, however, says in his evidence that the goods were never sold, but that he took them over. He did not tell Arnott that he had done so, but still he says that he took them over, and that he has some of the goods still. In the circumstances I think the trustee is well entitled to know where those goods are and what became of them, because, for aught we know, the goods may turn out legally to belong to the bankrupt estate, and it may be the trustee's duty to bring them into the sequestration. He may, by the inquiry he proposes to make, find out that those goods are worth much more than the price stated in the account, or that the market price at the time they were stated to have been sold was greater than it is stated to have been, and if so, though I give no opinion on the point, he may be entitled to say that they belong to the estate. Now, is he not entitled to find out this by the examination of this gentleman who has put himself in a most suspicious position? I think he is quite entitled to do so. It is not, I think, sufficient to say that because the subject of the inquiry may become hereafter the subject of litigation, it is therefore incompetent to ask questions such as those here proposed. It is very possible the matter may become the subject of litigation, but that is no reason for the trustee being prevented from ascertaining where the goods are now, and what has become of them. I quite understand that in the case of a creditor who is claiming in an estate you are not entitled to bring into the question the merits of the claim in the examination of the bankrupt himself or of the creditor. That is quite established law, but this question is quite different, for if we refuse to allow this line of inquiry it would go far to prevent the trustee from following up

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1855, 17 D. 457, 27 Scot. Jur. 193; Sawers v. Balgarnie, Dec. 17, 1858, 21 D. 153, 31 Scot. Jur. 61; Delvoitte & Co. v. Baillie's Trustee, Nov. 16, 1877, 5 R. 143; A B v. Binny, June 4, 1858, 20 D. 1058, 30 Scot. Jur. 642; Burnet v. Calder, June 14, 1855, 17 D. 933, 27 Scot. Jur. 402.

the goods, and vindicating them for the creditors. I think, therefore, we ought to refuse the appeal.

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LORD ADAM and LORD KINNEAR concurred.

LORD MURE and LORD SHAND were absent.

THE COURT dismissed the appeal.

J. STEWART GELLATLY, S.S.C.—LOCKHART THOMSON, S.S.C.—Agents.

No. 103.

Mar. 15, 1888.
Wilson v. Brakenridge.

JOHN WILSON, Pursuer (Appellant).—*Watt.*
WILLIAM BRAKENRIDGE AND OTHERS, Defenders (Respondents).—*Macfarlane.*

Process—Appeal—Competency—Interlocutor limiting proof to writ or oath—Sheriff Court (Scotland) Act, 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 24.—A Sheriff pronounced an interlocutor sustaining a plea for the defender of prescription, and limiting the proof to his writ or oath. The pursuer appealed. *Held* that the Sheriff's judgment was not a final interlocutor within the meaning of the Sheriff Court Act, 1853, sec. 24, and was therefore not appealable.

Shirra v. *Robertson*, June 7, 1873, 11 Macph. 660, *followed.*

1ST DIVISION.
Sheriff of Roxburgh.
M.

JOHN WILSON, St Boswells, in October 1887 raised an action against William Brakenridge and others in the Sheriff Court of Roxburghshire, at Jedburgh, concluding for payment of £51.

The defenders pleaded prescription.

The Sheriff-substitute (Speirs), on 27th October 1887, repelled that plea.

The defenders appealed to the Sheriff (Jameson), who, on 10th January 1888, pronounced this interlocutor:—"Recalls the Sheriff-substitute's interlocutor of 27th October 1887: Sustains the first plea in law for the defenders: Finds that the pursuer's proof must be limited to writ or oath of the defenders: Finds the pursuer liable to the defenders in the expenses of this appeal; modifies the same to the sum of £2, 10s. sterling: Decerns and ordains the pursuer to make payment of said sum to the defenders: *Quoad ultra* reserves all questions of expenses: Remits the cause to the Sheriff-substitute for further procedure, and decerns."

The pursuer, on 1st March 1888, appealed to the Court of Session.

On the cause appearing in the Single Bills the respondents objected to the competency of the appeal.

Argued for the respondents;—This was not a final judgment,[1] and was therefore not appealable under the Sheriff Court Act, 1853, sec. 24.* The appeal was taken too late under sec. 40 of the Judicature Act, taken along with the A. S., 11th July 1828.[2] [LORD PRESIDENT.—This is not an interlocutor merely allowing proof, it finds that the proof must be

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[1] Robertson v. Earl of Dudley, July 13, 1875, 2 R. 935; Duff v. Steuart, Oct. 20, 1881, 9 R. 17.

* Sec. 24 of the Sheriff Court Act, 1853, provides,—"It shall be competent in any cause exceeding the value of twenty-five pounds to take to review of the Court of Session any interlocutor of a Sheriff sisting process, and any interlocutor giving interim decree for payment of money, and any interlocutor disposing of the whole merits of the cause, although no decision has been given as to expenses, or although the expenses, if such have been found due, have not been modified or decerned for; but it shall not be competent to take to review any interlocutor, judgment, or decree of a Sheriff, not being an interlocutor sisting process or giving interim decree for payment of money or disposing of the whole merits of the cause as aforesaid."

[2] Kinnes v. Fleming, Jan. 15, 1881, 8 R. 386.

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limited to writ or oath. If there is no writ, it must be referred to the defender's oath, and after that is taken I cannot see how it can be gone back upon afterwards, even if the pursuer should satisfy the Court that proof *prout de jure* ought to have been allowed.] That question was decided in the case of *Shirra* v. *Robertson*,[1] where it was held that such an interlocutor was not final, and therefore not appealable. [LORD PRESIDENT.—The hardship I alluded to scarcely arose there, as it was the party to whose oath reference was made who brought the appeal. The result in this case would be that the Sheriff's interlocutor would be unappealable for ever.] [LORD ADAM.—It is very difficult to see how an interlocutor should be appealable by one party and not by the other.] The judgment in *Shirra's* case was applicable here, and the grounds of judgment reached this case. Further in the case of *Robertson* v. *Earl of Dudley* the proof of part of the cause had been limited by the Sheriff to the writ or oath of the defender, and to that extent the appeal seems to have been held to be incompetent, only the other part of the case having been sent to proof.

Argued for the appellant;—The circumstances in *Shirra's* case were so different that it ought not to rule the present case. It was not intended in that case to decide that in such circumstances as the present a Sheriff's interlocutor should be absolutely final. [LORD PRESIDENT.—I am afraid *Shirra's* case is conclusive against you. If, however, you refused in the Sheriff Court to refer the cause to the oath of the defender, final judgment would go out against you, and that interlocutor would be appealable.]

LORD PRESIDENT.—I think the case of *Shirra* (11 Macph. 660) is conclusive against the competency of this appeal. The only difference between the cases is that in that case the appeal was brought at the instance of the party to whose oath reference was made, while here it is the other way. I cannot say that I see that that makes any difference on the question of competency, and as *Shirra's* case was a judgment pronounced after consultation with the other Division, I do not think we can get over it.

LORD ADAM and LORD KINNEAR concurred.

LORD MURE and LORD SHAND were absent.

THE COURT refused the appeal as incompetent.

DAVID HUNTER, S.S.C.—ADAM SHIELL, S.S.C.—Agents.

No. 104.
—
Mar. 15, 1888.*
Assessor for
Argyllshire v.
Stuart.

THE ASSESSOR FOR ARGYLLSHIRE, Appellant.—*Low.*
MRS E. M. DOWNING STUART, Respondent.—*Sol.-Gen. Robertson—Mackay.*

Valuation Acts—Shootings—Unlet deer forest—Sporting Lands Rating Act, 1886 (49 *Vict. cap.* 15), *secs.* 6 *and* 7.—Lands in the occupation of the proprietor were used as a deer forest only, there being neither other game nor farm stock thereon. *Held, per* Lord Fraser (agreeing with the determination of the Valuation Committee), that the lands fell to be entered in the Valuation-roll at their value as a deer forest only; *per* Lord Lee, that looking particularly to the terms of the Sporting Lands Rating Act, 1886, secs. 6 and 7, there ought to be a double entry of the lands at their value as grazing ground, and at their value as a deer forest. The Judges being divided in opinion, the determination of the Valuation Committee *stood.*

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[1] Shirra v. Robertson, June 7, 1873, 11 Macph. 660, 45 Scot. Jur. 412.

* Decided Feb. 10, 1888.

No. 104.

Mar. 15, 1888.
Assessor for Argyllshire v. Stuart.

Lands Valuation Appeal Court.
Lord Lee.
Lord Fraser.

Case No. 84.

AT a meeting of the Valuation Committee of the county of Argyll on 13th September 1887 to dispose of appeals against the valuations of lands and heritages by the county assessor for the year ending Whitsunday 1888, Mrs Stuart of Dalness appealed against the following entries:—

No.	Description of Subject.	Proprietor.	Occupier.	Yearly Rent or Value.
				£ s. d.
9836	Dalness Grazings.	Mrs E. M. Downing Macdonald or Stuart of Dalness.	Proprietrix.	285 0 0
	Do. Shootings.	Do. do.	Do.	300 0 0

The Valuation Committee, having regard to the evidence adduced before them, and to the decision in the case of *Lord Middleton*,[1] restricted the annual value of the lands to £255, being at the rate of £15 per stag for 17 stags.

The Assessor took a case. It appeared from the case that the lands were unlet, and that they were exclusively used as a deer forest, there being no stock thereon and no other game. "In Inverness, deer form a considerable element in the landlord's property, and, as a rule, the deer forests in that county are entirely cleared of sheep and other farm stock. In Argyllshire there are very few cleared deer forests, but in the northern part of the county deer frequent the sheep ground, which is not unusually lightly stocked with sheep and cattle." The case further set forth at considerable length the result of evidence regarding the value of shootings.

The case also stated that the Inverness-shire Commissioners of Supply had, after an exhaustive inquiry into the basis for valuing unlet shootings and deer forests, come to the conclusion that taking one thing with another "the nett value should be £15 per stag for deer, and the nett value per brace of grouse 10s." The parties were agreed that seventeen stags was the number that could be shot on Dalness. In 1885 Dalness was a sheep farm, and its grazing value was then entered at £285.

The Assessor contended that under the Sporting Lands Rating Act, 1886,* he was bound to value the lands for sporting and for grazing purposes separately, even although *de facto* they were not used as grazing ground. Mrs Stuart maintained that the actual condition of the lands only was to be looked at, and that the lands here, being used as a deer forest and for nothing else, ought to be valued only as a deer forest.

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[1] Lord Middleton v. Assessor for Ross-shire, March 1, 1882, 10 R. 28.

* The Sporting Lands Rating (Scotland) Act, 1886 (49 Vict. cap. 15), enacts, —Sec. 6—"In order to ascertain and assess under the Valuation Acts the yearly value of shootings and deer forests in Scotland, it shall be the duty of the assessor to enter separately for each parish, and in respect of each proprietor therein, the yearly value of the shootings over the lands and of the deer forests belonging to him in so far as situated within such parish."

Sec. 7—"All county, parochial, and other public assessments, and all assessments, rates, or taxes, under any Act of Parliament, authorised to be imposed or made upon or according to the annual value of lands or heritages ascertained under the Valuation Acts, or upon or according to the annual value of lands and heritages ascertained under the Poor-Law Act, shall be imposed or made upon or according to the annual value of shootings and deer forests ascertained under the Valuation Acts, as amended by this Act, or upon the annual value thereof ascertained under the Poor-Law Act, as amended by this Act, as the case may be."

No. 104. At advising,—

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Lord Fraser.—The case states "that no other stock than deer is kept on the lands, and that no other game exist thereon." Therefore this must be treated as a deer forest, according to the rule laid down in *Lord Middleton's* case (1st March 1882, 10 R. 28), and indeed, according to the provision of the 6th section of the statute, that the lands are to be valued as in their actual state. It appears that in the year 1885 the grazing value of the lands was ascertained to be £285. Whether that value for grazing would be obtained now is not stated as a fact, and certainly cannot be assumed, looking to the fall in rents of all grazing lands. But whether it could be obtained or not is wholly immaterial, for the property is not now, in its actual state, a grazing ground. The same argument as the Assessor here states was urged in the case of *Lord Middleton*, and was rejected. We there held that it was irrelevant to aver that the forest that Lord Middleton let would bring a greater rent if let for grazing; to that averment the answer was, that it was not let for grazing, but as a deer forest, and must be valued as such; and that answer was held to be sufficient. Now, then, dealing with the present case as a deer forest, what is the reasonable rent that might be expected for it? The Commissioners seem to have taken a good deal of trouble in ascertaining what were the rents for deer forests in Argyllshire and in Inverness-shire, the result being, that taking one thing with another, "the nett value should be £15 per stag for deer, and the nett value per brace of grouse 10s." As there are no grouse here, that matter may be thrown out of consideration; but the case further states that the number of stags that could be shot in a year was 17, which, at the rate of £15 per stag, brings out the value stated by the Commissioners of £255, with which I am quite satisfied, and I therefore think the valuation to be right.

The present case presents no feature of novelty from other cases where property is in the actual possession of the owner. It is the ordinary case with which assessors and valuation committees have every day to deal. It was perfectly lawful for the owner to use the ground for the grazing of sheep, and it was also perfectly lawful for her to turn it into a deer forest, the latter, according to present rents of grazing properties, being perhaps the more profitable of the two. It is very absurd to say that in this case the owner allows her property to go to waste, and that the annual value must be ascertained, not as in its actual state, but according to the annual value that it might bring if it were used for something else. Neither the Assessor, nor the Valuation Committee, nor this Court, have any right to dictate to a proprietor as to the mode in which his property shall be used, provided it is *bona fide* used for a beneficial purpose, and without arbitrary restrictions as to use laid upon it by the owner. It is just as inadmissible to assimilate this case to that of the *Blyth Hall Trustees* (24th February 1883, 10 R. 659), where the owner of property directed buildings to be erected upon ground to be used in all time coming as a public hall, with ante-rooms, offices, and others in connection therewith, but with positive injunctions that it should be used for no other purpose. The result of these restrictions was, that the expenditure exceeded the revenue obtained, and the argument came to be, that as there was no revenue the entry in the Valuation-roll should be *nil*. This contention was negatived upon the plain ground that these restrictions could not be allowed to interfere with the potential value which the buildings possessed if there were no such restrictions. That case has no bearing whatever upon the present one, where the property is used for a purpose undoubtedly beneficial, and calculated to bring out the full annual value which it possesses.

The bearing of the decision in the case of *Lord Middleton* has been entirely misunderstood. It is said that there was a lease in that case, which is quite true; but the same argument was used there which is presented to us once more in the present case, viz., that Lord Middleton ought not to have let his lands as a deer forest, but to have let them for grazing sheep and cattle, in which case a larger rent would, it was said, have been obtained. This is the very position taken up by the appellant now, when he maintains that Mrs Stuart of Dalness ought not to keep her land as a deer forest, but ought to use it, if she does not let it, for grazing cattle and sheep. Both contentions are unsound; and if the case of *Middleton* is to be considered an authority, then the determination of the Valuation Committee was right.

The Assessor erroneously made an entry of grazings, as separate from shootings, and put a value upon each. This was clearly an error on his part. The property must be treated either as grazing land or as a deer forest, but not as both; and accordingly the Commissioners have so dealt with the matter quite rightly by making only one entry.

LORD LEE.—The subjects here are unlet, and therefore, in a question as to the principle on which they should be valued, it seems to me quite irrelevant and useless to refer to the case of *Lord Middleton*. For that was the case of subjects actually let as a deer forest, and where the only question was how much of the rent was paid on account of the furniture, foresters, ponies, gardeners, and gillies, and other servants included in the stipulated sum. Upon this point it is enough to refer to the case and opinions.

The Valuation Committee appear to have held that because no other stock than deer is kept on the lands of Dalness, they can only be valued as a deer forest at their sporting value, and that that should be fixed at £15 for each stag that could be shot in a year, such being the estimated nett value in Inverness-shire and some other parts of the country. They have therefore excluded altogether the value of the lands entered by the assessor as "grazings," and thus have entered the subjects only at their sporting value as a deer forest, which they estimate at £255, being £30 less than the amount stated in the case as the admitted value for grazings.

This assumes that the Sporting Lands Rating (Scotland) Act of 1886 has the effect of superseding, in the case of unlet deer forests, the directions of the 3d clause of the Lands Valuation Act of 1854, requiring that the whole lands and heritages in the country are to be entered separately, "specifying in each case the nature of such lands and heritages." I think that this is a mistake, and that the true meaning and effect of the recent statute, in amending the interpretation clause of the Lands Valuation Act, is to require the assessor in the case of unlet shootings and deer forests, to enter separately for each parish the value of such shootings and deer forests, without leaving unvalued the lands and heritages previously required to be valued.

But further, if lands are not to be valued excepting as a sporting subject, merely because no other stock than deer is kept thereon, a very serious question arises, viz.,—Whether a proprietor can, consistently with the Valuation Statute, exclude his lands from valuation? If he is entitled to reduce the value of the lands, or to prevent them being valued as lands, by clearing them of all stock other than deer, I presume that he would be entitled to clear them of deer too, and thus to leave them absolutely valueless. Can he do this to the effect of excluding the lands from valuation? I assume that he has a right to do what he likes with his own in all other respects. For we have nothing to do here with social questions. But the question whether he can do this to the effect of avoiding valuation appears to me to be forced upon us by this determination of the Argyllshire Valuation Committee, and I am of opinion that it must be answered in the negative.

It is said that the subjects must be valued in their actual state. That is quite true. The question is, what would the lands let for in their actual state by the year? But their actual state is to be considered as a question of fact. It is not to be governed by restrictions placed upon them by the mere will of the proprietor. That was settled in the case of the *Blyth Hall Trustees* in 1883, 10 R. 659.

I think that, independently of the sporting value which they possess as a deer forest, these lands in their actual state are capable of valuation as grazings —they are in fact grazings. This is stated in the case, and they are none the less grazings that they are only grazed by deer.

If it could have been shewn that deer are stock, and that the lands have been, by deer fences and other artificial appliances, appropriated to such stock, and made unsuitable for the grazing of ordinary stock, something might be said.

But it was conclusively settled, in the case of the *Duke of Atholl* v. *M'Inroy*, Feb. 28, 1862, 24 D. 673, that deer are not stock, and it is not contended that anything has been done which in fact renders these lands unfit for occupation as ordinary grazings.

My opinion therefore is that the Valuation Committee, in reducing the valuation to £255 (which is below the value of the lands as sheep grazings alone), is wrong.

THE JUDGES being divided in opinion, the determination of the Valuation Committee stood.

J. & J. H. BALFOUR, W.S.—J. C. & A. STEUART, W.S.—Agents.

No. 105.

Mar. 15, 1888.*
Maitland v. Assessor for Midlothian.

SIR JAMES RAMSAY GIBSON MAITLAND, BARONET, Appellant.—*C. J. Guthrie.*

THE ASSESSOR FOR MIDLOTHIAN, Respondent.—*Maconochie.*

Valuation Acts—Appeal—Competency.—The Lands Valuation Act, 1854, enacts that any person whose name is entered by the assessor in the Valuation-roll shall be entitled to appeal to the Commissioners with reference to such entry, provided the appellant shall intimate in writing that he is to maintain the appeal, and "specify the amount of valuation which he alleges should be substituted for that stated by the assessor." The proprietor of K intimated in writing to the assessor "an appeal against your entering in the Valuation-roll the shootings of K at £5," and added that the lands were not shot over, and that if the shootings were let as assessed the rent of the lands would be diminished to a very much larger extent. Before writing the letter he had stated to the assessor verbally that he objected to the shootings being entered in the Valuation-roll at all. *Held* that there had been sufficient intimation of an appeal against the shootings being entered in the roll.

Lands Valuation Appeal Court.
Lord Lee.
Lord Fraser.

SIR JAMES RAMSAY GIBSON MAITLAND of Barnton, Bart., appealed against the following entries made by the Assessor for the county of Edinburgh in the County Valuation-roll, viz., of £13 for shootings in the parish of Kirkliston, of £12 for shootings in the parish of Corstorphine, and of £12 for shootings in the parish of Cramond, all of which were unlet.

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* Decided Feb. 10, 1888.

Sir James' agents had stated verbally to the Assessor that they objected to the shootings being entered in the Valuation-roll at all, when the Assessor intimated his willingness to reduce the valuations to £5, £5, and £10 respectively. His offer was declined. Sir James' agents then sent a letter to the Assessor in the following terms:—

"Dear Sir,—In compliance with instructions given by Sir James R. G. Maitland, we beg to intimate an appeal against your entering in the Valuation-roll the shootings in the parish of Kirkliston at £5, in the parish of Corstorphine at £5, and in the parish of Cramond at £10. You are aware Sir James has never shot over the lands in these parishes, and he is satisfied that if the shootings were let as assessed there would be a diminution of the farm rents to a very much larger extent.—Yours faithfully, JOHN C. BRODIE & SONS. William Kennedy, Esq., Assessor."

The Assessor objected to the appeal, on the ground that the appellant had failed to specify in writing the amount of the valuation which he alleged should be substituted for the amount stated by the Assessor, in terms of the 9th section of the Lands Valuation Act.*

The appellant replied that as there were, in his opinion, no shootings, they should not have been entered in the roll at all, and that accordingly no value could be put upon them.

The Commissioners sustained the objection.

Sir James took a case, in which the foregoing facts were stated.

At advising,—

LORD LEE.—In this case the Valuation Committee have sustained an objection to the competency of the appeal, on the ground that the appellant failed to comply with the requirement of section 9, as to specifying the amount of valuation which he alleges should be substituted for the amount stated by the Assessor.

The entries objected to were for unlet shootings in the parishes of Kirkliston, Corstorphine, and Cramond. Such entries became competent for the first time under the Sporting Lands Rating Act of 1886. The appellant does not allege that any value should be substituted for the amount stated by the Assessor. On the contrary, it appears from the case that he had explained to the Assessor that he "objected to the shootings being entered in the Valuation-roll at all"; and his notice of appeal explains the view on which he was to maintain this objection.

It appears to me that the provision of section 9 is inapplicable to such a case; and that to exclude the appeal because the appellant had not done that which he could not do consistently with the nature of the objection, was to disallow altogether an appeal on the only ground which was maintained. This is clearly contrary to the statute, which requires the assessor to give notice to every person included in his valuation, that if he considers himself aggrieved by such valuation he may appeal against the same in terms of the Act.

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* The Lands Valuation Act, 1854 (17 and 18 Vict. cap. 91), sec. 9, enacts, —"All persons whose names shall have been entered by the assessors in the Valuation-roll of the county or burgh respectively, whether as proprietors or tenants or occupiers, shall be entitled to appeal to the said Commissioners or Magistrates, as the case may be, with reference to such entry; provided always that the appellant shall, six days at least before such appeal is heard, intimate in writing to the assessor that he is to maintain such appeal, and specify the amount of valuation which he alleges should be substituted for the amount stated by the assessor."

But I am not disposed to rest my opinion solely on the ground that the appellant could not consistently specify any value to be substituted. I think that there is a much broader ground on which the Committee might have repelled the objection. It is a well-settled principle, even in the case of proper judicatories, and where the Court of first instance exercises full jurisdiction in the matter, that review is always competent unless excluded, and that provisions as to the form of appeal will not exclude review, unless failure to comply with them has the effect of rendering the judgment appealed from final. Provisions of a directory kind, and compliance with which is not an essential condition of the superior Court exercising its jurisdiction, will not render an appeal incompetent. Prior to the Act of 1868 such questions were of constant occurrence in the Court of Session, and these principles were in daily observance. The case of *Wilson* v. *Stewart* (15 D. 817) is but one of many cases illustrating a familiar doctrine.

The case here, however, is much stronger. The assessor appointed under section 3 of the statute does not occupy the position of a Judge. The statute imposes the duty of making up the Valuation-roll upon the Commissioners of Supply, and the assessor is merely an officer appointed by them for the purpose of ascertaining the yearly rent or value. What subjects are to be entered in the roll and valued is a different question altogether from the question of amount. We have had another example at these sittings of an appeal on this point in the case of the Forth Bridge Railway. To hold in such a case that the provision of section 9 excludes the Commissioners from entertaining an appeal, unless the appellant has specified the amount which he wishes to be entered, appears to me to be absurd. But even if the statute could be read as containing a direction that in such a case the appellant must specify an amount to be substituted, I should hold that, in the absence of any sanction of finality, the provision must be read as merely directory, and that the appellant ought to have been allowed an opportunity of complying with it, if he had not already done so.

My opinion is that his notice of appeal was sufficient to raise the question which he desired to present to the Committee, and that their determination to disallow the appeal as incompetent was wrong.

LORD FRASER.—The right of appeal from the Assessor's valuation to the Valuation Committee is, by the 9th section of the Valuation Act, given under a condition, viz., that the appellant shall "specify the amount of valuation which he alleges should be substituted for the amount stated by the assessor." If no such specification be given, the plain inference is that there is no competent appeal. No such specification was given by the appellant in this case. He now says that there ought to be no value entered in the roll, for the reasons which he assigns; and if so, he ought to have intimated to the Assessor that such was his contention. I am not surprised, therefore, at the Valuation Committee holding that there was no competent appeal before them. But at the same time I am not disposed to differ from your Lordship as to what ought to be done now. It has been told us that the Assessor had information, besides the letter written by the appellant's agents, as to what the contention was to be, and such being the case, and the objection being so purely technical, I think the proper course will be, upon the whole, to remit the case to the Valuation Committee to hear it on the merits.

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Mar. 15, 1888.
Maitland v. Assessor for Midlothian.

THE following was the opinion:—"We are of opinion that the determination of the Valuation Committee is wrong, and the Judges therefore remit to the Committee in order that the appeal may be disposed of on its merits."

J. & J. H. BALFOUR, W.S.—JOHN CLERK BRODIE & SONS, W.S.—Agents.

No. 106.
Mar. 15, 1888.[*]
Forth Bridge Railway Co. v. Assessor for Linlithgowshire.

THE FORTH BRIDGE RAILWAY COMPANY, Appellants.—*Asher*—*J. C. Thomson.*

THE ASSESSOR FOR LINLITHGOWSHIRE.—*John Wilson.*

Valuation Acts—Lands acquired for purposes of a railway but not yet so used—Whether valuation to be by county or by railway assessor.—In an appeal against a determination of the Valuation Committee sustaining a valuation by the assessor for the county of certain ground which had been acquired by a railway company (whose line was partly constructed) for the purposes of their undertaking, but which was still in grass and in no way used for these purposes, *held* (*per* Lord Lee) that the ground had rightly been valued by the county assessor and not by the assessor for railways and canals, notwithstanding a provision of the company's Act of Parliament that the lands from time to time acquired by the company should, "for all purposes of tolls, rates, and charges, and for all other purposes whatsoever, be the undertaking, railway works, and property of the company"; *held* (*per* Lord Fraser *contra*) that the ground in question ought to have been valued by the assessor for railways and canals as part of the undertaking of the company. The Judges being divided in opinion, the valuation *stood.*

Lands Valuation Appeal Court.
Lord Lee.
Lord Fraser.

Case No. 86.

AT a meeting of the Valuation Committee of the Commissioners of Supply of the county of Linlithgow, on 13th September 1887, for the purpose of hearing appeals against valuations made by the County Assessor for the year ending Whitsunday 1888, the Forth Bridge Railway Company appealed against an entry of "Land (15½ acres) Bankhead and Wester Dalmeny," of which they were entered as proprietors and occupants, at a yearly value of £45.

The ground in question had been acquired by the company for the purposes and under the powers of "The Forth Bridge Railway Act, 1882." It was still in grass and had not yet been used for the statutory purposes of the company, their undertaking not having been completed, but it was not disputed by the Assessor that the company's contemplated line of railway leading to the Forth Bridge would, if completed, intersect the ground. He however stated that the greater part of it would even then be available for other purposes.

The railway company maintained (1) that the ground ought to be valued (if at all), as a part of their undertaking, by the Assessor of Railways and Canals under section 21 of the Lands Valuation Act, 1854 (17 and 18 Vict. cap. 91), and not by the County Assessor under section 3; and they founded on section 16 of their own Act.[†] They admitted that the ground was not entered or taken into account in the Valuation-roll prepared by the Assessor of Railways and Canals. They contended further (2) that

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[*] Decided Feb. 10, 1888.

[†] The Forth Bridge Railway Act, 1882 (45 and 46 Vict. cap. cxiv.), sec. 16, declared, that "subject to the provisions of this Act, the lands and property from time to time acquired by the company under this Act, and the railway and works by this Act authorised, shall for all purposes of tolls, rates, and charges, and for all other purposes whatsoever, be the undertaking, railway works, and property of the company, as if the company had by their previous Act of 1873 been authorised to acquire, make, and maintain the same."

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under section 127 of the Lands Clauses Consolidation Act, 1845,* the ground did not fall to be entered in any Valuation-roll until the works connected with the railway were completed, the company till then being bound only to make up any deficiency which might "occur in the several assessments for land-tax and poor's-rate and prison assessment, according to the Valuation-roll in force at the date of the passing of the special Act."

The Assessor maintained that the ground fell within his jurisdiction and not within that of the Railway Assessor, inasmuch as the Railway Assessor dealt only with subjects actually forming part of a railway company's undertaking—railway stationmasters' houses, coal and other yards at railway stations, lands and houses let to tenants and not forming part of the railway system, being all included in the County or Burgh Assessor's Roll as the case might be.[1] He further maintained that section 127 of the Lands Clauses Consolidation Act, 1845, had no application to matters of valuation, which were regulated solely by the Lands Valuation Act, 1854.

The Valuation Committee, after pointing out that the contention of the railway company led to the result that the ground in question would practically be exempt from taxation so long as the line of railway was not formed across it, stated,—"It appeared to the Commissioners that in these circumstances it was only equitable and right that the owners of the land should bear their due share of the public burdens thereon, and, as it was not disputed that £45 was the fair value of the subject, the Commissioners accordingly refused the appeal, and allowed the entry to stand."

The railway company took a case. The foregoing narrative is taken from the case.

Lord Lee.—The contention of the railway company is that the lands of Bankhead acquired by them for the purposes of their undertaking, and ultimately destined for railway purposes, do not at present fall to be entered in any Valuation-roll, but ought to be dealt with under section 127 of the Lands Clauses Consolidation (Scotland) Act.

The Valuation Committee have rejected this contention, and have entered the subjects in the roll, and my opinion is that their determination is right.

The question appears to me to depend on the statute regulating the valuation of lands and not upon the effect to be given to the 127th section of the Lands Clauses Act. The provisions of that section have reference to liability to assessment for the land-tax and poor's-rate and prison assessments. We have here nothing to do with questions of liability to assessment. It has often been pointed out that the Lands Valuation (Scotland) Act relates only to the matter of valuation, and is by section 41 expressly excluded from affecting questions of liability to assessment. In so far as it regulates matters of valuation, it has been decided that it supersedes all previous enactments on that subject—*Commissioners of Supply for Argyll* v. *Commissioners of Caledonian Canal*, 10 Macph. 639.

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* The Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 19), sec. 127, provided, that if the promoters of the undertaking became possessed of any lands charged with the land-tax, or liable to be assessed to the poor's-rate or prison assessment, "they shall from time to time, until the works shall be completed and assessed to such land-tax and poor's-rate and prison assessment, be liable to make good the deficiency in the several assessments for land-tax and poor's-rate and prison assessment, by reason of such lands having been taken or used for the purposes of the work . . ."

[1] Dundee and Arbroath Joint Line Committee, Dec. 21, 1883, 11 R. 396.

Dealing with the question, therefore, as a question of valuation under the statutes which govern the preparation of the Valuation-roll, I think it clear that all lands and heritages in Scotland must be included either in the Valuation-roll made up by the assessor appointed under section 3, or in the valuation made up by the assessor appointed under section 20, for lands and heritages belonging to railways and canals.

It was admitted that the time has not come for valuing the undertaking called the Forth Bridge Railway. It is not constructed. The directions of the statute as to the valuation of such an undertaking are inapplicable to the present circumstances of the Forth Bridge Railway. The question then is, and the appellants so put it, whether the lands of Bankhead are to be left wholly unvalued and included in no roll? I think that this is clearly contrary to the statute. It is said that the appellants' private act declares the whole lands acquired by them for the purposes of the railway to form a part of the undertaking. It appears from the terms of the clause that it is only for the purposes of the rates and charges to be levied by the company, and other purposes of that kind, that they are declared to form part of the undertaking. But assuming the clause to have the effect of making these lands *de jure* a part of the undertaking, it has not the effect of making them *de facto* a part of the undertaking, to the effect of requiring them to be valued by the Assessor of Railways. It is therefore of no consequence for the purposes of valuation until the time comes when the lands and heritages belonging to the company, and forming part of their undertaking, fall to be valued by the Assessor of Railways. I think that these lands must be valued by the assessor under clause 3.

LORD FRASER.—The piece of ground which is valued by the Assessor is at present in grass. It was obtained by the appellants from Lord Rosebery, under powers for the acquisition of land granted to the appellants by the Forth Bridge Railway Act, 1882. The purpose for which the railway company acquired the land is primarily with the view of carrying a railway over it towards the bridge, and,—as was explained by their counsel,—for other railway purposes, such as warehouses. The bridge not being finished, the railway company have no occasion at present to construct the railway that is intended to be led towards it; but by the 16th section of their Act of Parliament it is declared, "that the lands and property from time to time acquired by the company under this Act, and the railway and works by this Act authorised, shall, for all purposes of tolls, rates, and charges to be levied by the railway company, and for all other purposes whatsoever, be the undertaking, railway works, and property of the company"; and hence it is contended that the valuation should not be as if the lands were a separate subject, but should be valued under the 21st section of the Valuation Act *in cumulo* with the whole undertaking of the company; and this by the Assessor of Canals and Railways. The case of the *Edinburgh, Perth, and Dundee Railway Company* v. *Arthur* (22d December 1854, 17 D. 252) shews that a property belonging to a railway company may be valued as a separate subject from the general undertaking, although the Act of Parliament of the company declares such property to form part of their undertaking,—for it was there determined that "a right of ferry which a railway company had

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acquired, as empowered by their Act, and which was declared to form part of their undertaking, was assessable for poor-rates, not on the mileage principle, as forming part of the line of railway, but as a separate property distinct from the line." There were, however, specialties in that case which induced the Court to come to a conclusion as regards the clause having reference to the construction of the works which do not exist here. The ferry was not exclusively for the use of the railway. A right of ferry existed, which, no doubt, the railway company were authorised to exercise, but which others could do as well as they. There was a separate table of fares—for the ferry had a different rate from those of the railway company; but here the ground is exclusively the property of the appellants, and the mere circumstance that their works have not advanced so far that the ground has been covered with warehouses, station houses, and a railway, will not deprive the words,—that the lands acquired should, for all purposes whatever, be the undertaking of the railway company, —of their natural meaning. I am therefore, of opinion that we must alter the determination of the Commissioners in this case, and direct that the lands in question must be dealt with as if they formed a part of the general undertaking, and be valued as such.

Although in the case submitted to the Committee of the Commissioners of Supply the railway company maintained an argument upon the 127th section of the Lands Clauses Act, no argument was submitted to this Court in support of that contention. The only argument that we heard was that which, I think, is sound, and to which I have given effect, viz.:—that the ground in question constituted a part of the undertaking of the company. I may add that I can find no reason for adopting the decision of the Committee, that it was "equitable" (if by that is meant something different from what is statutory and legal), to value the land as a separate subject from the undertaking of the company. There is no room here for "equitable" considerations; the only question is, What has the Act of Parliament enacted?

THE JUDGES being divided in opinion, the determination of the Commissioners stood.

MILLAR, ROBSON, & INNES, S.S.C.—JOHN KINMONT, S.S.C.—Agents.

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Mar. 16, 1888.
Lord Abinger v. Cameron.

THE RIGHT HONOURABLE LORD ABINGER, Pursuer (Appellant).—*Sol.-Gen. Robertson—Dundas.*

EWEN CAMERON, Defender (Respondent).—*C. S. Dickson—Salvesen.*

Lease—Crofter—Crofters Holdings (Scotland) Act, 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 1, *subsec.* 4, *and secs.* 3 *and* 33.—Section 1 of the Crofters Holdings Act, 1886, provides that a crofter shall not be removed from the holding of which he is tenant, except in consequence of the breach of one or more of certain statutory conditions, viz.,—subsec. 4, "The crofter shall not, without the consent of his landlord in writing, subdivide his holding, or sublet the same or any part thereof." Section 3 provides that when a tenant has broken any of the statutory conditions he shall forfeit his tenancy and be liable to removal from the croft.

Where a crofter had several years before the passing of the Act entered into an arrangement with a farm-servant engaged yearly, from Whitsunday to Whitsunday, to allow him to occupy a house and part of the arable ground on the croft, as part remuneration for his services, and had continued this arrangement after Whitsunday 1887, *held* that, as the subdivision of the croft had taken place prior to the passing of the Act, the crofter had not by the mere continuance of the arrangement after that date subdivided his holding and so committed a breach of the statutory condition contained in sec. 1, subsec. 4, of the Act.

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1st Division.
Sheriff of Inverness.
M.

On 1st July 1887 Lord Abinger, Inverlochy Castle, Inverness-shire, raised an action in the Sheriff Court at Fort-William against Ewen Cameron, crofter, Unachan, near Spean Bridge, in which he prayed the Court "to find that the defender having, without the consent of the pursuer in writing, subdivided that holding occupied by him under the pursuer, or otherwise having sublet the same or part thereof, has thereby forfeited his tenancy of the croft at Unachan occupied by him on the pursuer's estate of Inverlochy, and is liable to be removed in manner provided by the fourth section of the Act of Sederunt anent removing of the 14th day of December 1756: To ordain the defender summarily to flit and remove himself, his family," &c.

The pursuer averred that the defender was tenant of a croft on his property at a yearly rent of £17, 16s., that he resided on his holding, that the parish in which the croft was situated had been declared a crofting parish in terms of the Crofters Holdings Act, 1886, and that the defender was a crofter in terms of that Act.

He averred further, that Angus MacIntyre, road contractor, occupied a dwelling-house and pertinents in the croft, other than the house occupied by the defender, and also a piece of ground "forming part of said croft." (Cond. 5) "The defender has, without the consent of the pursuer in writing, subdivided his holding, or otherwise the said defender has sublet the same or part thereof, in contravention of the said section 1, subsection 4, of the said Act, to the said Angus MacIntyre."*

He pleaded;—(1) The defender having, without the consent of his landlord (the pursuer) in writing, subdivided his holding, or otherwise sublet the same, or part thereof, and having thereby contravened one of the statutory conditions of the Crofters Holdings (Scotland) Act, 1886, his tenancy has been forfeited, and decree of removing should be granted as craved, with expenses.

The defender admitted the pursuer's statements as to MacIntyre's occupancy under the explanation that he "is a servant to the defender, and as such has occupied a house on the croft for the last ten years or thereby, and also potato ground, together with the summering of a cow—the house and ground and summering being perquisites allowed by the defender to MacIntyre."

The pursuer denied this explanation. With reference to the statement that he had subdivided his croft the defender answered,—(Ans. 5) "Denied, and explained that the defender occupied his croft at and prior to the date of the Crofters Act, and he has not subdivided or sublet his holding."

The defender pleaded;—(1) The defender not having subdivided his holding, or any part thereof, and not having made any change in his occu-

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* Section 1 of the Crofters Holdings Act, 1886, enacts,—"A crofter shall not be removed from the holding of which he is tenant, except in consequence of the breach of one or more of the conditions following (in this Act referred to as statutory conditions)—but he shall have no power to assign his tenancy. . . . (4) The crofter shall not, without the consent of his landlord in writing, subdivide his holding or sublet the same, or any part thereof, or erect or suffer to be erected thereon any dwelling-house otherwise than in substitution for those already upon the holding at the time of the passing of this Act."

By section 3 of the Act it is enacted, *inter alia*, that when a crofter has broken any of the statutory conditions set forth in sec. 1, "he shall forfeit his tenancy, and shall be liable to be removed in manner provided by the 4th section of the Act of Sederunt anent removing of the 14th day of December 1756."

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pation or possession of the same, the present action is unfounded, and the pursuer is not entitled to remove him from his holding.

The following was the result of the proof, as expressed in the first four findings of fact in the Sheriff (Ivory's) interlocutor, which were afterwards adhered to by the Court:—"(1) That in 1875 Angus MacIntyre was engaged as a servant by the defender's father to assist him in working the croft in question, which the defender's father then held as tenant of the pursuer, his wages being then £24 a-year and his board; and that for a period of about two years he lived in the same house with the defender and his father, and worked upon the croft; (2) that in 1877 MacIntyre married, and was then allowed by the defender's father to enter into possession of the house he now occupies, while he at the same time got the use of a cow's grass on the hill; but in consequence of these privileges his wages as a servant were reduced to £20; (3) that in 1879 the defender's father died, and the defender succeeded to the croft, and that for two years thereafter MacIntyre continued to occupy the house, and to work on the croft as the defender's servant for the same wages and on the same terms as during the two previous years; (4) that in 1881 there was less work for MacIntyre on the croft, in consequence of a part of the latter having been taken from the defender by the pursuer, and a new arrangement was entered into, under which MacIntyre engaged to serve the defender for a year, from Whitsunday to Whitsunday, at the reduced wages of £14, with the house and cow's grass as before, while he was to get in addition a small piece of the croft, consisting of arable ground of two acres or thereby, on part of which he planted potatoes and oats, and the remainder was kept in grass; that it was part of this arrangement that MacIntyre was to work on the defender's remaining portion of the croft all the year round whenever the defender required him; that when not working there, he was to work for the defender on the roads for which the latter was contractor; and that when the defender had no work for him either on his croft or on the roads, he was to be allowed to work for himself where he pleased"; and that this arrangement subsisted down to the date of the present action.

On 5th July 1887 "the defender's agent, after stating that 'the defender has not subdivided his holding or sublet any part thereof, and it appears to me that he has not committed a breach of any of the conditions created under section 1 of the Crofters Act 1886,' made the following offer:—'The defender is, notwithstanding, willing to remove MacIntyre, if Lord Abinger so wishes, but he would suggest that he should be allowed till Whitsunday to look out for a suitable place for himself and young family.'" This offer was not accepted.

On 15th September 1887 the Sheriff-substitute (Simpson) pronounced this interlocutor:—"Finds that the defender, who is a 'crofter' within the meaning of the Crofters Holdings (Scotland) Act, 1886, has, without the consent in writing of his landlord, the pursuer, subdivided the holding occupied by him, the defender, under the pursuer at Unachan, Inverlochy, in contravention of the statutory condition, or the part thereof relating to subdivision of holdings, set forth in subsection 4, section 1, of the said Act, and has thereby forfeited his tenancy of the said holding: Therefore repels the defences, and ordains the defender to remove from his holding under the authority of the 3d section of the statute and in terms of the conclusions of the petition, and decerns."

The defender appealed to the Sheriff (Ivory), who, on 19th October, recalled the Sheriff-substitute's interlocutor, and assoilzied the defender.*

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* The Sheriff's interlocutor was as follows:—"Recalls the interlocutor appealed

The pursuer appealed to the Court of Session, and argued;—There was undoubtedly subdivision of the croft here. MacIntyre had a part of the

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against: Finds in point of fact—[Here followed the four findings in fact quoted above]—(5) that at the date of the passing of the Crofters Act, viz., 25th June 1886, the said small piece of arable ground did not form part of the defender's holding in the sense of the Act, but the same was then held, occupied, and used by MacIntyre, as it had been since 1881, as part of the privileges enjoyed by him as servant of the defender; (6) that from the year 1881, when the said arrangement was entered into down to 30th June 1887, when the present action was raised, MacIntyre continued to act as defender's servant from year to year under the arrangement entered into in 1881, and enjoyed the privileges thereby conferred on him, the only difference being that at Whitsunday 1886 MacIntyre himself, with the defender's consent, became contractor for a small portion of the roads in the neighbourhood, but he had another man assisting him in carrying out his own contract, so that the latter did not interfere in any way with his duly carrying out his contract of service with the defender: Finds in law, in the circumstances above stated, that the pursuer is not entitled to remove the defender from his holding in respect that the latter has not subdivided or sublet his holding, or any part thereof, since the date of the passing of the Crofters Holdings (Scotland) Act, 1886, and has not contravened any of the statutory conditions of the said Act, and, *separatim*, in respect that even if the defender had so subdivided or sublet his holding, or any part thereof, the same having been let to a person in the employment of the defender (who was a tenant of the landlord) is especially exempted from the application of the Act by the 33d section thereof: Therefore sustains the defences, assoilzies the defender, and decerns."

The following note was annexed to the interlocutor:—"NOTE.—It was contended on the part of the pursuer at the debate that MacIntyre was not a servant of the defender at the date of the passing of the Act. The pursuer's agent, however, admitted (though at first he declined to give any opinion on the matter) that MacIntyre was a servant during the defender's father's lifetime, and for two years thereafter down to 1881. But he maintained that a substantial change took place in 1881, and again in 1886, when MacIntyre took a road contract for himself; and that, at the latter date at all events, MacIntyre ceased to be a servant of the defender. After giving the evidence the most careful consideration, the Sheriff has arrived at the conclusion that from 1875 down to the present time MacIntyre was *bona fide* employed by the defender and his father as a servant on the croft, that he was bound to work, and did in point of fact work thereon whenever he was required to do so, and that, looking to the more important engagements of the defender otherwise, the work of the croft could not have been satisfactorily performed without the aid of MacIntyre or another duly qualified servant.

"It was contended further that, assuming MacIntyre to have been employed as a servant of the defender at the passing of the Crofters Act, that Act prohibits all subdivision or subletting, whether to servants, members of the family, or others; and that by subletting the house and small piece of ground to MacIntyre, the defender had broken one of the statutory conditions of the Act, and is in consequence, along with his family and subtenants, liable to be removed summarily from the croft.

"The Sheriff is of opinion that this contention is unsound. By section 33 of the Crofters Act it is provided that nothing in this Act shall apply to any holding or building let to a person during his continuance in any office, appointment, or employment of the landlord, 'or of any tenant of the landlord.' Now, the defender is tenant of the landlord, and the piece of ground or holding is let to MacIntyre, who is in the employment of the defender. The Act, therefore, is specially declared not to apply to such a holding as that of MacIntyre.

"It was maintained that section 33 does not apply to holdings let to their servants by crofters, but only to those let to servants by tenants whose farms are above £30 rental. There is nothing in the Act, however, to support this

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croft and a house situated on the croft given off to him. This subdivision admittedly began before the passing of the Act, but it was illegal *ab initio*, subleases being prohibited by the estate regulations. The Act could not have been intended to make illegal acts on the part of the tenant legal. But there was sublease here as well as subdivision. The relation of MacIntyre to Cameron was that of tenant to landlord, though he did not pay a money rent but gave a consideration in the form of services. The sublease was one from year to year, and was continued by tacit relocation. By allowing possession under tacit relocation to go on, the defender had really entered yearly into new subleases, and, therefore, whatever was the character of the sublease before the Act passed, each renewal of it subsequent to that date was in contravention of the Act. Section 33* was not intended for cases of this sort. The object of the whole Act was to prevent the multiplication of crofts, and section 33 was enacted in order to make it possible for a landlord or a tenant of a landlord to put a servant into a cottage without running the risk of not being able to put him out unless he committed a contravention. This was not a case of that kind. "Tenant" of the landlord could not mean "crofter." The two words were sharply opposed throughout the Act.

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view, while section 33 clearly excludes from the application of the Act any holding whatever let to any servant or other person in the employment of any tenant of the landlord, whether the annual rent of such tenant is above or below £30.

"There is, moreover, no reason why servants of tenants whose rental is above £30 should be differently treated from servants of tenants whose rental is below that sum, and keeping in view the object and spirit of the Act, it must be presumed that it was intended to exclude all servants alike from claiming the benefit of it.

"Again, if section 33 of the Act was held not to apply to holdings let to servants of crofters, there is nothing to prevent these servants maintaining that they come within the definition of 'crofters' in section 34 of the Act, and that they are entitled to the privileges of crofters.

"Further, the contention of the pursuer necessarily leads to this, that no male crofter, however old, and no female crofter, however infirm, could give to a shepherd, ploughman, or other servant, the privileges usually accorded to such parties, of a house, cow's grass, and piece of potato ground on the croft, without committing a breach of the statutory conditions. In point of fact, if the pursuer's contention is sound, the provision against subdivision would have the effect of seriously injuring the crofters' interests, by preventing their working their crofts to the best advantage, instead of benefiting them, as it was undoubtedly intended to do.

"Lastly, before the defender can be held to have broken the statutory condition in regard to subdividing or subletting his holding, it must be clearly established that he did so subsequent to the date of the passing of the Act. It is clearly proved, however, that the subdivision or subletting by the defender to MacIntyre took place five years before the passing of the Act. At the date of the passing of the Act, and for five years prior thereto, the house and piece of ground let to MacIntyre were held, occupied, and possessed by him, and not by the defender. These subjects therefore did not then form any part of the defender's 'holding' in the sense of the Act. The defender's holding remained still the same as it was when the Act was passed, and there had been no subdivision or subletting of it since. On the whole, therefore, the Sheriff is of opinion that the Crofter Act does not apply to the present case, and that the pursuer cannot, under its provisions, insist on having the defender removed from his croft."

* Sec. 33 of the Act enacts,—"Nothing in this Act shall apply to any holding or building let to a person during his continuance in any office, appointment, or employment of the landlord, or of any tenant of the landlord," &c.

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Argued for the defender;—The first section of the Act was only intended to cover contraventions committed after the passing of the Act. The words "shall not" in the subsection indicated future acts, and the enactment with regard to dwelling-houses at the end of the subsection could only refer to houses to be erected for the first time after that date. There was no subdivision here. That word under the general scope of the Act meant subdivision amongst the various members of a family. MacIntyre was simply a servant, and he could not insist upon staying in the occupancy of the house or potato ground a day longer than he remained in the defender's service. MacIntyre being his servant, and he being a tenant of the landlord, section 33 applied to the case.

At advising,—

LORD PRESIDENT.—This is an application to the Sheriff to have it found that the defender having, without consent of his landlord in writing, subdivided his holding has forfeited it, and there is also a prayer for his removal. The application is founded on sec. 1, subsec. 4, of the Crofters Holdings Act, 1886, which provides that "the crofter shall not, without the consent of his landlord in writing, subdivide his holding or sublet the same or any part thereof." If the proceeding complained of in the present application had been taken after the passing of the Act, I should have been inclined to hold, and indeed would have held without difficulty, that there had been subdivision of the croft. But the circumstances of the case are very peculiar, for what is said to amount to subdivision was something which was done before the Act was passed. The question therefore is whether where the Act at its passing found the croft in a particular state of occupation, it is intended that the crofter shall forfeit his right because of something which was done before that date, and which was, for the first time, forbidden to be done by the Act.

The facts seem to me to be very well brought out in the cross-examination of the defender, where he says,—"My father had the croft for about twenty years before his death. MacIntyre was engaged as a servant for my father through me in or about the year 1875. His wages were £24 a-year. They were paid in cash, and he lived in the same house with my father and myself. About two years afterwards MacIntyre married and we gave him the house that he now occupies. After his marriage we gave him £20 wages together with the house that he now occupies, and also a cow's grass on the hill. He however did not use the privilege of cow's grass for some time after his marriage, because he had not the means to purchase a cow. He did not get the arable land till about six years ago. Till that time, namely, six years ago, the money wages continued to be £20. Up till 1881 he planted his potatoes along with my own. Up to that time he did all the work of the croft. When the work of the croft would permit I employed him to work for me on the roads. At one time we had the whole of Macarthur's croft, but in 1881 part of it, namely, one-third, was taken from us and given to the inspector of the poor. This reduced the work of the croft, and the rent was reduced by fifty shillings, leaving the rent as at present £17, 16s. There being thus less work to do, MacIntyre and myself agreed that the wages should be reduced from £20 to £14, at which sum they stand at present. He is bound to work for me on the croft whenever I require him all the year round, and when he is not working at the croft he is bound to work for me at the roads. When I have no work for him on the croft or on the roads MacIntyre is allowed to work for himself where he pleases. He has had the arable ground, about an acre to an acre and a-half, above referred to during these six years. His engagement with me is from year to year counting from Whitsunday . . . There has been no change in the management of the croft, or in my relations with MacIntyre during the last six years."

I think the account he gives there quite fairly represents the situation. There is no evidence to contradict it. The position of MacIntyre was just that of a servant of the crofter, and he was allowed to occupy a house which was on the croft for six years prior to the passing of the Act. With that house he had certain potato ground, which was part of the croft, and leave to graze a cow. He was a servant to the extent and so long as the crofter required his services, and when his services were not required he could work for himself. This was the state of possession when the Act passed, and the question comes to be whether anything has been done subsequently in violation of the Act. Only one plausible argument has been advanced for that view, viz., that this man must be taken to be a subtenant of the crofter, and that he is possessing this house on tacit relocation from year to year, and that the crofter by permitting this tacit relocation to go on is in fact subdividing or subletting part of his croft. Now, looking to the nature of the arrangement, it does not appear to me that MacIntyre is really in the position of a subtenant. He occupies the house simply as part of his remuneration as a servant, and as soon as he ceases to be a servant his right of occupation will also cease. No doubt it would be quite fair if he were dismissed that his occupation should not end at a day's notice, and he might probably in fairness be entitled to remain till the next term. That, however, does not make him any the more a subtenant. He was originally engaged at £24 of wages; that was subsequently reduced to £20, when he got a portion of the croft for his use; and now his wages are £14. I do not think all this constitutes a violation of the Act. I think it could only be held to be so on a strained construction of the words of the Act. It is plain that in the case of a crofter erecting a new house, and thereby incurring forfeiture, the statute contemplated the erection of a house after the passing of the Act, for it says also in sec. 1, subsec. 4, that he shall not erect a new house "otherwise than in substitution for those already upon the holding at the time of the passing of the Act," and looking at the way in which subdivision of the croft and the erection of new houses are slumped together in this subsection, it is evident that both operations are to have the same point of time, viz., the passing of the Act. I therefore agree with the Sheriff in his decision, though I am not disposed to affirm all the holdings in his interlocutor.

Lord Adam.—The Sheriff-substitute and the Sheriff have come to opposite conclusions in this case, and we would therefore naturally infer that it is a case of some difficulty. I think it is. The subsection in question says that a crofter shall not subdivide his croft, and the question comes to be, has he done so here? I confess that I entertain no doubt that the croft has been subdivided. If a crofter gives another person a right to a house situated on the croft, and to the use of some acres of the ground of the croft, and he enters and possesses those parts of the holding, I think that is subdivision. I have no doubt on that point, and it is of no consequence whether the return is made in the form of rent or of services done, or if nothing be given in return at all. Further, I have no doubt that sec. 33 has nothing to do with the case, and therefore I cannot agree with the Sheriff on that point. I think, further, that it is clear that subsec. 4 of sec. 1 points to future and not to past acts, and therefore I am of opinion that the fact of this croft having been subdivided does not infer liability to forfeiture on the part of the crofter. It was not the intention of the Act that a mere continuance of a previous subdivision of the croft should give ground for forfeiture, for if it were the Act and the forfeiture would be simultaneous. Therefore, that view of the statute will not do.

That brings me to the difficulty of the case, viz., whether the defender has done anything since the passing of the Act amounting to subdivision. The only thing that can be said for that view is that his agreement with MacIntyre was one from year to year, and that he might have put an end to it at any period before Whitsunday 1887. He has not done that, and the whole question is whether that is equivalent to granting a new agreement to the old effect. I cannot put that interpretation on Cameron's actings. It was not the intention of the Legislature to interfere summarily with subdivisions made previous to the passing of the Act, but to prevent such things being done in the future. In my opinion, therefore, the defender has done nothing subsequent to the passing of the Act in the way of subdivision. The Sheriff has, I think, reached the right conclusion, but has given wrong reasons for doing so.

LORD KINNEAR.—I cannot agree with the Sheriff in finding that the piece of ground occupied by MacIntyre was not a part of this holding. I think it was part of the croft, because sec. 33 of the Act has no application to the circumstances of the case. But disregarding that ground of judgment I agree with your Lordships in thinking that the 4th subsection of section 1 has not been violated by Cameron. The section prohibits certain things being done on pain of forfeiture of the holding, but I think that Cameron has done nothing to incur that penalty. It is not impossible that a crofter might infringe it by making an arrangement for continuing an occupation which was legal before the Act passed; but there is nothing of that kind here, and what he proposed to do when he was challenged by the landlord seems to me very reasonable. He said, I am not satisfied that I am bound to remove MacIntyre, but I would suggest that he should be allowed to remain till the next term. I do not think that in making that answer he violated the Act, and there is nothing else that he has done that in my opinion amounts to contravention of its provisions.

LORD MURE and LORD SHAND were absent.

THE COURT pronounced this interlocutor:—"Refuse the appeal, and adhere to the interlocutor of the Sheriff of 19th October 1887 in so far as regards the first, second, third, and fourth findings in fact: *Quoad ultra* recall the said interlocutor: Find in law that the defender has not subdivided his croft since the passing of the Crofters Holdings (Scotland) Act, 1886, within the true meaning of section 1, subsection 4, of the said Act: Therefore of new assoilzie the defender, and decern: Find the defender entitled to expenses in both Courts."

DUNDAS & WILSON, C.S.—GILL & PRINGLE, W.S.—Agents.

No. 108. MRS R. E. MACLAINE OR MAQUAY, Petitioner.—*Sol.-Gen. Robertson—Jameson.*

Mar. 17, 1888. Maquay v. Campbell.

JOHN CAMPBELL, Respondent.—*D.-F. Mackintosh—Murray.*

Parent and Child—Guardianship and custody of children—Guardianship of Infants Act, 1886 (*Act* 49 *and* 50 *Vict. cap.* 27), *sec.* 5.—A widow who had three children by her first marriage—two girls and a boy—married a British subject who was engaged in business in Florence, and she and her husband thereafter permanently settled there. A petition at her instance to have her daughters, who were in pupillarity, delivered to her was resisted by their uncle, their tutor-nominate, with whom they were at that time residing in Scotland. The Court, having regard to the provisions of the 5th section of the Guardianship of Infants Act, 1886,* granted the prayer of the petition.

1ST DIVISION. B.

MISS ROSA ELIZABETH MACLAINE was married to William Macbean Rankine of Dudhope on 8th July 1874. Mr Rankine died on 31st October 1879. There were three children of the marriage—(1) Violet Campbell Rankine, born 28th April 1876; (2) Walter Lorne Campbell Rankine, born 4th July 1877; and (3) Muriel Campbell Rankine, born 25th September 1878.

By antenuptial marriage-contract between Mr and Mrs Rankine, John Campbell of Kilberry—Mr Rankine's elder brother—and three others were appointed trustees, and they were also nominated tutors and curators to the children of the marriage. Two of the trustees never accepted office nor acted as tutors, and the third having died Mr Campbell was then the only surviving and acting tutor.

On 5th July 1884 Mrs Rankine married a second husband, Mr William Maquay, a British subject in Florence, and a partner of a banking-house carrying on business in Florence, Rome, and Leghorn. At the time of her marriage she sent her elder daughter, who had been with her in Italy, back to this country,—to join the other children who were under their uncle's care at Kilberry, in Argyllshire,—with the intention of taking all of them to Italy when she was settled in her new home.

Notwithstanding repeated requests Mr Campbell had ever since refused to allow the children to reside with their mother. She now brought this petition asking that the Court should ordain him to deliver the two girls to her, and should direct that the boy, who was at school in England, should spend his Christmas holidays in each year with her.

She founded upon the provisions of the Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 27).*

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* 49 and 50 Vict. c. 27, sec. 2, enacted that "on the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then, from and after the passing of this Act, the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. . . ."

The 3d section (subsection 3) enacted that "in the event of the guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the Court for its direction, and the Court may make such an order or orders regarding the matters in difference as it shall think proper."

The 5th section enacted that "the Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act. . . ."

The 8th section enacted,—"In the application of this Act to Scotland the word 'guardian' shall mean tutor, and the word 'infant' shall mean pupil."

In his answers Mr Campbell submitted that the Guardianship of Infants Act, 1886, did not justify the application, and he stated,—"The respondent has always been perfectly willing that the children should be with the petitioner when she is for a time in this country, and she has never been refused their society on such occasions, but he does not think it right, in the interests of the children, that they should be sent out of the country and the jurisdiction of the Court. He is aware that their late father objected to children being brought up abroad." He further stated that the children were being educated and brought up along with his children.

Argued for the petitioner;—In the circumstances the petitioner was entitled to the custody of the children—whether at common law or not—certainly under the provisions of the Guardianship of Infants Act, 1886, above quoted.

Argued for the respondent;—By the old law a mother was disqualified from being the guardian of her children by a first marriage by entering into a second.[1] The Infants Act of 1886 did not alter that rule. Further, the old practice was, if the mother was allowed the custody of her children, not to permit the children to be taken out of the jurisdiction, even to England. Here it was proposed to take them to a foreign country.

Lord President.—I am for granting the prayer of this petition, looking to the provisions of the 5th section of the Guardianship of Infants Act, 1886. That section provides that "the Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act. . . ." The circumstances of the present case are very simple. The mother of the two girls has entered into a second marriage, and, her husband being a banker in Florence, she naturally resides with him. The question is, whether it is best for the interests of the children, and most suitable for them in the circumstances of the case, that they should reside with their mother or with their uncle at Kilberry. I cannot say that I have any doubt that the fitting and appropriate place for them is with their mother. If there had been any imputation against the character of the mother, or anything in the circumstances to render her unfit to be their guardian,—I use the term in its popular and not in its legal sense,—the Court would give great weight to such considerations. But there is nothing of that kind alleged. I think, therefore, that the natural and proper course is that the girls should be given over to their mother, and that the boy should spend his Christmas holidays with her, as she asks.

Lord Adam.—I entirely agree with your Lordship, and, while I concur in thinking that we should grant the prayer of the petition under the 5th section of the Guardianship of Infants Act, 1886, I do not express any opinion on the question whether a mother is disqualified from acting as guardian to her children by the fact of her entering into a second marriage.

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[1] Erskine's Inst. i. 7, 12 and 29; Speirs, Dec. 23, 1854, 17 D. 289, 27 Scot. Jur. 122; Stuart, March 20, 1861, 23 D. 779; A B v. C D, July 19, 1850, 12 D. 1297, 22 Scot. Jur. 572.

No. 108. Mar. 17, 1888. Maquay v. Campbell.

LORD KINNEAR concurred.

LORD MURE and LORD SHAND were absent.

THE COURT granted the prayer of the petition.

F. J. MARTIN, W.S.—PEARSON, ROBERTSON, & FINLAY, W.S.—Agents.

No. 109. Mar. 17, 1888. Taylor v. Rutherford.

ROBERT AITON TAYLOR, Pursuer (Respondent).—*Darling—G. W. Burnet.*
ALEXANDER C. RUTHERFORD, Defender (Reclaimer).—*Gloag—Shaw.*

Reparation—Agent and Client—Wrongous use of diligence—Debt collector—Slander—Publication of decrees of Court of Justice.—A debt collector was employed by a creditor to collect a debt. Having failed to do so he employed a law-agent, who used arrestments against the debtor on the dependence of an action subsequently raised in the creditor's name against him in the Sheriff Court. The debtor was then outwith the jurisdiction of the Sheriff, and was not duly cited. Decree in absence was obtained, and arrestments in execution used against him. The debt collector then published in a "Commercial Compendium," for which it was alleged he was responsible, a bare statement that the decree had been obtained against the debtor for the amount of the debt in question. The decree in absence was subsequently recalled on the ground of improper citation. In an action for damages at the instance of the debtor against the debt collector for wrongous use of diligence, and wrongful publication of the decree in absence in the knowledge that it had been improperly obtained, *held*, on the averments, (1) that the defender was merely an intermediary between the client and the law-agent, and was not responsible for the errors of the latter; and (2) that the defender not being responsible for the obtaining of the decree was not liable in damages for publishing the fact that it had been granted. The action was therefore (*rev.* judgment of Lord M'Laren, who had allowed issues) *dismissed* as irrelevant.

1ST DIVISION. Lord M'Laren. M.

[SEE *Taylor* v. *M'Dougall & Sons*, July 15, 1885, 12 R. 1304.]

On 19th December 1887 Robert Aiton Taylor, Trinity, near Edinburgh, raised an action against Alexander C. Rutherford, manager and secretary of the Glasgow and West of Scotland Guardian Society, Glasgow, concluding for damages.

He averred that in 1884 he was head clerk to an insurance company in Glasgow, and that in April of that year he was made joint secretary to the Caledonian Insurance Company at their Liverpool office, and removed there on the 8th of the same month:—(Cond. 7) "The defender carries on business at No. 145 Queen Street, Glasgow, and styles himself 'manager and secretary' of a concern which he calls and advertises as 'The Glasgow and West of Scotland Guardian Society for the Protection of Trade.' It is believed and averred that there is no such society in existence, but that this title is merely a name under which the defender carries on, solely for his own behoof and profit, the business of an ordinary debt collector." That when the pursuer left Glasgow he was owing M'Dougall & Sons an account of £30. (Cond. 8) "On the 24th May 1884, and while the pursuer was in Liverpool attending to his duties, the defender caused a debts recovery summons to be raised against the pursuer at the instance of M'Dougall & Sons, and served at his former residence, No. 91 Claremont Street, Glasgow, which was then in the occupation of Mr Gatow, and on the dependence of this action he, on the same day, which was a Saturday, caused a portion of the pursuer's furniture, which was then in process of removal, to be arrested at the Caledonian Railway Station in the hands of the contractor who was removing same, and of said railway company." (Cond. 9) "At the time when he received instructions to recover the said rent and trade debt, the defender was informed by his clients, and was himself well aware, that the pursuer had left his Glasgow house *animo non revertendi*, and that his domicile was in England, and he knew the pursuer's address, and that he was joint secretary in Liverpool of the Caledonian Insurance Company, of which company the defender was an agent; but, notwithstanding such knowledge, he caused the summons to be served at the pursuer's dwelling-house after he had left it, and after his furniture and effects were out of it and another tenant was in possession. He also caused the sheriff-officer employed by him to serve the summons,—who is one of his employees, and has no separate business of his own,—to watch the removal of the pursuer's furniture during the said 24th May 1884, until it had been transferred to the Caledonian Railway Station in Glasgow, addressed to the pursuer for transit to him at Liverpool, and there to arrest the said furniture on the dependence of the action; and on 2d June 1884 he moved for and obtained decree in absence against the pursuer for the amount of said account, and immediately thereafter arrested the furniture above referred to in the hands of the Caledonian Railway Company on said decree. The pursuer knew nothing of all this procedure, nor that a decree in absence was being obtained against him, till on or about the 4th of June, when he received a telegram from his brother informing him that his name was published as a defaulting debtor in Stubbs & Company's paper of that same date, and in other papers of a similar nature, commonly known as the 'Black Lists.' In particular, publication of the pursuer's name was made by the defender in one of those lists called 'The Commercial Compendium,' purporting to issue from the said Glasgow Guardian Society. The said 'Compendium' is compiled, printed, and published, or at all events is issued and circulated, by or on behalf of the defender for his own behoof and profit; and he maliciously and wrongfully, and in the full knowledge that said decree in absence against the pursuer had been wrongously and illegally obtained, furnished the information whereby the said decree in absence was published in said lists. The papers referred to contain the names and addresses of debtors against whom decrees in absence have passed, and are well known and extensively circulated amongst and read by tradesmen and commercial and professional men all over the United Kingdom." That on 16th July 1884 the Sheriff-substitute, on the ground that the defender had not been duly cited, recalled the decree, dismissed the action, and found the said M'Dougall & Sons liable to the pursuer in expenses.

The pursuer further averred that all the proceedings complained of were taken "*in mala fide*, recklessly, oppressively, maliciously, and without any just or necessary cause by the defender for his own ends, and ultimately for the purpose of gratifying the malice he entertained towards the pursuer by ruining his credit and prospects in life, and the defender is liable to the pursuer for the loss, injury, and damage resulting to him therefrom, and for solatium in respect thereof."

The pursuer pleaded;—(1) The defender, while in knowledge of the pursuer's permanent removal from Glasgow, and of his address in Liverpool, having raised and served the said action, and taken the decree condescended on, without having given to the pursuer any citation or intimation of the dependence thereof, the same, and the subsequent proceedings therein, were illegal, nimious, oppressive, and wrongful. (3) The defender having published the said decree in absence against the pursuer, or having issued and circulated it in the full knowledge that the same had been wrongously and illegally obtained, to the great loss, injury, and damage of the pursuer, the pursuer is entitled to reparation therefor, as concluded for. (4) The said publication having been made maliciously and without probable cause by the defender, to the great hurt and prejudice of the pursuer, he is entitled to reparation as concluded for.

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The defender pleaded, *inter alia*;—(1) No relevant case.

On 25th February 1888 the Lord Ordinary (M'Laren) approved three issues for the pursuer.

The defender reclaimed to the First Division.

When the case was heard counsel for the pursuer made sundry alterations on the issues proposed by him. The form in which they were finally proposed was—" 1. Whether, on or about 24th May 1884, the defender wrongfully used or caused to be used arrestments against the pursuer in the hands of the Caledonian Railway Company on the dependence of a summons raised in the Sheriff Court of Lanarkshire against the pursuer at the instance of Messrs M'Dougall & Sons, china merchants, Glasgow, for the sum of £30, 15s. 0½d. sterling, to the loss, injury, and damage of the pursuer? (2) Whether, on or about 2d June 1884, the defender, in execution of a decree in absence in the said Sheriff Court, obtained on or about said date, at the instance of the said Messrs M'Dougall & Sons against the pursuer for the said sum of £30, 15s. 0½d., wrongfully arrested certain articles, or parts of articles of furniture, belonging to the pursuer, or caused the same to be arrested, to the loss, injury, and damage of the pursuer? (3) Whether, on or about 5th June 1884, the defender, in the knowledge that the foresaid decree in absence had been illegally and unwarrantably obtained, wrongfully published the pursuer's name, or caused it to be published in a publication called the 'Commercial Compendium' issued by or for him, as a person against whom the said decree had been obtained, in the form contained in the schedule annexed hereto, to the loss, injury, and damage of the pursuer?"

Argued for the defender;—The action was not relevant, and therefore the issues should be disallowed. There was no relevant averment on record of malice and want of probable cause, which was necessary in such a case. There was no specific averment of malice,[1] and that there was probable cause was evident.[2] The summons disclosed the fact that the debt existed on which the action was raised, and as matter of fact it was paid after the decree in absence was obtained. All that appeared on the averments in the present action was that the defender was employed as a debt collector to collect the debt, that failing to do so, he employed a law-agent to take the necessary steps, and that he raised the action. The defender was simply acting on instructions,—that was admitted in the action against M'Dougall & Sons (12 R. 1304); and he having put the matter into the hands of a law-agent, could not be held responsible for his error. If the defender was not liable in damages for thus putting the matter into the hands of an agent to raise an action for a debt due, the arrestments on the dependence and on execution, with which the first two issues dealt, were only steps in that process, and he could not be held responsible for them either.[3] It was not alleged that the defender gave the order for the use of the arrestments. Further, the pursuer here had discharged any claims against M'Dougall & Sons for these proceedings, and having discharged the principal he could not now go against the agent.[4] Such multiplication of actions for one delict ought not to be allowed.[5] There was no case in the books in which an action of this kind was allowed against a client and his agent where the agent was not a law-agent, though it was admitted that both the client and his law-agent were responsible for wrongous use of diligence, and that in such cases malice and want of probable cause need not be averred.[1] But the circumstances here took the case out of the rule of *Smith & Company's* case. On the third issue he argued;—The mere publication of the fact that a decree in absence had been obtained against a person could not afford a ground of action.[2] The records of such decrees were open to any of the public who chose to inspect them under the provisions of the Debts Recovery Act. In *Andrews'* [2] case, what made the action relevant was the "caution" issued along with the list of persons against whom decrees in absence had been obtained. If the defender was not liable for the use of the diligence or responsible for the raising of the action, he was simply in the position of any other member of the public who published a record of a proceeding in open Court.

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[1] Scott v. Turnbull, July 18, 1884, 11 R. 1131.

[2] Craig v. Peebles, Feb. 16, 1876, 3 R. 441.

[3] Wolthekker v. Northern Agricultural Co., Dec. 20, 1862, 1 Macph. 211, 35 Scot. Jur. 156.

[4] Ersk. Inst. iii. 1, 15.

[5] Stevenson v. Pontifex & Wood, Dec. 7, 1887, *ante*, p. 125.

Argued for the pursuer;—The action was relevant. The rule, settled by a long series of cases of which *Smith & Co.* v. *Taylor* [3] was the last, settled that both client and agent were responsible for wrongous use of diligence, and that malice and want of probable cause need not be put in issue; that only required to be done when the proceedings were regular and all that was bad was the claim on which they were taken. Here it was admitted that the citation was bad, and therefore that rule did not apply. It was not to the point that the foundation of the action was a just debt, because that was held not to be a relevant answer in *Smith & Co.'s* case. Further, the pursuer was out of the jurisdiction when the action was raised. The Supreme Court would have had jurisdiction in respect of the house of which the pursuer was tenant, but the Sheriff had none.[4] [LORD PRESIDENT.—The pursuer appeared in the action and did not plead want of jurisdiction.] That could not cure want of jurisdiction *ab initio*. Mere appearance could not create jurisdiction. The defender was really the client's agent here; he was looked to to collect the debt, and the action was in fact raised by him, *i.e.*, under his orders. The discharge of the principal did not free the defender. There was joint delinquency, and the delinquents could properly be proceeded against separately.[5] There was no parallel between this case and that of joint cautioners. On the third issue he argued;—The gravamen of the charge here was that the defender, in full knowledge of the fact that this decree in absence had been obtained against a person over whom the Sheriff had no jurisdiction, and who had not been duly cited, published the decree as if it had been properly obtained. Such publication was calculated to injure, and in point of fact did injure, the pursuer.

LORD PRESIDENT.—The main complaint which is made in this case by the pursuer is, that there has been a wrongous use of diligence, first as regards the arrestments used upon the dependence of the action raised against him at the instance of M'Dougall & Sons, and second with reference to the arrestments in execution of the decree in absence obtained against him on 2d June 1884. Now, it may be observed that the law-agent who carried through these proceedings is not made a party to the present action, and we know nothing about him. This action is directed solely against a debt collector who was employed by M'Dougall & Sons to collect the debt due to them by the pursuer. That this

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[1] Smith & Co. v. Taylor, Dec. 8, 1882, 10 R. 291.

[2] Andrews v. Drummond & Graham, March 5, 1887, 14 R. 568.

[3] 10 R. 291.

[4] M'Bey v. Knight, Nov. 22, 1879, 7 R. 255.

[5] Western Bank v. Baird, March 20, 1862, 24 D. 859, 34 Scot. Jur. 435.

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debt was justly due to M'Dougall & Sons there can be no doubt, for it was afterwards paid by the pursuer. But the objection to the proceedings upon which diligence was used is that at the time the action was raised the pursuer was not residing in Glasgow, and could not be cited in the Sheriff Court, except by edictal citation, perhaps not even in that way.

That the pursuer was not duly cited to this action appears from what followed to be quite clear, and the result of the defective citation was to render the subsequent proceedings invalid. Upon that matter there can be no doubt, and the decree in absence was accordingly recalled.

The peculiarity of the present action is its being directed against the defender, who was merely employed to collect the debt, and I have very great doubts in the circumstances about the relevancy of this claim. The office of a debt collector is a simple one. He receives instructions from the creditor to collect the debt, and perhaps there is implied in the instructions authority also to employ a law-agent if he finds himself unable otherwise to recover the money. The client is liable for everything done under his authority by the law-agent, while on the other hand the law-agent is liable for any mistake by which a third party has been subjected to a legal wrong.

In the present case the defender obeyed the instructions which had been given to him, and the proceedings which are objected to were carried through by a properly qualified law-agent acting upon information duly conveyed to him from M'Dougall & Sons. No doubt a mistake was made by this law-agent in connection with the present pursuer's citation, a mistake for which he is responsible, and so is his client. But the wrong which the present defender is said to have committed I can neither comprehend nor define, and I must say that I have not heard any intelligible definition of it as yet from the pursuer's counsel. What I have already said therefore disposes of the first and second issues.

With regard to the third issue—assuming that there was no fault on the part of the defender—and from what I have already said I do not think there was—upon what ground is he to be made liable if he neither committed the wrong nor was responsible for it? He is alleged to be the proprietor of a publication called the "Commercial Compendium," in which, among other things, are published decrees in absence, and the complaint is that the decree obtained against the present pursuer was published in it.

Now, assuming that the defender here is in no way liable for this decree having been obtained, then there is no ground for this third issue. The mere statement of the fact that decree in absence had been obtained against the pursuer is not a libel. The fact that decree in absence was obtained against the pursuer, and the publishing of this fact, is not a thing for which the defender can be made responsible. I am therefore for disallowing all these issues.

Lord Adam.—There is no doubt that in conformity with all the decisions a client and his law-agent are both responsible for any wrong suffered through the wrongous use of diligence. Such cases follow the ordinary rule in cases of damages. The servant whose neglect causes the wrong is liable, and the person instructing him is also liable, because the act was done by his authority. But the defender here is in neither of those positions. His position was accurately defined by Mr Darling when he said that he was an intermediary. He was acting under instructions to recover a debt; he took the necessary steps to do so, and having failed to recover it himself, he employed a law-agent to raise an

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action for it. I cannot see how he can be held liable. I therefore agree that the first two issues must be disallowed. The case would be different if it had appeared that the defender in raising this action had acted simply for his own purposes, and not on the instructions of his employer. There are some statements in the record which go to raise that question, but they were not insisted on.

I also agree that the third issue should be disallowed. All the defender did was to publish an extract of the decree in absence, and it probably appeared among a list of a dozen others. This issue, I think, depends upon the other issues, and as they are disallowed, I think this one must follow them.

LORD KINNEAR.—I think the averments on record come to nothing but this, that the defender, acting on instructions, employed a law-agent to raise an action for the recovery of a just debt, and that in the course of the proceedings raised by the law-agent there was at least one irregularity for which the client and the law-agent were both responsible. If the averments could be read as meaning that in course of these proceedings the defender had without authority interfered, and maliciously done all that is stated on record, the case would have been different. But I cannot find any averment on record that that was the case. He was just an intermediary—a messenger between the client and his law-agent—and to say that he made himself responsible for the agent's faults by acting in that capacity is, I think, out of the question.

The third issue necessarily follows the other two, and therefore falls to be disallowed.

LORD MURE and LORD SHAND were absent.

THE COURT disallowed the issues, and dismissed the action as irrelevant.

FODD, SIMPSON, & MARWICK, W.S.—P. MORISON, S.S.C.—Agents.

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Thoms v. Bain.

MRS M. I. J. MACLAREN OR THOM AND HUSBAND, Pursuers.—*Rhind—Craigie.*

DAVID DORWARD BAIN, Defender.—*Gloag—C. N. Johnston.*

Process—Mandatary—Extent of mandatary's powers.—A mandatary has no power to settle an action without special authority to do so.

1ST DIVISION.
Lord Lee.
B.

MR GEORGE R. THOM, a merchant in Calcutta, and Miss Margaret I. J. Maclaren were married in Dundee on 10th May 1887. On the day before the marriage Mr Thom received a letter from Mr David Dorward Bain, in consequence of which, on 4th July following, his wife and he brought an action of damages for slander against the latter, concluding for £5000. The letter contained the foulest accusations and statements of and concerning Mrs Thom, and was intended to prevent the marriage.

Mr and Mrs Thom appointed Mr Hugh Patrick Davidson, commission merchant, Dundee, to be "our mandatary in the action which we have instituted against David Dorward Bain, . . . and we authorise and instruct you to prosecute and follow forth said action in the Court of Session, and to employ Mr R. Mitchell, solicitor, Perth, and such Edinburgh agents and counsel as to you may seem best."

A minute of tender was subsequently lodged for the defender, stating "that he admitted the statements in reference to the pursuer Mrs Thom, contained in the letter addressed by him to the pursuer Mr Thom, to be

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unfounded, and he withdrew the said statements, and expressed regret that they had been made. He further tendered to the pursuers the sum of 100 guineas, with expenses, in full of the claim made by them in the present action."

A formal agreement was afterwards, on 22d December 1887, executed between Mr Davidson and Mr Bain, in which the retractation and apology contained in the minute of tender were repeated, and the defender agreed to pay £200 to the pursuers.

The case, which had been set down for trial at the Christmas sittings 1887, was accordingly postponed, but at the instance of the pursuers, who repudiated the agreement between Davidson as their mandatary and Bain, it was again set down for trial at the Spring sittings 1888.

The case having been enrolled by the defender in the Single Bills, he argued that it could not proceed, as it had been settled by the agreement above quoted.

The Court then appointed Davidson to state in a minute whether he had any special authority from the pursuers, by letter or otherwise, to make the agreement referred to, and what communications, if any, he had had from the pursuers since its date.

It appeared from the minute which was lodged in obedience to that order, that Davidson, who was a brother-in-law of the pursuer, had had no special authority to make the agreement.

The defender, however, argued, that even apart from special instructions, a mandatary had power to settle a case. His mandate gave him the whole control of the cause, he being the person within the jurisdiction representing the party to the cause.[1] He had the full authority of an agent, and although it was not settled that an agent had power to compromise a case, still there was nothing against it. The pursuers in any case would have their remedy by an action against the mandatary for exceeding his powers,[2] but the compromise must stand, and the trial must in any case be postponed.

The pursuers argued that without special powers a mandatary had no authority to settle a case, and there were no such special powers here.

Lord President.—The only question is whether the trial is to be postponed, but in considering this question it is necessary to determine whether the mandatary had power to enter into the compromise which was carried through between him and the defender. If he had that power there is an end of the case. If he did not have that power what he has done in the way of settling the case must be taken as not done, and there is no obstacle in the way of proceeding to trial with it. The mandate is in these terms,—"We hereby appoint you our mandatary in the action which we have instituted against David Dorward Bain, . . . and we authorise and instruct you to prosecute and follow forth said action in the Court of Session, and to employ Mr R. Mitchell, solicitor, Perth, and such Edinburgh agents and counsel as to you may seem best." It is contended that this mandate implied an authority to settle as well as to prosecute and follow forth the case. But it appears to me that it is no part of the office of an ordinary mandatary to give up a client's case. No one could contend that he was entitled to abandon it. But if he were entitled to settle it, he might do so on such terms as would virtually amount to abandonment. No doubt a mandatary might be fortunate enough to effect a good settlement for the mandant, but such a settlement, in order to be effectual, must be adopted by the mandant.

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[1] Overbury v. Peck, July 9, 1863, 1 Macph. 1058, 35 Scot. Jur. 604; Gunn & Co. v. Couper, Nov. 22, 1871, 10 Macph. 116, 44 Scot. Jur. 74; Begg on Law-Agents, 96, 97, and 98.

[2] Comrie v. Grigor, May 23, 1862, 24 D. 985, 34 Scot. Jur. 488.

The nature of the office of a mandatary has been frequently described, but nowhere better than in the opinion of Lord Kinloch in the case of *Gunn & Co.* v. *Couper* (10 Macph. 118),—"A mandatary without a mandate I consider to be none at all. I think with Lord Deas that the object of the proceeding is not only to make the mandatary liable for expenses, but also to secure a party responsible for the proper conduct of the cause, and for the availability of every step taken in Court. Without a mandate there is nothing binding on the alleged mandant." The definition of the duties of a mandatary is very fairly stated in these words. I do not think the power of a mandatary in the conduct of a case goes further.

I am of opinion that the agreement made by the mandatary in this case was not binding on his constituent, and that the pursuers are quite entitled to prosecute their case notwithstanding that arrangement. I say nothing about the nature of the arrangement, because I have thought it right to base my opinion upon broad grounds, but I can hardly conceive a settlement of a case less suitable to be made by a mandatary, without special authority in the absence of his principal, than that which has been embodied in this agreement. I never saw a more inadequate settlement. That being so, there is really nothing more to be said. The pursuers are entitled to go on with their case before a jury.

Lord Adam.—There are mandates and mandates by the law of Scotland. Where the principal is within the jurisdiction, a mandatary is sisted who is liable for the expenses of the cause. Then, where the principals are outwith the jurisdiction, mandataries are sisted—not with a view to expenses merely, but in order that there may be someone responsible for the conduct of the case. Such a mandatary, without special authority, has no power to settle a cause, and upon that ground I cannot agree with Mr Gloag's argument.

Lord Kinnear concurred.

Lord Mure and **Lord Shand** were absent.

The Court accordingly refused the motion.

Subsequently the case went to trial, when a verdict was returned for the pursuers, damages being assessed at £2500.

Begg & Bruce Low, S.S.C.—Henderson & Clark, W.S.—Agents.

No. 111.

Mar. 20, 1888.
Broad v. Edinburgh Northern Tramways Co.

Harrington Evans Broad, Petitioner.—*Murray*.
Edinburgh Northern Tramways Company, Respondents.—*Sir Ludovic Grant.*

Process—Judicial Factor—Vacation—Companies Clauses Consolidation (Scotland) Act, 1845, *sec.* 57.—The powers conferred upon the Court by the 57th section of the Companies Clauses Consolidation (Scotland) Act, 1845, for the appointment of an interim judicial factor cannot be exercised by the Lord Ordinary on the Bills during vacation.

1st Division.
B.

On 19th March 1888 a petition was presented to the Court by Mr Harrington Evans Broad, the holder of mortgages for £3370 and other sums due by the Edinburgh Northern Tramways Company, incorporated under the Edinburgh Northern Tramways Act, 1884, for appointment of an interim judicial factor upon the undertaking in terms of

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the provisions of the 56th and 57th sections of the Companies Clauses Consolidation (Scotland) Act, 1845.*

It was argued for the petitioner that the decision in the case of the *Glasgow, Garnkirk, and Coatbridge Railway Company*,[1] in which it was held that such an appointment could not be made in vacation, did not now apply, in view of the provisions of the 4th and 10th sections of the Distribution of Business Act, 1857 (20 and 21 Vict. c. 56).†

THE COURT were of opinion that the provisions of the Distribution of Business Act, 1857, could not be held to apply to the present case, which involved the exercise of a kind of diligence; but in respect that the company were represented at the bar and gave their consent, an interlocutor was pronounced appointing intimation, service, and answers, and, of consent, appointing Mr D. N. Cotton, C.A., to be interim judicial factor upon the undertaking and property of the company, and to receive the whole, or a competent part of the tolls, or sums liable in the payment of the interest payable on the mortgages mentioned in the petition, until the same, with all costs, shall be fully paid.

GRAHAM, JOHNSTON, & FLEMING, W.S., Agents.

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Seville Sulphur and Copper Co. Limited, v. Colvils, Lowden, & Co.

THE SEVILLE SULPHUR AND COPPER COMPANY, LIMITED, Pursuers (Respondents).—*Asher—Salvesen.*

COLVILS, LOWDEN, & COMPANY, Defenders (Appellants).—*Balfour—Ure.*

Ship—Seaworthiness—Charter-party—Exceptions—"Errors or negligence of navigation."—A charter-party of a steamship freed the owners from liability through "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and/or errors or negligence of navigation, of whatsoever nature and kind, during said voyage." The vessel was lost in consequence of the breakdown of her boiler through the presence of muddy water in it. In an action by the charterers against the shipowners for damages on account of the loss of the cargo, *held* (1) that it was proved that the muddy water had been put in the boiler before the commencement of the voyage; (2) (*dub.* Lord Young) that the presence of muddy water in the boiler when the ship started rendered her unseaworthy; and consequently (3) that the clause of exemption in the charter-party did not apply.

2D DIVISION.
Sheriff of Lanarkshire.
I.

BY charter-party, dated Glasgow, 2d September 1886, it was mutually agreed between Colvils, Lowden, & Company, owners of the steamship "Ethelwolf," and the Seville Sulphur and Copper Company, Limited, of

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* The 57th section of that Act provides,—"Every application for a judicial factor in the cases aforesaid shall be made to the Court of Session, and on any such application so made, and after hearing the parties, it shall be lawful for the said Court, by order in writing, to appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, as the case may be, until such interest, or until such principal and interest, as the case may be, together with all costs, including the charges of receiving the tolls or sums aforesaid, be fully paid . . ."

[1] The Glasgow, Garnkirk, and Coatbridge Railway Co. v. The Caledonian Railway Co., May 28, 1850, 12 D. 944.

† The 4th section of that Act provided (subsec. 4) that "petitions and applications for the appointment of judicial factors" should be disposed of before the Junior Lord Ordinary, and the 10th section provided that "the Lord Ordinary on the Bills during vacation shall have the same powers in regard to petitions for the appointment of . . . judicial factors as are by this Act conferred in relation thereto on the Junior Lord Ordinary as aforesaid."

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Glasgow, *inter alia*, "That the said ship, classed 100 A1, and being tight, staunch, strong, and every way fitted for the voyage, shall with all possible despatch proceed direct to (with outward cargo for owners' benefit), and thence to the port of Seville, and there, after being reported to charterers' agent as ready to receive cargo, load in turn in the customary manner, at the place ordered by said agent, a part cargo of cupreous sulphur ore and/or other lawful merchandise, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, furniture, &c. Being so loaded, the said ship shall proceed to one of the undernoted ports (as ordered on signing bills of lading), and there deliver the said cargo at the place and in the manner directed by the consignees, to whom the ship is to be addressed. . . . . Penalty for non-performance of this agreement—estimated amount of freight (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and/or errors or negligence of navigation of whatsoever nature and kind, during said voyage always excepted)."

In pursuance of this charter-party 350 tons of sulphur ore belonging to the Seville Sulphur and Copper Company were loaded on board the "Ethelwolf" at Seville. The following was the bill of lading:—"Shipped in good order and condition by J. S. Macdougall, as agent for The Seville Sulphur and Copper Company, Limited, Seville, on board the good ship 'Ethelwolf,' whereof Cargill is master, now in this port, 350 tons of sulphur ore, which are to be delivered (the act of God, the Queen's enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever excepted) in the like good order and condition at Swansea (North Dock), unto The Seville Sulphur and Copper Company, Limited, of 30 George Square, Glasgow, or to their assigns, freight and all other conditions as per charter."

The "Ethelwolf" sailed from Seville on 5th December for Swansea. On the 8th the "crowns" of her furnaces, which were within the boiler, began to come down. Had this been allowed to continue the boiler might have exploded. The engineer therefore had the boiler emptied, but, as the vessel from want of steam-power began to drift towards the shore, he, at the urgent request of the captain, refilled the boiler with water from the sea, which, being cold, caused the boiler, which was still hot, to shrink, and consequently to leak. This in turn lessened the steam-power until, on the 10th, it died away entirely. An attempt was then made to navigate the vessel under sail, but three out of the five sails which were set split. The vessel was ultimately abandoned.

In March 1887 the Seville Sulphur and Copper Company raised an action against Colvils, Lowden, & Company in the Sheriff Court at Glasgow, for payment of £1224, 12s. 6d., as the value of the ore shipped on board the "Ethelwolf."

The pursuers averred;—(Cond. 4) "When the 'Ethelwolf' sailed from Seville, as above stated, she was not in a condition fitted for the voyage, but was in an unseaworthy condition. In particular, her boilers and machinery were defective and out of order, the boiler leaking, the boiler pumps out of order and unable to supply the boiler properly with water. The feed pipe was leaking, and the water-gauge was defective and out of order. The bilges were full of dirt, and the bilge pumps choked with dirt, so that they could not pump the water out of the bilges, and the air-pump valves were broken. The sails were old and defective, and insufficient in number; and no spare sails, or canvas to repair the sails, were provided, and her bridge steering gear was out of order and useless." (Ans. 4) "Denied." (Cond. 5) "Further, the loss of said vessel and cargo was caused, or materially contributed to, by the negligence of the

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engineers in allowing the water in the boiler to run so low that the boiler was further damaged, and it became necessary to draw the fires." (Ans. 5) "Denied. Explained that shortly after leaving Seville the 'Ethelwolf' grounded on a mud-bank on the Guadalquiver river, and it is believed and averred that a quantity of mud then found its way into the boiler through the pumps; that subsequently the vessel experienced very severe weather, and that these causes combined to injure the boiler, tubes, water-gauge, and machinery, and ultimately to bring about the loss of the vessel. Explained further, that if the water in the boiler became low it was in consequence of this damage thus sustained by the water-gauge. Explained also that by the charter-party under which said ore was shipped, the act of God, and all and every other dangers and accidents of the seas and rivers, or errors or negligence of navigation, are excepted."

The pursuers pleaded;—(1) The defenders having failed to deliver the goods in question, in terms of their contract, and the pursuers having thereby sustained loss and damage to the amount sued for, decree ought to be granted as craved. (2) Said goods having been lost in consequence of the unseaworthiness of the "Ethelwolf" when she sailed on the voyage in question, decree should be granted as craved. (3) The pursuers having suffered loss and damage through the fault of the defenders, or of those for whom they are responsible, decree should be granted as craved.

The defenders pleaded;—(4) The loss of the "Ethelwolf" having been brought about by causes falling under the exceptions specified in said charter-party, the defenders ought to be assoilzied.

A proof was allowed.

In addition to the grounds of unseaworthiness specifically founded on by the pursuers on record, viz., the defective condition of the boiler and machinery and of the sails, another ground of unseaworthiness not specifically set forth on record by the pursuers, but suggested by the defenders' answer to cond. 5, came to bulk largely in the ultimate decision of the case. The pursuers maintained that, assuming the boiler to have been in other respects in a sound condition when the vessel left Seville (which on the evidence they denied) the breakdown of the boiler had been caused by the presence of muddy water in it; but they contended that it was proved that this muddy water had been taken on board at Seville before the homeward voyage commenced, and not at a mud bank fifty miles down the river, as the defenders averred. That being so, the pursuers contended that the vessel had left Seville in an unseaworthy condition. It was not disputed on either side that the presence of mud in the boiler had a tendency to cause it to break down (in the manner explained by the Sheriff-substitute in the passage from his note quoted below *), and would also tend to cause the water-gauge to shew "false water." The only question therefore on this branch of the case came to be whether the mud was taken on board at Seville or at the bank fifty miles down the river. The pursuers' evidence shewed that the water of the Guadalquiver is exceptionally muddy. The pursuers admitted that some water was taken in at the bank when the vessel grounded, and that it was muddy, but they maintained that the quantity of water then required was so small as to be of no appreciable importance. The defenders admitted that the boiler had been filled at Seville with water from the river, but they contended that as it had been taken in at high water the quantity of mud was inappreciable, and that, on the other hand, even a small quantity of water taken on board at the mud bank after the mud had been churned up by the efforts to get the vessel off, would be sufficient to cause the boiler, or at all events the water-gauge, to go wrong in the way alleged.

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* "The main question remains, What was the cause of the boiler of the 'Ethelwolf' and its pipes being in such a condition on the morning of 10th December that it was impossible to raise steam, and that the vessel had to be abandoned within a few miles of Vigo? The defenders account for this by saying that though the boiler and its accessories were in a good and seaworthy condition when the voyage was commenced at Seville, muddy water had to be taken into the boiler on the way down the Guadalquiver, the mud from which in the course of the voyage gradually settled on the crowns of the furnaces, causing them to become over-heated and sink, so that for fear of an explosion the engineer had to draw the fires; and it being necessary soon thereafter to get up steam again to save the vessel from drifting on the rocks, cold water had to be pumped in by the donkey-boiler from the sea, which, coming on the boiler-plates while still hot, made them shrink, and the boiler thus became

The result of the evidence on the other points is given in the interlocutor of the Sheriff-substitute.

On 20th September 1887 the Sheriff-substitute (Erskine Murray) pronounced this interlocutor:—" . . . Finds (2) that under the bill of lading and charter-party the defenders were freed from their obligation

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more and more leaky till it ceased to be fit for raising steam at all. The taking in of mud which caused all this was, they say, if not inevitable, an occurrence in the course of the voyage covered by the exceptions in the charter-party. To understand this argument some explanation is necessary.

"The boiler arrangement of the 'Ethelwolf' is represented in No. 18 of process. It will be observed that, as is the rule with marine engines, the three furnaces with their apparatus of tubes, &c., are all inside the circumference of the boiler. Water goes around, above, and under them. The tops or 'crowns' of the furnaces are a good deal below the ordinary level of the surface of the water in the boiler. The test water-gauge, or test-glass, at the side, shews (when in order) the height of the water in the boiler. The proper surface of the water space of the boiler should be somewhere within the range of the gauge. If there is no water in it the water may be too low; if it is all water, the water may be too high in the boiler, and air space or steam space too small. When once the boiler has been filled, the fires lighted, steam got up by degrees, and the engines started, the water that goes off in steam is for the most part returned to the boiler, after having been reliquified in the condenser. So the boiler mostly feeds itself when all is in order. But there is always a certain but small amount of waste of steam from various causes. To make up for this there is an auxiliary or supplementary feed pump, by which very small quantities of water can be added, so small as not to lower the temperature to an appreciable extent, or to let down steam. But if from any cause these feed pumps, principal or supplementary, are out of order, or if the boiler has had to be emptied for purposes of cleaning and repairs, there is nothing for it, if at sea, but to pump up cold sea-water into the boiler by means of the donkey engine. This does no harm, or very little harm, if done when the boiler is cold; but if done when the boiler, though not so red-hot as to explode, is still hot, it causes the metal to shrink, and the boiler therefore to leak severely. Again, it has to be remarked that a danger occurs when any portion of the boiler-plates gets red-hot, and is so when cold water is introduced; and the arched furnace crowns or tops, from their position, are naturally exposed to the greatest heat. As long as they are in contact with water, the heat passes through them into the water, but if the water in the boiler is allowed to get so low that the empty surface of the crowns is uncovered, or if a thick coating of mud is allowed to accumulate on them between them and the water, the heat no longer passes through, but tends to make them red-hot. The hotter they get the softer they get, and the greater tendency they have to sink, and to yield to any pressure from within the boiler; and if they yielded to any considerable extent they might crack, and the boiler become useless, if it did not explode."

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to deliver in case of loss from dangers of the sea, or errors or negligence in navigation during the voyage: Finds (3) that, on the whole, it appears that when the 'Ethelwolf' started from Seville on 5th December last she was not (whether from the weakly condition into which the boiler and its pipes had been allowed to get or from the boiler having been filled with muddy water at Seville, the mud from which constituted an element of danger to the boiler) in what constitutes a seaworthy condition in the eyes of the law: Finds (4) that on her voyage down the river Guadalquiver she having stuck for half-an-hour on a bank and lost some steam, more muddy water had to be pumped into the boiler: Finds (5) that she proceeded on her voyage till, on the 7th and 8th, she experienced some rough weather with north-west winds off the coast of Spain, near Cape Finisterre: Finds (6) that the gauge-glass which ought to shew the depth of water in the boiler got out of order in consequence of the mud in the water, and on the afternoon of the 8th the furnace crowns began to sink, which shewed either that they had got encrusted with mud or that the water in the boiler had gone dangerously low: Finds (7) that there can be no doubt that in reality the water in the boiler had got very low and that much had been lost by leakage: Finds (8) that the engineer at once drew the fires either with the intention (which he was unable to carry out from the position of the ship) of emptying and then repairing the boiler, or simply of enabling him to refill the boiler with cold water pumped in from the sea without danger of explosion: Finds (9) that, the captain hurrying him to get up steam in consequence of the dangerous position of the ship, he refilled the boiler with cold water from the sea while it was still hot, which caused a shrinkage of the tubes and greatly increased the leakage, so that although, by the early morning of the 9th, he was able to get up steam, it was only to about one-third of the proper power: Finds (10) that after running about ten miles out to sea the captain resolved to steer for Vigo, and accordingly turned the ship's head to the south-east: Finds (11) that the steam power gradually failed (the leakage of the boiler increasing), till on the morning of the 10th it failed altogether, when they were only a few miles from Vigo, but unfortunately there was a thick fog, and though the wind was not high there was a strong sea from the west: Finds (12) that during the last few days when the steam power was weak or in abeyance, an attempt had been made to utilise the sails of the 'Ethelwolf' to get her out of danger; but though some of them were of a little use the most of them were found to be so weak that they either gave way at once or had to be repaired before they were used . . . Finds on the whole case and in law (1) that (for the reasons stated in the note annexed hereto) the causes of the loss of the 'Ethelwolf' and its cargo do not fall under the exceptions in the bill of lading and charter-party; (2) that the 'Ethelwolf' was not (in a legal sense) seaworthy at the time of her departure from Seville: Therefore repels the defences, and decerns against the defenders, in terms of the prayer of the petition."

The defenders appealed to the Court of Session, and argued;—The contract here was contained in the charter-party and the bill of lading taken together, not in the bill of lading only.[1] The case of *Russell* v. *Niemann*,[2] founded on by the other side as an authority to the contrary, was a case with the holder of the bill of lading, not with the charterer. "Errors or negligence of navigation" were therefore within the exceptions. The question thus came to be whether the cargo had been lost through the vessel's unseaworthiness before the voyage from Seville commenced, or through an error or negligence of navigation. To take the breakdown of the boilers first. There were two questions there, viz.—first, what in point of fact was the cause of that breakdown? and secondly, did that cause in law amount to unseaworthiness? The *onus* was on the pursuers to prove unseaworthiness.[1] Now, the only unseaworthiness in the machinery which they averred on record—that it was defective and out of order in certain respects specified—had not been instructed by the proof. Their other theory on this head—that the breakdown of the boiler was due to the presence of mud in the water taken on board at Seville—was equally unproved. All that the evidence, fairly read, shewed was that muddy water was taken on board at some time or another, and the *onus* being on the pursuers, it was for them to shew when. This they had failed to do. But even if the pursuers' evidence, such as it was, shewed that the river at Seville was unusually muddy, that evidence had been incompetently admitted, there being no corresponding averment by the pursuers, and the defenders, having had no notice, were not called on to meet it. The defenders believed that they could easily prove that the river at Seville was not muddy to any appreciable extent. They did not, however, desire an opportunity of proving that, except in answer to any evidence which might be led by the pursuers if they should ask and obtain leave to amend their record. But granting that the river at Seville was unusually muddy it was not easy to see how that could produce the result contended for by the pursuers. For the mud would have had time to sink to the bottom of the boiler before the vessel started on her voyage, and how it afterwards came to rise to the crown of the furnaces was hard to understand, but that it had done so was a necessary part of the pursuers' theory. The defenders' theory was much more consistent with the probabilities of the case. They maintained that the mud which did the damage was taken on board at the bank after the voyage had commenced, and that it had either encrusted the furnace crowns in the way explained by the Sheriff-substitute, or at least had clogged the water-gauge, causing it to shew "false water" and so to deceive the engineer. In either view an error of navigation had been committed. But taking it that the pursuers' view of the facts was proved to the full, the error was still one of navigation, and not due to the unseaworthiness of the vessel. It could not be both. An error or negligence of navigation meant—and the words "during the voyage" had no restrictive effect—an error or negligence in connection with the conduct of the voyage, but not necessarily an error or negligence committed when the vessel was actually in motion.[2] It was enough if it took place during the preparations for the voyage, provided it did not create a structural fault in the vessel, and by structural fault was meant such a fault as could not be rectified during the voyage. In *Steel & Craig*,[3] the fault could not have been so rectified, and the plea of unseaworthiness was in consequence sustained. Here it could be proved that the boiler could have been cleaned out at sea—not perhaps in the actual circumstances of the case—that was another matter; but had the vessel been well out to sea, or had the wind been blowing off shore instead of on shore, the defect

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[1] Scrutton on Charter-Parties, p. 33.

[2] Russell v. Niemann, June 25, 1864, 17 C. B. (N.S.) 164, 34 Law Jour. C.P. 10.

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[1] Boyson v. Wilson, March 6, 1816, 1 Starkie, 236; Steel and Craig v. State Line Steamship Co., July 20, 1877, 4 R. (H. L.) 103; Pickup v. Thames Insurance Co., May 16, 1878, L. R., 3 Q. B. D. 594; Xantho, July 14, 1887, L. R., 12 App. Cases, 503; Bell's Comm. vol. i. (7th edn.), 597, 663, 664.

[2] Carmichael & Co. v. Liverpool Indemnity Association, May 19, 1887, L. R., 19 Q. B. Div. 242; Good v. London Protecting Association, June 23, 1871, L. R., 6 C. P. 563; "The Warkworth," June 28, 1884, L. R., 9 Prob. Div. 145.

[3] Steel & Craig v. State Line Steamship Co., July 20, 1877, 4 R. (H. L.) 103.

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could have been removed with ease. The defenders had had no opportunity of proving that. The seaworthiness of a vessel could not depend on the accident of her position, and of the wind being favourable to the performance of a necessary operation. As regarded the alleged defect in the sails the evidence shewed, in the first place, that the sails were fairly good sails; and secondly, that the best of sails could not possibly have saved their steamer in the actual circumstances of the case. A sailing vessel might probably enough have been so saved, but to say that this steamer was unseaworthy because she could not be navigated under sail alone in such weather as there was here was in effect to condemn most modern merchant steamers as unseaworthy.

Argued for the pursuers;—The bill of lading superseded the charter-party, and the general reference to the charter-party in the bill of lading only imported conditions *ejusdem generis* with those immediately preceding the reference and not the whole conditions of the charter-party.[1] But taking it to be a question on the charter-party, the defenders had failed to deliver the cargo; the *onus* consequently was on them to shew that they were within the exceptions.[2] They had failed to do so. The pursuers did not desire to amend their record. It was not for them to prove unseaworthiness, but for the defenders to prove seaworthiness. The evidence in the first place shewed that the boiler was nearly worn out, and that, of course, was unseaworthiness, but if that were held not proved then the undoubted break-down of the boiler must have been due to something else, and it was admitted on both sides that that something else could only be the presence of mud in the boiler, which either obscured and choked the gauge-glass, or heated the furnace crowns, one or both, and it was immaterial which. The important question was when was the muddy water taken on board? The pursuers said at Seville, and it was undoubted that the boiler was filled there, that it was filled with water from the river, and that the river was exceptionally muddy. The defenders said the mud was taken on board some fifty miles down the river, but the vessel was at the most only three quarters of an hour on the bank, and her boiler was already nearly full. That defence failed therefore. But it was further argued by the defenders that even if the mud which did the damages was taken on board at Seville still that was an error of navigation. It certainly was not an error of navigation "during the voyage." But apart from that specialty, the rule was that if a vessel had in her before starting on her voyage anything which required only moderately bad weather to become a source of danger to her or her cargo she was unseaworthy, and seaworthiness was an implied condition, notwithstanding the exception of errors and negligence of navigation.[3] That rule applied here. Then as regarded the sails the evidence plainly shewed that they were worthless. It might be that good sails would not have saved the ship; but the pursuers were entitled to that chance. The vessel was a vessel professing to have a certain amount of sails, and to be seaworthy she must have these sails in an efficient state.

At advising,—

LORD JUSTICE-CLERK.—The parties to this action are respectively the Seville

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[1] Russell v. Niemann, June 25, 1864, 17 C. B. (N. S.) 164, 34 Law Jour. C. P. 10.

[2] Moes, Moliere, & Tromp v. Leith and Amsterdam Shipping Co., July 5, 1867, 5 Macph. 988.

[3] Steele & Craig v. State Line Steamship Co., July 20, 1877, 4 R. (H. L.) 103; Kopitoff v. Wilson, Feb. 23, 1876, L. R., 1 Q. B. Div. 377; Tattersall v. National Steamship Co., March 11, 1884, L. R., 12 Q. B. Div. 103; "The Glenfruin," March 31, 1885, L. R., 10 Prob. Div. 297.

Sulphur and Copper Company, who are the pursuers, and the owners of a steamship called the "Ethelwolf," who are the defenders. The pursuers demand a sum of £1224, 12s. 6d. as the value of a cargo of minerals shipped by them on board the "Ethelwolf" for delivery at Swansea, which obligation they allege that the defenders failed to fulfil.

The defenders admit that they received the goods on board, and that they became bound to deliver them in terms of the charter-party founded on. But they maintain that as the vessel was lost on her voyage from causes for which they are not responsible, they are not liable for the value of the goods.

The contract of carriage is constituted by charter-party, the terms of which are substantially these,—It was agreed "that the said ship, classed 100 A1, and being tight, staunch, strong, and every way fitted for the voyage, shall with all possible despatch proceed direct to (with outward cargo for owners' benefit), and thence to the port of Seville, and there, after being reported to charterers' agent as ready to receive cargo, load in turn in the customary manner, at the place ordered by said agent, a part cargo of cupreous sulphur ore $^{\text{and}}_{\text{or}}$ other lawful merchandise, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, furniture, &c. Being so loaded, the said ship shall proceed to one of the undernoted ports (as ordered on signing bills of lading), and there deliver the said cargo at the place and in the manner directed by the consignees, to whom the ship is to be addressed . . . Penalty for non-performance of this agreement—estimated amount of freight (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, $^{\text{and}}_{\text{or}}$ errors or negligence of navigation of whatsoever nature and kind during said voyage always excepted)."

It is maintained for the defenders that the circumstances under which this vessel was lost substantially fall under the exceptions contained in the charter-party. As the vessel was lost and the cargo with it, the contract of carriage was of course not implemented, and the shipowners must in the first instance discharge themselves of their liability. It is entirely a case between carrier and customer. There is no question with insurers.

The immediate cause of the loss of the vessel does not admit of dispute. She sailed from Seville on the 5th of December 1886 for her destination at Swansea. On the 8th her boilers gave symptoms of leakage, and it was found necessary to extinguish the fires, and after some temporary attempts to get up steam they finally gave way on the 10th, and in spite of an unsuccessful attempt to run to Vigo under canvas, the crew were obliged to abandon the vessel, and were taken off by another steamer, and she became a total wreck.

In this state of the facts the pursuers maintain that the vessel was unseaworthy, first, from the state of her boilers, and secondly, from the imperfect condition of her sails. The defenders, on the other hand, contend that the derangement of the boilers arose after the commencement of the voyage, and was within the exception in the charter-party, while they deny that the state of the sails was defective, or in any way led to the loss of the ship.

In regard to the last point, I may as well dismiss it with the remark that whatever was the condition of the sails, it was not the primary or even a contributory cause of the wreck. A steamship is not meant to be navigated under canvass alone, although it sometimes may be so, but in this instance it seems quite clear that, however good the sails had been, they could not, from the position of the vessel and the state of the wind and weather, have availed to avoid

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the calamity. The cause therefore of the loss of the vessel was the failure of her steam power.

On this matter we have a very large, intelligent, but conflicting body of evidence. It is not disputed that the steam-producing machinery had suffered injury, although the parties differ as to the time and the cause. When the fires were blown down on the 8th of December the leakage was admittedly such as to render an explosion probable if not inevitable. It does not appear that although the boiler had been under suspicion, even before the arrival of the ship at Seville, there was when she left any material defect in her construction, but before she had sailed for three days the engineer and his assistants began to see that there was something materially wrong. The gauge-glass, which is constructed so as to indicate the height of the water in the boiler, was found to be erroneous in its indications, to shew the water muddy, and to exhibit "false water," as the technical term seems to be. At last no doubt remained. The boiler was leaking profusely, and on the 10th came the result I have described.

The contending parties account for this occurrence differently, although it is not disputed that the presence of mud in the boilers and connections, which is admitted, had a tendency to produce the results which ensued.

On this part of the case the defenders maintain that the muddy water which was introduced into the boilers, and was the cause of the mishap, was taken in owing to the steamer having partially grounded on a mud bank in the river about fifty miles from Seville, and that this cause was within the exception contained in the charter-party, having occurred in the course of the voyage. On the other hand, the pursuers allege that the night before the vessel sailed from Seville her boiler, which had been emptied for cleaning, was refilled with water from the Guadalquiver, a river notoriously muddy.

It is not disputed that the ship was delayed by partial grounding on the mud bank in question on the morning of the 5th of December, and that some of the water of the river was at this time supplied to the boiler after leaving Seville. The question of fact therefore on which the case turns is, whether the water with which the boilers were entirely filled at Seville before she started was muddy, and produced the results which turned out so disastrous.

I think that on the evidence no doubt remains on this matter. The testimony of Thomson, the engineer, is sufficient to establish it. He describes the steps which he took by blowing down and cleaning out the boiler at Seville, and then he adds that "at ten o'clock at night I filled the boiler after consultation with the captain. The tide was about high-water then," so he filled it from the river. That was on the night of Saturday the 4th. They sailed next day, Sunday, the 5th of December. In re-examination he says—"We had muddy water in the Gaudalquiver. It was very bad, and it was worse at low tide. Did you get a message from the owners about it?—Yes, but it was too late. I had the boiler blown down before the captain told me."

There is ample evidence from witnesses of experience that the presence of mud in the boiler was quite sufficient to account for such failure of the machinery as occurred here, as well as for the time which elapsed before the ultimate results made themselves known. Without going into further detail I am of opinion that this steamship was lost, and with it the cargo, by reason of the failure of the propelling power; and that this failure was caused by the action of mud which had been introduced into the boiler when it was filled at Seville with muddy water from the river Guadalquiver the night before the voyage commenced.

The only question which remains is, whether the ship was seaworthy when she sailed from Seville on the morning of the 5th December. I am of opinion that she was not; and if I am right in attributing the failure of her motive or propelling power to the muddy water of the river at Seville, this steamship was not fit to go to sea when she sailed, as the result only too clearly proved.

I do not think it necessary to go into the general question as to what constitutes unseaworthiness. A steamship, the boilers of which will not generate steam, is not capable of navigation or carriage with safety to life or cargo. This is a stronger case than that of *Steel & Craig*, for in that case there was no structural defect, only careless stowage of the cargo, which prevented one of the port-holes from being closed. But the propelling power of a sea-going ship is of its essence, and if this vessel for the time had none it could not be seaworthy.

No doubt the injury to the boiler was the unthinking or ignorant act of the engineer, and did not arise from organic or radical defect. It was accidental, and not structural. But so was the stowage in the case of *Steel & Craig*, for but for the temporary impediment caused by the cargo the construction of the vessel was not in fault.

It makes no difference in my opinion that the defect was in the machinery and not in the fabric of the vessel. The power of locomotion on the waters is as much of the essence of a seagoing ship as the capacity of flotation, and a steamer without steam is as little the vessel which the charter-party describes, and which the defenders undertook to furnish, as a sailing vessel without sails would have been.

Lord Young.—I understand my brethren to agree in the judgment which your Lordship has proposed, and with such a concurrence of opinion I should not perhaps venture to express any doubt, but as I had some doubts, and as these doubts have not been entirely removed, I trust I may be excused if I give expression to them, although I confess that a judgment which is supported by such a concurrence of opinion is probably, almost certainly, the right one.

The Sheriff-substitute's interlocutor consists of a number of findings of fact, fifteen I think, and two of law, but I think the material finding in fact is the third—"Finds (3) that on the whole it appears that when the 'Ethelwolf' started from Seville on 5th December last she was not (whether from the weakly condition into which the boiler and its pipes had been allowed to get or from the boiler having been filled with muddy water at Seville, the mud from which constituted an element of danger to the boiler) in what constitutes a seaworthy condition in the eyes of the law." Then the corresponding finding in point of law is "that the 'Ethelwolf' was not (in a legal sense) seaworthy at the time of her departure from Seville." I think that the opinion of the Sheriff-substitute and of your Lordships is that this unseaworthiness arose not from any defect in the machinery of the vessel, but from the fact that the boiler had been filled with very muddy water taken from the river Guadalquiver before the steamer left Seville, and the question of fact upon which I have felt the doubts I have referred to is whether the evidence shews that there was unseaworthiness before the commencement of the voyage in this respect.

I have to notice as introductory to what I wish to say that the charter-party, which was entered into in Glasgow, provides that the vessel should with all possible dispatch proceed to the port of Seville, should there take in a cargo, and should then proceed to one or other of certain ports named; and then there

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is the clause upon which the defenders found, guarding them against liability arising from any "errors or negligence of navigation of whatsoever nature and kind during said voyage." Under this charter-party the vessel did proceed to Seville but before she could start thence on her return voyage it had to be seen to that there was water in her boiler, and she had her boiler filled with water from the Guadalquiver. The Guadalquiver is a notoriously muddy river, but still the ships lying there do take the water from the river into their boilers. Of course the muddy state of the river may be so bad at certain times that the shipmaster instead of taking in the water from the river should send elsewhere for it. Whether this mistake of taking water from the river amounts to an error of navigation in the sense of the charter-party is a question which has never been decided. I think it was a mistake to take water into the boiler in a muddy condition, and the evidence shews that this muddiness caused or contributed to the loss of the ship, but I have a doubt as to whether it brought about what the Sheriff-substitute calls unseaworthiness in "a legal sense." The ship was seaworthy when she arrived at Seville, she was seaworthy down to the moment when those in charge of her filled the boiler with muddy water, and that the presence of that muddy water in her boiler constituted unseaworthiness is a proposition by no means clear to my mind. If it is a case of unseaworthiness as distinguished from an error in navigation, then the law is quite clear, that the shipowner is liable for any loss or damage occasioned to the cargo by such unseaworthiness. I have no doubt about that, and none was suggested to us. My only doubt is as to whether by taking in muddy water from the river this steamer became an unseaworthy vessel.

Lord Craighill was absent through illness, but the Lord Justice-Clerk intimated that he concurred.

Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—"Find in fact (1) that in December 1886 the pursuers shipped at Seville on board the steamship 'Ethelwolf' belonging to the defenders 350 tons of sulphur ore of the value of £1224, 12s. 6d., to be carried to Swansea and delivered there to the pursuers or their assigns as stipulated between the parties in the charter-party and relative bill of lading; (2) that by the said charter-party and bill of lading the defenders undertook to carry the said goods and deliver them at the port of their destination, the Act of God, fire, and all and every other dangers and accidents of the seas, rivers, $\frac{\text{and}}{\text{or}}$ errors or negligence of navigation of whatsoever kind during the voyage being excepted; (3) that before the commencement of the voyage from Seville the boiler of the said ship was filled with muddy water from the river Guadalquiver, which, after the ship had put to sea, caused leakage of the boiler, and ultimately failure of the steam power, in consequence of which the ship became unmanageable, was abandoned, drifted on rocks near Vigo on the coast of Spain, and became a total wreck: Find in law that the cause of the loss of the ship does not fall under any of the exceptions of the charter-party and bill of lading, and that the defenders are liable to the pursuers in payment of the value of the said goods: Therefore dismiss the appeal: Affirm the judgment of the Sheriff-substitute appealed against: Of new decern in terms of the conclusions of the petition: Find the pursuers entitled to expenses in the inferior Court and in this Court," &c.

Boyd, Jameson, & Kelly, W.S.—Webster, Will, & Ritchie, S.S.C.—Agents.

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Philp v. Assessor for Rothesay.

ANDREW PHILP, Appellant.—*A. S. D. Thomson.*
THE ASSESSOR FOR ROTHESAY, Respondent.—*Ure.*

Valuation Acts—Method of valuation—Hydropathic Establishment—Proof—Competency of compelling proprietor and occupant to disclose his profits—Valuation Act, 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 10.—The valuation (on the basis of capital cost) of a hydropathic establishment in the occupation of its proprietor *reduced*, on a comparison with the valuation of similar establishments throughout Scotland, from £1120 to £850.

Opinion (*per* Lord Fraser) that the proper method of valuing such an establishment, when in the occupation of its proprietor, was to ascertain the profits which he made, and that under the 10th section of the Lands Valuation Act, 1854, he might be compelled to disclose these profits, and to produce his books.

Opinion on this point reserved by Lord Lee.

Lands Valuation Appeal Court.
Lord Lee.
Lord Fraser.

Case No. 87.

ANDREW PHILP of the Glenburn Hydropathic Establishment, Rothesay, appealed to the Magistrates and Town-council of Rothesay against an entry in the Valuation-roll for the burgh of Glenburn House and grounds (the Hydropathic), of which he was entered as proprietor and tenant at a yearly value of £1300, and craved that the valuation should be reduced to £600.

The Assessor stated that he had arrived at £1300 as the value of Glenburn House, baths, and grounds, by taking the cubic contents of the main building at 9d. per cubic foot, the baths at 4d., and adding for chimney stalk £61, for pavilion £120, and for steam-engine £100, making the total capital cost £17,396, which, at 7½ per cent, brought out an annual value of £1304, 14s., besides the estimated rent of the grounds, which he took at £51. In the absence of evidence as to any other similar subjects actually let, either in the county or out of it, or of a statement of profit and loss, which he had asked for from Mr Philp, he maintained that this was an equitable mode of arriving at the valuation of Glenburn, 7½ per cent on the capital cost being recognised as a fair return for a commercial property such as Glenburn.

The appellant maintained that it was not a proper mode of arriving at the valuation to adopt the principle of estimated cost—the method adopted by the Assessor—and that the only just and equitable principle for fixing the annual value of a hydropathic establishment in the occupancy of the proprietor was by a fair comparison with other similar establishments.

A proof was allowed. The material results of the evidence sufficiently appear from Lord Fraser's opinion.

The Magistrates and Council found that, taking into account the situation and surroundings, superficial area, and character of the appellant's premises, and the whole circumstances of the case, the fair annual value of the Glenburn House, baths, and grounds was £1120, at which sum they assessed the same, and to that extent they sustained the appeal.

The appellant took a case. The above narrative is taken from the case.

At advising,—

LORD FRASER.—I am obliged at the present, as at former sittings of this Appeal Court, to express my disappointment that we have not got that kind of evidence that would enable us to fix with somewhat like precision what a tenant would pay for the Glenburn Hydropathic Establishment if that house were let from year to year. Such is the criterion of value laid down by the 6th section of the Valuation Act. As I have repeatedly stated, the only elements that would be taken into consideration by an intending tenant are, what profits would be made out of the establishment, and this the intending tenant would endeavour to find out from the tenant that preceded him. Knowing the amount of such profit, he would be enabled to state what rent he could afford to pay. Instead of this direct source of knowledge, what this Court has been hitherto treated to is indirect sources of the most unsatisfactory kind. We have been favoured in a number of these cases with the cost of the building—what has the intending tenant to do with that? Also, with the superficial area or floor space in it, and with a comparison between it and similar or dissimilar establishments elsewhere, and the valuations put upon these. Where a man is owner and tenant at the same time of a hydropathic establishment, of a hotel, of a distillery, one can understand why he is unwilling to disclose his profits before a meeting of commissioners or magistrates of a burgh; but he need not do so to these bodies, if he satisfy the assessor, by shewing him his books, what are the real profits that he makes, and the assessor has power to compel him to make such disclosure, for by the 10th section of the statute it is declared that "It shall be competent to the Commissioners of Supply and Magistrates of burghs respectively, in the hearing of appeals under this Act, to cite and examine the parties and their witnesses on oath, and to call for all papers and documents which they may deem necessary." Under this provision, the information which I desiderate might have been obtained. Mr Philp was examined as a witness for himself, and he might have been asked, and could have been compelled to state, what were the profits that he makes; and his books might have been called for, in order to support or check his statements. But this was not done, and other courses were adopted. The cost of the building was estimated by the Assessor, and he took 7½ per cent of that cost as indicating the annual value. Also, evidence was led as to the superficial flooring, not merely of the Glenburn Hydropathic Establishment, but of hotels in Rothesay, and of hydropathic establishments elsewhere, and of their lettable rooms, and a comparison is made between the Glenburn establishment and these others. I reject altogether the mode adopted by the Assessor of taking a percentage of the cost of the building; and we are shut up to the only other kind of evidence before us, viz., comparison with other establishments elsewhere. I reject such evidence, so far as it is sought to be instructed as between hydropathic establishments and hotels. These two classes of institutions stand upon a totally different footing. An hotel has sources of profit which a hydropathic establishment does not enjoy; and a hotel upon the main street of Rothesay is better situated for traffic than the Glenburn Hydropathic Establishment, situated half a mile from the business part of the town. The profits made upon liquors consumed in hotels are the main source of income which enable the innkeepers to pay heavy rents, and this the owner of a hydropathic establishment does not possess.

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* Decided March 16, 1888.

Thus, one is shut up to a comparison of the valuation of one hydropathic establishment with another; and the parties here have been very industrious in presenting the Court with information upon that subject, which must have been obtained at considerable cost. Two states have been laid before us, the one shewing the amount of flooring in the Glenburn establishment and in various other hydropathic establishments, and the other shewing the number of lettable rooms in each. There are, in some of these establishments, rooms which are not lettable, such as billiard-rooms, reading-rooms, recreation-rooms, &c., of

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a larger size in some than in others, and which make no pecuniary return. Therefore, I think that the comparison ought to be between the number of lettable rooms in each, of which there are in the Glenburn establishment ninety-six. The Magistrates have fixed the valuation at £1120. Now, this is fixing it at a higher value than any other of the eleven cases which have been brought before us. For example, Peebles has 119 lettable rooms, and the valuation there is £800; Kilmalcolm has 127 lettable rooms, and the valuation is £435; Shandon has 115 lettable rooms, and the valuation is £1100; Moffat has 156 lettable rooms, and the valuation is £800; Craiglockhart has 106 lettable rooms, and the rent payable is £600; Dunblane has 120 lettable rooms, and the rent payable is £400. Now, from these cases, it will be seen that the Glenburn Hydropathic Establishment is put at a higher rate than any one of them, and this is said to be justified by the circumstance that Rothesay is situated favourably for a hydropathic establishment. In regard to this point we have little or no evidence to guide us. All I will say is, that I do not think that any advantages which Rothesay may enjoy, if it does possess them, will justify the unequal treatment which it receives when compared with the other cases; and I am therefore of opinion that the valuation should be reduced to £850.

LORD LEE.—I concur in the result arrived at by Lord Fraser, but I cannot regard profits as being so important a factor in the ascertainment of lettable value as I understand Lord Fraser to consider it. I wish also to add that I give no opinion upon the question, how far owners and occupiers of business premises are liable to be called upon to shew their books, and disclose their incomes and earnings for the purposes of the Valuation of Lands Act.

THE JUDGES were of opinion that the determination of the Magistrates and Council was wrong, and that the valuation should be reduced to £850.

SMITH & MASON, S.S.C.—JOHN LATTA, S.S.C.—Agents.

No. 114.

COLIN BERWICK, Appellant.—*Party.*
THE ASSESSOR FOR FIFESHIRE, Respondent.—*Rankine.*

Mar. 20, 1888.*
Berwick v. Assessor for Fifeshire.

Valuation Acts—Valuation—Farm let for part of year as grazings and otherwise unlet.—A farm which was entirely laid out in grass was let annually for part of the year—from Whitsunday to Martinmas—as grazings, and during the rest of the year was in the proprietor's own hands. For the year 1887 the rent of the grazings was £301, and the valuation of the farm as fixed by the Valuation Committee £400. On appeal *held per* Lord Lee that the valuation of the Valuation Committee was right, *per* Lord Fraser that the valuation ought to be reduced to £301, the rent received for the grazings. The Judges being divided in opinion the valuation *stood.*

Lands Valuation Appeal Court.
Lord Lee.
Lord Fraser.

COLIN BERWICK, judicial factor on the lands of Bonnytown, appealed to the Fifeshire Valuation Committee against an entry in the Valuation-roll of the county for 1887 of the farm and house of Bonnytown, of which he was entered as proprietor and occupier at a yearly rent or value of £500.

Case No. 88.

The farm of Bonnytown—in extent 300 acres—was under the management of the appellant as judicial factor. The whole lands were laid down in grass, and the grazing on the fields was annually let by public roup for the grazing season, Whitsunday to Martinmas. The total rents for

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* Decided March 16, 1888.

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which the lands were let for the grazing season 1887 amounted to £334, 9s. 2d. Out of that the appellant had to pay outlays (in 1887) amounting to £33, 8s. 11d.

The appellant maintained that the actual rent of the farm for the current year, under deduction of the outlays, viz., the sum of £301, 0s. 3d., should be entered in the Valuation-roll as the annual value of the farm. He led no evidence as to the present letting value of the farm for ordinary agricultural purposes.

The Assessor maintained that he was not bound to regard the rent obtained for the grazing season in any one year (which did not take into account the wintering) as the annual value of the farm, but that he was entitled to enter the rent at which, one year with another, the lands might reasonably be expected to let for ordinary agricultural purposes. He admitted that the grass rents received for a series of years—say three or four—would have been helpful in ascertaining the present value, but the appellant's agent was unable to give any information except as regarded 1887. He referred to the undernoted cases[1] as confirming this basis of valuing grass lands.

The Committee fixed the annual value of the farm at £400, "being a reduction of upwards of forty per cent on the annual value appearing in roll of 1878-79."

The appellant took a case. The foregoing narrative is taken from the case, which further stated,—"During the last three years the annual value of most of the farms in Fife in the occupation of proprietors has been considered by the Valuation Committee, with the assistance of skilled agriculturists—tenant farmers—in the various districts, and they have adopted in most cases the value as appearing in the Valuation-roll for 1878-79, under deduction of from fifteen to twenty-five per cent, according to the special circumstances of the different subjects. This principle has been adopted, as the reductions in rents of let farms during the past few years in Fife have been at least to that extent. In the present year the Committee extended the abatement, owing to the continued agricultural depression, and in many cases have allowed thirty per cent, and in a few special cases even a little more, from the rents and values of 1878-79."

At advising,—

Lord Lee.—It was necessarily conceded by the counsel for the appellant that the subjects are properly entered as in the occupation of the proprietor. The statute authorises the Assessor to recognise "rent" only where the lands are "let for a yearly rent"; and it has been repeatedly decided that land let as grass parks for the grazing season is not in this position. Indeed the practice is quite settled. So that even if the subjects had consisted entirely of grass parks, let as stated by public roup for the period from May to November, it was the duty of the Assessor to value them according to the rule stated in the beginning of clause 6, viz., as unlet subjects, as to which he has to ascertain the "rent at which one year with another such lands and heritages might in their actual state be reasonably expected to let from year to year."

The question then is, whether the Commissioners have gone wrong in arriving at £400 as the rent at which they might so be expected to let? The cases of *Maitland* (20 D. 1356) and *Ker's Trustees* (9 R. 1236) make it clear that, if former decisions and settled practice are to be regarded, the Assessor was neither bound nor entitled to take the sums paid for summer grazing as conclusive. In *Maitland's* case the rule was applied in favour of the proprietor, and to the effect of valuing the subjects below the sums actually paid; and in *Ker's Trustees* it was again applied, to the effect of entering a sum greater than the amount received,—the principle in both cases being to ascertain what the subjects would bring one year with another if let as an agricultural subject. It is not said that on that principle the sum here entered is too high; but it is contended that the subjects must be valued in their actual state, and that as grass parks £400 cannot be got for them. Undoubtedly they must be valued in their actual state; but according to the decisions there is nothing in their actual state to exclude them from being considered as an agricultural subject. The fact that the proprietor prefers to keep them in his own occupation, and to sell the right of grazing for only six months in the year, is not enough; and if it be the fact, as alleged, and not disputed at the bar, that there are some farm buildings on the ground of which he retains the sole occupation for the whole year, this would make it all the more difficult to recognise the sum obtained for summer grazing as ascertaining the value by the year. It is enough, however, to say that, consistently with the decisions referred to, and the settled practice, I cannot hold the principle of valuation adopted by the Assessor and the Commissioners to be otherwise than right.

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[1] Maitland, Dickson, and Campbell, 9th October 1858, 20 D. 1356; Ker's Trustees, 7th March 1878, 9 R. 1236.

Lord Fraser.—In this case the land is beneficially occupied as grass parks. It is occupied as such during the whole grazing season, which throughout Scotland differs in different localities. During the remainder of the year there is nothing earned from the ground, and it is allowed to lie at rest in order to recover for the next season. Now the total rents for the grazing season 1887 amounted to £334, 9s. 2d., from which there were outlays by the proprietor to the extent of £33, 8s. 11d, leaving £301, 0s. 3d. as the sum which, according to the appellant, ought to be entered in the Valuation-roll. I am of opinion that this demand by the appellant is right, and that the determination of the Committee fixing the value at £400 is wrong. The Committee discarded altogether from their view the return that was obtained from the grass parks, and proceeded arbitrarily to fix the value according to some rule that I do not comprehend. In fixing the value for the current year, what the Committee do is to go back to the year 1878—ten years ago,—and to take the rent paid in that year, when it was occupied not as grass parks, but for ordinary agricultural purposes, and from that rent they deducted 40 per cent on account of the fall in prices. Now the Committee had no right whatever under the statute to adopt this course. What they were called upon to do, was to ascertain the present annual value, as ascertained by the latest letting of the subjects; and what better criterion could they have for ascertaining the present annual value than the rent obtained for the land as grazing land, into which it has been turned for several years back. They are bound to value the land in its actual state, and not in the state it was in ten years ago. It is said that the grazing rent obtained cannot be looked at, because there was here no letting in the proper sense of the term. I deny that altogether. But let it be assumed that the graziers who pay the grazing rents are not to be held to be tenants, yet the rents that they do pay surely afford the best means of ascertaining the present value of the lands. It is not said that the proprietor is not doing his very best to obtain the present value of his estate; and whether he be entered both as proprietor and as occupier

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is of no moment as to the question,—What sum is to be entered in the Valuation-roll? I would have no objection to his being entered in the Valuation-roll as occupier as well as proprietor, if there be any inconvenience in entering the grazier who takes the parks as occupier; but what I object to is the valuing a subject devoted to one purpose as if it had been devoted to another and different purpose, and to the adoption of some arbitrary rule based upon a rental dated ten years ago, instead of taking the rental which is paid and received by the proprietor the present hour.

THE JUDGES being divided in opinion, the determination of the Valuation Committee stood.

ROMANES & SIMSON, W.S.—PARTY—Agents.

No. 115.
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Mar. 20, 1888.*
Assessor for Fifeshire v. Curror.

THE ASSESSOR FOR FIFESHIRE, Appellant.—*Party.*
DAVID CURROR AND OTHERS, Respondents.—*C. S. Dickson.*

Valuation Acts—Subject of Valuation—Right to prevent coal from being worked so as to cause surface damage.—The titles of a vassal reserved to the superior the coal in the lands feued, but gave the vassal the right to prevent the coal from being worked except on the "stoop-and-room" system, one object of which was to provide against the subsidence of the surface. The vassal entered into an agreement with the lessee of the coal under which, in return for annual payments, the amount of which was to be regulated by the coal won, the lessee became entitled to work the coal on the "longwall" or complete excavation system. *Held* that the vassal did not fall to be entered in the Valuation-roll as proprietor of collieries in respect of such payments.

Lands Valuation Appeal Court.
Lord Lee.
Lord Fraser.

Case No. 89.

THE predecessor of Sir P. A. Halkett of Pitfirrane let on a long lease —999 years—to the predecessor of Lord Elgin, and Lord Elgin sublet to Thomas Spowart & Company, Limited, the coal (forming part of the "Elgin Collieries,") in or under the lands belonging respectively to David Curror of Wester Craigduckie, James Alexander of Meldrum's Mill, and John Brown of Colton, all in the county of Fife, which coal had been expressly reserved in the titles of Messrs Curror, Alexander, and Brown. In accordance with agreements entered into between each of Messrs Curror, Alexander, and Brown, and Thomas Spowart & Company, certain annual payments were made to these three proprietors by Thomas Spowart & Company. These agreements, which were adopted by Sir Arthur Halkett and the Earl of Elgin, narrated (1) that the coal in question under their lands was not the property of Messrs Curror, Alexander, and Brown; (2) that as owners of the surface these three proprietors were entitled to prevent the coal being worked otherwise than in a particular manner, technically known as "stoop-and-room," the object of which was to provide against subsidence of the surface; (3) that in respect of permission being granted for working and mining the coal so far as under the lands of Craigduckie, Meldrum's Mill, and Colton, by the "longwall" or complete excavation system of mining, certain annual payments, called in the agreements "royalty rents" and "lordships," should be made to each of the said David Curror, James Alexander, and John Brown; and (4) that the amount of these annual payments should be regulated and determined by the quantity of coal won. The agreements preserved the proprietors' right to compensation for surface damage.

In September 1887, Messrs Curror, Alexander, and Brown appealed to

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* Decided March 16, 1888.

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the Valuation Committee of Fifeshire against the following entries in the Valuation-roll of the county for 1887-8 :—

No.	Description of Subjects.	Proprietor.	Tenant.	Occupant.	Rent.
	Elgin Collieries.	David Curror of Wester Craigduckie.	Thomas Spowart & Co., Ld.	Same.	£92 0 3
	Do.	James Alexander of Balmule.	Do.	Do.	85 0 1
	Do.	John Brown of Colton.	Do.	Do.	109 4 4

The sums entered as the values in these entries were the amount of the payments made to the appellants respectively under the foregoing agreements for the year 1887.

The appellants maintained that the entries ought to be expunged in respect that under the Valuation Acts only "proprietors" or "tenants" or "occupiers" fell to be entered in the roll; that it had been held by the Court of Session that Mr Curror was not the "proprietor" of the coal in respect of which the payments to him were made,* and the same principle applied to the cases of the other appellants; and that the annual payments were of the nature of incorporeal rights or subjects which did not fall within the category of lands and heritages, or within any class of subjects which under the Lands Valuation Acts were to be entered in the Valuation-roll.

The Assessor maintained that the annual payments were correctly entered in the Valuation-roll as being accessory to the ownership of the surface.

The Valuation Committee were of opinion that the annual payments did not fall to be entered in the Valuation-roll, and sustained the appeal accordingly.

The Assessor took a case.

The foregoing narrative is taken from the case.

At advising,—

LORD LEE.—There appears to be a question here whether the reservation of coal from the grant of lands includes the right to work that portion of the coal which is necessary to support the surface. If it does not include that right, another question arises as to the nature of the right and interest of the proprietor of the lands in the coal necessary for the support of the surface. The Lands Valuation Act requires the valuation of all lands and heritages, including expressly "mines, minerals, and coalworks," and I incline to the opinion that the coal which the proprietor of the reserved right cannot work, and which is worked by an arrangement with the proprietor of the lands, falls under the designation of "lands and heritages" within the meaning of the statute, and ought to be entered in the roll and valued either as being within the infeftment of the proprietor of the lands, or as being the property of the superior under his reserved right. The opinions of Lords Deas and Kinloch in the case of *Harvie* v. *Stewart* (9 Macph. 129) shew the difficulties which may arise in deciding whether an interest in coal is of the nature of a right of property. But it is unnecessary in this case to give any opinion on that point. For whatever the

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* Not reported.

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nature of the right of Curror and others as proprietors of the surface, it is conceded that they are not proprietors of the "Elgin Collieries," and that they are not liable to be entered in the roll as such. Reserving my opinion as to the proper mode of dealing with the coal in question under the Valuation Act, I think that the entry as it stands cannot be sustained, and that the Commissioners in sustaining the appeal were right. It would rather appear that if the coal in question is to be valued as the property of the appellants, Curror and others, it can only be as part and pertinent of the lands held by them not included in the reservation of minerals.

LORD FRASER.—It was decided in the Court of Session that David Curror, Wester Craigduckie, had no right to any of the coal in any of his lands, but that the same had been reserved by the predecessors of Sir Peter Arthur Halkett, and let by him to Lord Elgin. The action in which this was determined was one at the instance of David Curror, and was a declarator. It first came before me as Lord Ordinary, and my judgment was affirmed by the Second Division.* The other two persons, James Alexander and John Brown, to whom payments are made, are in the same position as Curror, and are not owners of the coal. But notwithstanding this, the tenants of the coal, Thomas Spowart & Company, do make payment to Curror, Alexander, and Brown, of certain sums of money, which are now sought to be entered in the Valuation-roll as payments of rent to these persons. It is quite clear that these payments are not for rent, because neither Curror, Alexander, nor Brown, is proprietor. But the agreement which is set forth in the case shews us for what these payments are made. The owners of the surface—Curror, Alexander, and Brown—have the right to prevent the owner of the coal beneath from working in any other way than according to the old system of stoop-and-room, which does not allow them to obtain as much coal as they could do by working by longwall, or the complete excavation system of mining. They had therefore to purchase the privilege of so working the coal from the owners of the surface, who could interdict them from working longwall—and hence the payments which the coal tenants agreed to make to the surface proprietors. But the coal tenants not being tenants under Curror, Alexander, and Brown, cannot be so entered in the Valuation-roll, and the payments that they make being simply compensation for non-interference with their working, such payments cannot be entered as rent paid by a tenant. The case seems to be governed by the decision in the case of *Renfrew* (11 Macph. 979). The decision of the Committee is right.

THE JUDGES were of opinion that the determination of the Valuation Committee was right.

PARTY—CURROR, COWPER, & CURROR, W.S.—Agents.

No. 116.

Mar. 20, 1888.†
Callander and Oban Railway Co. v. Assessor for Oban.

THE CALLANDER AND OBAN RAILWAY COMPANY, Appellants.—*R. Johnstone.*
THE ASSESSOR FOR OBAN, Respondent.—*Ure.*

Valuation Acts—Burgh Assessor or Assessor of Railways and Canals—Railway bookstall.—*Held* that the bookstall in a railway station, in the occupation of newsagents who paid the company a fixed sum annually for the privilege of supplying newspapers and books within the station, but who supplied not only passengers travelling on the railway but inhabitants of the town with newspapers

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* Not reported.

† Decided March 16, 1888.

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and books, had been properly valued by the Assessor of Railways and Canals as part of the undertaking of the company, and did not fall to be separately entered by the Burgh Assessor in his roll.

THE CALLANDER AND OBAN RAILWAY COMPANY appealed to the Magistrates of Oban against an entry in the Valuation-roll of the burgh for the year 1887-8 of "Bookstall, Railway Station" of which they were entered as proprietors and John Menzies & Company as tenants and occupiers, at a yearly rent or value of £50.

The appellants maintained that the entry was erroneous, in respect that the bookstall formed part of the appellants' undertaking of the Callander and Oban Railway, and was not an independent subject of let by them to John Menzies & Company, and that the use or occupation of it by John Menzies & Company was merely ancillary to an exclusive privilege or franchise granted by the appellants to John Menzies & Company of selling books, newspapers, periodicals, stationery, and such like, within the appellants' station at Oban.

The appellants produced an agreement, dated 11th July and 25th August 1887, entered into between them and John Menzies & Company.* They stated that the sum of £50 payable by John Menzies & Company to the appellants under this agreement had been returned by the appellants to the Assessor of Railways and Canals as part of the yearly revenue of their undertaking, and as such was included in the *cumulo* yearly rent or value of their undertaking, as appearing in the Valuation-roll made up by him.

The Assessor maintained that the bookstall formed an independent subject of let, of which John Menzies & Company had the exclusive use and occupation as tenants and occupiers thereof, to which use and occupation the sole and exclusive right, franchise, and privilege of selling books, &c. within the station was merely incidental; and therefore that the entry appealed against was properly and legally entered in the Valuation-roll made up by him as Assessor of the burgh. In support of his contention the Assessor founded on the lease which is quoted below.† The Assessor

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* Under this agreement the appellants granted to John Menzies & Company the sole and exclusive right, franchise, and privilege to vend, sell, lend, and exhibit for sale and loan newspapers, books, periodicals, stationery, and such other like articles required for the convenience of passengers by railway, as should be approved of by the secretary of the appellants at said station, with full liberty to the said John Menzies & Company for the purposes foresaid to use the existing bookstall at said station, provided that the appellants should be entitled to remove the said bookstall and to substitute another instead thereof, and to alter the position of the same at any time, with full and free ingress and egress to the said John Menzies & Company, their servants and agents, at all reasonable times, to the said station for the purposes foresaid: Declaring that the persons employed by the said John Menzies & Company should, while within said station, be under the control of the appellants' stationmaster, and liable to immediate removal from the station in case of insobriety or misconduct; and that for the space of five years from and after the term of Whitsunday 1887: Declaring that the said John Menzies & Company should not be entitled to assign said agreement, or to confer on or grant to any other person or persons whatever, the right, franchise, and privilege thereby granted without the express consent in writing of the appellants; the payment or consideration for the right, franchise, and privilege before mentioned being £50 per annum; and the said John Menzies & Company bound and obliged themselves to keep a regular supply of newspapers, books, &c., for sale to the passengers using the railway and station of the appellants.

† By this lease, which was entered into between the appellants and John Menzies & Company, and was dated 29th July and 13th August 1880, the

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maintained that this lease, which, he stated, had been continued by tacit relocation until the term of Whitsunday 1887, set forth the true contract between the appellants and John Menzies & Company, no change having taken place at the said term of Whitsunday 1887 in the possession had by John Menzies & Company; in other words, that the agreement founded upon by the appellants must be regarded as containing merely a repetition in a different form of words of the former arrangement, and as constituting a lease of the bookstall to John Menzies & Company.

The Assessor further averred that the books, newspapers, periodicals, stationery, and such like, sold by John Menzies & Company, were sold to all persons within the station willing to purchase the same, irrespective of their being passengers by the railway or not, and also that John Menzies & Company supplied residents in Oban at their residences with newspapers and periodicals, and thereby competed with the other booksellers and news-agents in the burgh.

The Magistrates allowed the Assessor a proof of these last averments, which were borne out by the evidence adduced.

The Magistrates held that, "in respect the said bookstall is, in the judgment of the Magistrates, an independent subject of let, of which the said John Menzies & Company have the exclusive use and occupation as tenants and occupiers thereof, to which use and occupation the sole and exclusive right, franchise, and privilege of selling books and others foresaid within the said station is, in the judgment of the Magistrates, merely incidental; and further, in respect it was proved to the satisfaction of the Magistrates that the said John Menzies & Company supply newspapers to persons at their residences outside the said station, and also sell newspapers to all persons within the said station willing to purchase the same, without reference to their being passengers by railway or not, and thereby compete with the other booksellers and news-agents in the burgh, the said bookstall is properly entered in the Valuation-roll for the said burgh at the rental of £50, and they therefore adhered to the said entry, and dismissed the appeal."

The railway company took a case.[1] The foregoing narrative is taken from the case.

THE JUDGES returned this opinion:—"We are of opinion that the

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appellants "let" to the said John Menzies & Company "All and Whole the bookstall" at the said station, with the fixtures and other fittings therein belonging to the appellants, with the sole right to the said John Menzies & Company of selling books, newspapers, periodicals, stationery, and such like, within the said station during the currency of the lease, and with right of ish and entry to the said bookstall on each lawful day while the station should be open for traffic, and at such other times as might be fixed by the appellants' manager or secretary, and that for the space of three years from and after the term of Whitsunday 1880; but subject to the right and power specially reserved to the appellants, in the event of the said bookstall not being conducted to their reasonable satisfaction, of terminating the lease at any of the terms of Whitsunday or Martinmas during the currency thereof, on giving three months' notice in writing to the said John Menzies & Company: For which lease the said John Menzies & Company became bound to pay to the appellants £50 sterling, "in name of rent or tack-duty for the said subjects," during the currency of the lease: And further, the said John Menzies & Company bound and obliged themselves to keep a regular supply of books and newspapers for sale to the passengers using the said railway.

[1] *Authorities referred to.*—North British Railway Co. v. Greig, March 20, 1866, 4 Macph. 645; Highland Railway Co. v. Dods, Sept. 21, 1876, 4 Poor-Law Mag. 603; Smith & Son v. Assessment Committee of Lambeth, Nov. 23, 1882, L. R., 10 Q. B. Div. 327.

determination of the Magistrates is wrong, in respect the Assessor of Railways and Canals has already properly valued the subject as a part of the undertaking."

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HOPE, MANN, & KIRK, W.S.—EMSLIE & GUTHRIE, S.S.C.—Agents.

No. 117.

Mar. 20, 1888.*
Lord Elphinstone v. Assessor for Middle Ward of Lanarkshire.

RIGHT HONOURABLE LORD ELPHINSTONE, Appellant.—*Dundas.*
THE ASSESSOR FOR THE MIDDLE WARD OF LANARKSHIRE, Respondent.

Valuation Acts—Mines and Minerals—Lands Valuation Act, 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 42.—The Lands Valuation Act, 1854, sec. 42, enacts "that no mine or quarry shall be assessed unless it has been worked during some part of the year to which such assessment applies."

A freestone quarry was let on a lease for eight years from Martinmas 1885, with a break in favour of the tenant at any term of Whitsunday or Martinmas after Martinmas 1886, at a fixed rent of £100, or a lordship in the option of the landlord. The tenant did not enter into possession till after the Valuation-roll for 1885-6 had been made up, and the quarry was not entered for that year. It was entered at £100 for 1886-7, in terms of the landlord's return. The lordship paid at Whitsunday 1886 was £92, 10s., and at Martinmas 1886 £89, 10s. The quarry ceased to be worked at Martinmas 1886, but the tenant remained in possession till Whitsunday 1887, when he took advantage of the break and brought the lease to an end. The excavations were filled up, and the ground restored. At Whitsunday 1887 the tenant paid the half-yearly fixed rent of £50. He had thus paid in all £232, but only £100 of that having been entered in the Valuation-roll, the Assessor entered the balance of £132 in the roll for 1887-8, although the quarry had not been worked and nothing had been paid during that year. *Held* that the valuation was wrong.

Lands Valuation Appeal Court.
Lord Lee.
Lord Fraser.

Case No. 92.

LORD ELPHINSTONE appealed to the Valuation Committee of the Middle Ward of Lanarkshire against an entry in the Valuation-roll of the county for 1887-8 of £132 in respect of a freestone quarry at Broadlees, of which he was entered proprietor and Adam H. Boyle as tenant and occupier.

The facts on which the appeal depended were as follows:—By lease, dated 31st March and 7th April 1886, Lord Elphinstone let to Mr Boyle the quarries of freestone rock in the lands of Broadlees for eight years, from Martinmas 1885, with a break in favour of the tenant at any term of Whitsunday or Martinmas after Martinmas 1886, on his giving three months' notice. The tenant bound himself to pay £100 of fixed rent yearly, or, in the option of the proprietor, a lordship.

The draft lease of the quarry was revised by the tenant on 2d October 1885, and his entry to the quarry was at Martinmas 1885, both dates being after the Valuation-roll had been authenticated for 1885-6, and so no return of rent was made, or could have been made, on behalf of the landlord for that year.

The fixed rent of £100 was returned in good faith at Whitsunday 1886 for 1886-7, although the royalty received up to that term was £92, 10s.

Mr Boyle was the contractor for the construction of a neighbouring line of railway, and took the quarry for that purpose, and it was uncertain for how long or to what extent he might require it. In fact he ceased to work it at Martinmas 1886, although he remained in possession till Whitsunday 1887, at which term he took advantage of the break and brought the lease to an end. All rent and royalty then ceased, so that there was no subject and no tenant for the year 1887-8. The excavations made had been filled up, and the ground restored at considerable expense.

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* Decided March 16, 1888.

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Mar. 20, 1888.
Lord Elphinstone v. Assessor for Middle Ward of Lanarkshire.

The tenant paid the following rents and lordships during his possession:—

1. Lordship to Whitsunday 1886, ...	£92 10 0
2. Do. to Martinmas 1886, ...	89 10 0
3. Half year's fixed rent to Whitsunday 1887, . .	50 0 0
	£232 0 0

The appellant founded on sec. 42 of the Lands Valuation Act, 1854,* and craved that the entry should be deleted.

The Assessor referred to the case of *Blantyre*[1] as establishing the principle that the words of the clause founded on were not to be read literally and without regard to the plain intention of the Act, which was, *inter alia*, to make all rents or royalties paid subject to rating. He stated that it frequently happened that a quarry was wrought for a part of a year and then stopped in such a way that if no entry were made in the roll for the year following such working the royalty paid would escape assessment. In the present case the payments amounted in all to £232, and as only £100 had previously been entered in the Valuation-roll, he submitted that in the circumstances it was quite in accordance with the true intent and meaning of the Valuation Acts that the balance of £132 should now be entered in the roll, and this he had accordingly done.

The Committee dismissed the appeal, and sustained the valuation.

Lord Elphinstone took a case. The foregoing narrative is taken from the case.

THE JUDGES were of opinion that the determination of the Valuation Committee was wrong.

DUNDAS & WILSON, C.S., Agents.

No. 118.

Mar. 20, 1888.†
Duncan's Trustee v. M'Cracken.

GEORGE HERON (Duncan's Trustee), Pursuer and Real Raiser.
MISS GEORGINA M'CRACKEN, Claimant.—*G. R. Gillespie.*
THE LORD ADVOCATE, Claimant.—*A. J. Young.*

Succession-duty—16 and 17 Vict. c. 51, sec. 2—Foreign domicile—Testament creating a British trust.—Although moveable property in Scotland belonging to a person domiciled abroad will not on his death be liable to succession-duty, yet if the deceased has directed part of his estate to be invested in this country in trust for a person in liferent and for another in fee, the fund so settled, as a fund to be administered according to the law of Scotland exclusively, will be subject to succession-duty when the fiar's right to possession emerges on the death of the liferenter.

OUTER-HOUSE
Lord Fraser.

MISS MARGARET HELEN DUNCAN, a native of Scotland, went to reside in Paris in 1847, and remained there till her death in September 1869.

By her will, which was executed on 30th November 1864, she disposed of the residue of her estate as follows:—"I give and bequeath the annual revenue of all I possess . . . to my brother-in-law, Mr John Hume of Forthill Cottage, Broughty-Ferry, for all his life, after his death the same to go to Mrs Elizabeth Cairncross, wife of Mr John William M'Cracken, notary-public, No. 233 York Street, Belfast, Ireland, for her life, when the residue of all I possess shall become the property of Georgina M'Cracken, third daughter of the said John William M'Cracken, subject to the following conditions, viz., that the capital shall be placed in such a way that she can neither lend it nor spend it, but may, if she please, buy an annuity with it."

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* Quoted in the rubric.

[1] March 15, 1883, 10 R. 773.

† Decided November 4, 1887.

Miss Duncan appointed Mr Hume and Mr John William M'Cracken to be her executors, and they entered on the administration of her estate and obtained probate of her will in Her Majesty's Court of Probate in England. The property left by Miss Duncan was all personal, and was wholly situated within the United Kingdom, with the exception of some articles of jewellery, and also certain foreign shares which were specially bequeathed. The funds forming the residue liferented by Mr Hume remained situated in this country, being invested in British stocks, and were so at the date of his death. Mr Heron, the sole surviving and acting trustee at the date of this action, was domiciled in Scotland.

Mr Hume, whose ordinary residence was at Broughty-Ferry, enjoyed the liferent of the residue until his death on 24th February 1875. He was predeceased by the other liferenter. On his death the residue became the property of Georgina M'Cracken, subject to the provisions of the will.

In a multiplepoinding brought by Miss Duncan's trustee, Miss M'Cracken claimed the whole fund *in medio*, or alternatively the whole fund, "that she may spend the same in buying an annuity." A claim was also lodged by the Crown for succession-duty at the rate of ten per centum on the free residue of Miss Duncan's estate, and on the dividends or interest derived therefrom since the date of Mr Hume's death; or, for succession-duty at the rate of ten per centum on the said free residue as at the date of Mr Hume's death, with interest on the said duty at the rate of four per centum per annum from said date.

The Crown maintained that the reason why moveable property belonging to a person domiciled abroad was exempted from succession-duty was that the property was subject to the jurisdiction of the Courts of the foreign country; but that did not apply when a fund had been created in this country subject exclusively to the jurisdiction of the Courts of this country. It was now a fund which, under the law of the trust, "devolved" in the sense of the second section of the Act upon the fiar on the death of the liferenter. The point had been decided by the House of Lords in the case of *Attorney-General* v. *Campbell*, April 22, 1872, L. R., 5 Eng. and Ir. App. 524. Here as there the Court had to deal with a British trust. The funds were invested in this country by the trustee, who resided here, and the trustee brought the action to distribute the estate.

Miss M'Cracken maintained that the right vested in her under the settlement and under the law of France. The restrictions imposed by the will, which prevented her getting possession of the fund till a certain event, did not affect the nature of her right, which was a succession to a person domiciled in France. The succession on which the Crown claimed duty was to an English and not to a French predecessor.[1]

THE LORD ORDINARY (FRASER) pronounced this interlocutor:—"Ranks and prefers the claimant the Lord Advocate upon the fund *in medio* for succession-duty, at the rate of ten per cent on the free residue as at the date of Mr Hume's death, with interest on the said duty at the rate of four per cent per annum from said date in terms of the alternative of his claim, No. 18 of process; and, subject to that claim, and to the expenses found due to the pursuer and real raiser, ranks and prefers the claimant Georgina M'Cracken to the

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[1] Wallace v. Attorney-General, Dec. 4, 1865, 1 Ch. App. 1.

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whole balance of the fund *in medio*, in terms of the first branch of her claim, No. 17 of process: Finds no expenses due to or by either of the claimants, and decerns." *

DRUMMOND & REID, W.S.—MITCHELL & BAXTER, W.S.—DAVID CROLE, Solicitor of Inland Revenue—Agents.

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* "OPINION.—The Lord Ordinary is of opinion that no proof as to the domicile of the testatrix is necessary in this case, because, assuming the domicile to have been in France, he has come to the conclusion that succession-duty is due.

"The 18th section of the Succession-Duty Act (17 and 17 Vict. cap. 51), enacts that 'No duty shall be payable under this Act upon any succession . . . by any person in respect of a succession who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the Legacy-Duty Acts.' Now, as it was decided (*Adv.-Gen.* v. *Thomson*, 18th February 1845, 4 Bell's App. 1) that legacy-duty was not exigible where the legacy was bequeathed by a person domiciled in a foreign country, it is said that no succession-duty is claimable by the Crown in the present case. This, however, is a misapprehension of the 18th section of the Succession-Duty Act, because it has been decided that the words quoted referred to exemption by express provision contained in the 55th Geo. III., cap. 184, sched., part 3—See *Att.-Gen* v. *Fitzjohn*, 2 Hurlst. & Norman, 465. Therefore, although a bequest may be exempt from legacy-duty because the testator is a foreigner, it does not follow that it may not be a succession, and therefore liable to succession-duty under the wider words of the Succession-Duty Act.

"There are two decisions of the House of Lords of recent date, and the question as to liability for succession-duty depends upon whether the present case comes within the rule laid down in the one case or in the other. The first case was that of *Wallace* v. *Att.-Gen.* (L. R., 1 Ch. App. 1), the rubric of which is in the following terms:—'Succession-duty is not payable on legacies given by the will of a person domiciled in a foreign country.' The testator was domiciled in France, but had large personal estate in the English funds, and he bequeathed the residue of his personal estate to the hospitals of Paris and London, and upon this residue succession-duty was claimed, but the House of Lords held that the claim was untenable. The same learned tribunal had the question before them in 1872 in the case of the *Att.-Gen.* v. *Campbell* (L. R., 5 E. and I. App. 524), where it appeared that the testator was domiciled in Portugal. He directed his executors to collect all his property which was in Portugal, to convert it into cash, pay certain legacies, and invest the residue in the English three per cents, to appropriate what they should think necessary to pay a life annuity of £50 to his sister, on the termination of which the appropriated fund was to revert to and form part of his residuary estate, and be divided (like the rest) among his three children. The executors exactly performed the directions of the trust; when the sister died the part appropriated to satisfy her annuity became divisible among the children. It was held that this constituted a succession within the meaning of the 2d section of the Succession-Duties Act, and was liable to the payment of succession-duty. Now, this case of *Campbell* is very similar to the present one. The testatrix in the present case gives a liferent of the whole of her property to her brother-in-law, Mr Hume, whom failing, to Mrs M'Cracken. This liferent corresponds to the annuity given in the case of *Campbell.* The executors continued to hold the property and to pay the liferent to Mr Hume. The original executors were Mr Hume and Mr M'Cracken. Mr Hume having died, Mr M'Cracken continued to be the sole trustee in the administration till 1878, when he assumed two new trustees and executors in the persons of Francis Cairncross and George Heron, the pursuer and real raiser in this action. The whole property was conveyed over to these new trustees in trust to be applied for the purposes of the will. A further change in the administration took place in October 1878, when Mr M'Cracken died and Mr Cairncross resigned his office of trustee, thus leaving

SUMMER SESSION.

No. 119.

May 19, 1888.
Broad v.
Edinburgh
Northern
Tramways Co.

HARRINGTON EVANS BROAD, Petitioner.—*Murray.*
SAMUEL HENRY DAY AND OTHERS, Respondents.—*G. W. Burnet.*
HAWTHORNS & COMPANY AND OTHERS, Compearers.—*A. J. Young.*
MAGISTRATES AND TOWN-COUNCIL OF EDINBURGH, Compearers.—
C. S. Dickson.

Judicial Factor—Companies Clauses Consolidation (Scotland) Act, 1845, *secs.* 56 *and* 57.—By the 56th and 57th sections of the Companies Clauses Consoli-

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the administration alone in the hands of Mr Heron, the pursuer, who has continued to administer the estate for behoof of Georgina M'Cracken, to whom the revenues have been paid since Mr Hume's death. The only difference between this case and the case of *Campbell* is this that in the case of *Campbell* the property was at the time of the death in Portugal and brought to this country by the executors, whereas in the present case the property was within the United Kingdom at the time of the death, but this, according to the English decisions, as cited by Mr Hanson in his treatise on the Succession Duties Acts (p. 225), is immaterial,—'It is to be observed that in this case the testator expressly directed that his property should be invested in this country, but the principle of the decision equally applies to cases where the trustees have power to invest it here or abroad at their discretion, or where the property itself is already actually invested in this country. For when once the property has been appropriated to answer the specific gift, it acquires the character of a trust-fund as distinguished from an ordinary legacy.' Now, then, let us see what were the grounds upon which the case of *Campbell* was decided. The Lord Chancellor (Lord Hatherley) said (p. 528),—'In order to have the personal property administered you must seek the forum of that country where the person whose property is in question had acquired a domicile. Then, when you obtain possession of that property, you do all which has to be done in the country to which the testator belonged. The question is afterwards, when the property has been so obtained and administered, and is in the state in which the testator desired it to be placed, in what condition do you find the fund? You find it in the condition of a settled fund. That condition arises no doubt from the operation of the testator's will; but I can see no difference, in consequence of that circumstance, from its having arisen in any other manner, as, for instance, from a deed executed in his lifetime, as might have been the case, or, supposing he had transmitted to his bankers a sum of money to be invested upon the same trusts. When there is any fund standing in this country in the names of trustees in consols or other property which has a *quasi* local settlement, which stock in the funds has, all the dividends having to be received in this country, and the persons who have to be dealt with in respect of it being persons residing in this country, that fund is subject to succession-duty. The settlement provides for the succession, and the interest of each person on coming into possession is liable to the payment of duty upon that interest to which he so succeeds. That is really the whole question involved in this case.' Now, applying these reasons to the present case, we have an estate situated in, and with executors resident in, the United Kingdom. They obtain probate as such executors, and they and the assumed trustees vest themselves with the administration of this estate, which they continue until the liferenter dies. The fund which is to be given to Georgina M'Cracken upon the expiry of the liferents has as much the character of a settled fund as the sum which was appropriated to paying the annuity in the case of *Campbell.*

"The executors in the present case are required by the will to give the property over to Georgina M'Cracken, under conditions—viz., 'That the capital shall be placed in such a way that she can neither lend it nor spend it, but may, if she please, buy an annuity with it.' It is very clear that a person to whom money has been bequeathed, without any right overgiven to any other person, cannot be deprived of the *jus disponendi* by a mere prohibition against alienation; nor can the executor insist, and he does not insist, upon purchasing an annuity for Georgina M'Cracken. . . ."

No. 119. dation (Scotland) Act, 1845, the mortgagees of a company may, for the purpose of enforcing payment of arrears of interest upon their mortgages, apply to the Court of Session for the appointment of a judicial factor upon the undertaking.

May 19, 1888. Broad v. Edinburgh Northern Tramways Co.

The duty of the factor under these sections being to receive a portion of the income of the company sufficient to pay the overdue interest, the petitioner is entitled to suggest the name of a person to be appointed to the post, and the Court will, in the absence of personal objections, appoint him.

1ST DIVISION. B.

(VIDE *ante*, p. 615.)

In this petition for the appointment of a judicial factor upon the undertaking of the Edinburgh Northern Tramways Company at the instance of a mortgagee, Mr D. N. Cotton, C.A., was appointed, on 20th March 1888, "interim judicial factor upon the undertaking and property of the company, and to receive the whole or a competent part of the tolls or sums liable in the payment of the interest payable on the mortgages mentioned in the petition until the same, with all costs, shall be fully paid, he finding caution before extract," &c. (*vide ante*, p. 615). The petition was presented under the 21st section of the Edinburgh Northern Tramways Act, 1887,* and the 56th and 57th sections of the Companies Clauses Consolidation (Scotland) Act, 1845.†

The appointment was asked so as to secure a preference over outside creditors, some of whom had obtained decrees against the company for payment of the sums due to them.

Answers were lodged for Samuel Henry Day and others, both holders of mortgages of the company and shareholders, who objected to the appointment of Mr Cotton as factor on the ground that he was the nominee of the

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* The 21st section of that Act was,—"The mortgagees of the company may enforce payment of arrears of interest or principal, or principal and interest, due on their mortgages by the appointment of a judicial factor. In order to authorise the appointment of a judicial factor in respect of arrears of principal, the amount owing to the mortgagees by whom the application for a judicial factor is made shall not be less in the whole than £500."

† The 56th section was,—"Where, by the special Act, the mortgagees of the company shall be empowered to enforce the payment of the arrears of interest, or the arrears of principal and interest, due on such mortgages, by the appointment of a judicial factor, then, if within thirty days after the interest accruing upon any such mortgage or bond has become payable, and after demand thereof in writing the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any competent Court, require the appointment of a judicial factor by an application to be made as hereinafter provided," &c.

The 57th section was,—"Every application for a judicial factor in the cases aforesaid shall be made to the Court of Session, and on any such application so made, and after hearing the parties, it shall be lawful for the said Court, by order in writing, to appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, as the case may be, until such interest, or until such principal and interest, as the case may be, together with all costs, including the charges of receiving the tolls or sums aforesaid, be fully paid; and upon such appointment being made, all such tolls and sums of money as aforesaid shall be paid to and received by the person so to be appointed; and the money so to be received shall be so much money received by or to the use of the party to whom such interest, or such principal and interest, as the case may be, shall be then due, and on whose behalf such judicial factor shall have been appointed; and after such interest and costs, or such principal, interest, and costs, have been so received, the power of such judicial factor shall cease, and he shall be bound to account to the company for his intromissions, or the sums received by him, and to pay over to their treasurer any balance that may be in his hands."

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petitioner, and that their interests conflicted with his. They did not, however, object to the appointment of a neutral person selected by the Court.

Hawthorns & Company and the Magistrates of Edinburgh, who were ordinary creditors of the company, compeared and raised the same objections.

Argued for the petitioner;—The reason why the appointment of Mr Cotton had been asked for was that he was the auditor of the company, and therefore thoroughly acquainted with its accounts. Even supposing there were conflicting interests,—which was not admitted,—the judicial factor had nothing to do with these. His duties were simply to collect the tolls and to pay over the interest. The factor would not pay the interest on one mortgage more than on another. It would have been different if any personal objection had been stated to Mr Cotton's appointment, but none had been stated. Hawthorns & Company and the Magistrates of Edinburgh were mere ordinary creditors, and had no right to appear until all the interest upon the mortgages was paid.

Argued for the respondents;—They were quite willing to leave the appointment of a factor in the hands of the Court, but they objected, for obvious reasons, to the appointment of a nominee of the petitioner. It had been held in an English case[1] that the first person appointed as a receiver and manager under the 4th section of the Railways Companies Act, 1867, remained so until all the ordinary creditors had been paid their arrears. That case applied here, and consequently it was of the greatest importance that a neutral person should be appointed.

Lord President.—Although the person to be appointed under this petition is called a judicial factor, both in the petition and in the statute, that name is a little misleading, because he is not clothed with the ordinary powers of a judicial factor. He is not appointed under this clause as manager of the company, as Mr Haldane was in the case of *Girvan and Portpatrick Railway Co.* (8 R. 669 and 1003, 9 R. 253). He is what is called in England a receiver, and, so far as I understand, he was appointed to receive a portion of the income of the company sufficient to pay the overdue interest upon the petitioner's mortgages. That is the whole object and aim of the appointment. The mortgagee as soon as his interest is overdue is entitled, as matter of legal right, to make the application, and, in my opinion, it is only right that a creditor or mortgagee should suggest to the Court the person whom he would wish to see appointed to look after his interests. Of course if there is any personal objection to the person who is proposed that is another matter. But there is not a word to be said against Mr Cotton except that he happens to know a good deal about this company, which I think affords a very great qualification for the office. He is the auditor of the company, and I can hardly conceive a safer hand to which to entrust the collection of a portion of the company's income in order to pay the interest due to the petitioner. I do not see any reason for refusing the appointment.

Lord Adam and Lord Kinnear concurred.

Lord Mure and Lord Shand were absent.

The Court accordingly continued Mr Cotton's appointment as judicial factor.

Graham, Johnston, & Fleming, W.S.—A. & G. V. Mann, S.S.C.—J. Knox Crawford, S.S.C.—Agents.

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[1] *In re* Mersey Railway Co., Jan. 11, 1888, L. R., 37 Chanc. Div. 610.

No. 120.

May 24, 1888.
Hutchison, Main, & Co. v. Pattullo Brothers.

HUTCHISON, MAIN, & COMPANY, Pursuers (Reclaimers).—*D.-F. Mackintosh —C. S. Dickson.*

PATTULLO BROTHERS, Defenders (Respondents).—*Murray—Kennedy.*

Patent—Specification—Construction—Disconformity between provisional and complete specification.—The provisional specification of a patent for "improvements in treating oils and fats" set forth:—"This invention has for its object the treating of oils and fats in an improved manner and so as to render them more suitable for various applications, and it consists in subjecting the oil, whether mineral, vegetable, or animal, or the fat to a temperature about equal to that of boiling water for eight or ten days, the oil or fat being exposed to air in layers of about half an inch in depth. . . . The treating of vegetable or animal oils or fats in the described manner has the effect of at once developing any tendency to thicken, so that when the thus thickened oil or fat is thinned to the desired consistency by combination with the mineral oil it forms a superior lubricant, having less tendency to thicken when in use. The thickening of the vegetable or animal oils or fats, which is believed to be due to oxidation, makes them better adapted for saponification and other uses besides that of forming lubricants."

The complete specification set forth:—"My said invention has for its object the treating of oils and fats in an improved manner, and so as to render them more suitable for making lubricants, and it consists mainly in subjecting the oil, whether mineral, vegetable, or animal, or the fat to heat whilst exposed to the air in shallow layers. . . . In practically carrying out my said invention in dealing with vegetable or animal oils or fats I prefer to expose them in shallow pans or dishes to the combined action of atmospheric air and heat, with or without the addition of water, for a lengthened time. The addition of water accelerates the process, but the colour of the oxidised oil or fat is generally paler if treated without water. . . . The mixing of a thickened or oxidised vegetable or animal oil or fat with mineral oil to form a compound of consistency and quality suitable for a lubricant is a part of my invention, irrespective of the precise means adopted for thickening or oxidising the oil. . . ." The specification claimed as the novelty of the invention,—"1. The subjecting of oils and fats in shallow layers to the joint action of air and heat, substantially as and for the purposes hereinbefore described. 2. The combining of oxidised or thickened vegetable or animal oils or fats with mineral oils, substantially as and for the purpose hereinbefore described."

In an action for damages for infringement of the patent against an oil manufacturer who combined oxidised or thickened vegetable and animal oils with mineral oils in order to form a lubricant, and thickened the vegetable and animal oils through the influence of air and heat, but by a different process from that described by the pursuer in his patent, *held*, after a proof, (1) that if the first head of the pursuer's claim in his patent was to be construed as a claim to a process there had been no infringement, the defender's process being different; if it was to be construed as a claim to a product the patent was invalid for want of novelty, oxidised or thickened animal and vegetable oils having been well known long prior to the date of the patent; (2) that the patent was invalid on the further ground that the complete specification claimed more than the provisional specification, in respect that the second head of the claim in the complete specification claimed as part of the invention the combination of thickened animal and vegetable oils with mineral oils irrespective of the process by which the thickening had been effected, whereas the provisional specification was limited to the thickening of vegetable and mineral oils in the particular manner therein described; and (3) that the patent was also invalid on the ground that the mixing of animal and vegetable with mineral oils either required no invention, or, if it did, that the process had not been disclosed.

Patent—Infringement—Prior use—Trade secret.—In an action of damages for infringement of a patent the defenders pleaded, *inter alia*, prior use, and in support of that plea adduced a witness from the firm of manufacturers from whom they had bought the articles said to constitute the infringement. This witness

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Hutchison, Main, & Co. v. Pattullo Brothers.

2D DIVISION.
Ld. Kinnear.
M.

deponed that his firm had been in the habit of manufacturing the articles for many years before the date of the pursuer's patent, but that they had kept their process "to themselves" as long as they could, and it appeared that it did not become a matter of public knowledge until after the date of the pursuer's patent. *Held* that the patent was invalid by reason of prior use.

ON 15th December 1886 Hutchison, Main, & Company, oil manufacturers, Glasgow, and Robert Hutchison, a partner of that firm, raised an action against Pattullo Brothers, oil refiners and merchants, Glasgow, concluding for payment of £10,000, as damages for the alleged infringement of a patent granted to Robert Hutchison, dated 10th October 1873 for the invention of "Improvements in treating oils and fats."

As appeared from the proof in the action animal and vegetable oils, known as "fat oils," are dear, and from their tendency to thicken in use, from the action of the atmosphere, and so to clog the machinery, they are unsatisfactory lubricants. Mineral oils on the other hand are too thin for use as lubricants except for very light machinery. Mineral oils and fat oils in their natural state cannot be advantageously mixed, because the fat oils, with the exception of castor oil, are not of sufficient gravity to bear dilution with the thinner mineral oils, and castor oil is only imperfectly soluble in mineral oil. The pursuers claimed for their invention that by oxidising or thickening fat oils in the way described in the specification they were made more suitable and valuable for use in the manufacture of lubricants, and that by combining the oxidised or thickened fat oils with mineral oils as mentioned in the specification a superior lubricant was produced at a low price.

The provisional specification set forth the invention thus:—

"This invention has for its object the treating of oils and fats in an improved manner and so as to render them more suitable for various applications, and it consists in subjecting the oil whether mineral, vegetable, or animal, or the fat to a temperature about equal to that of boiling water for eight or ten days, the oil or fat being exposed to air in layers of about half an inch in depth.

"The elements of the process may be modified; thus, with a greater depth or lower temperature, the treatment must be prolonged. In the case of mineral oil an alkali or alkaline carbonate or alkaline earth, by preference in solution or suspended in water, is added to the oil before heating it—and the treatment has the effect of removing the blueness or fluorescence which is considered objectionable in some mineral oils, and of rendering the oil more suitable for combining with a vegetable or animal oil or fat to make a good lubricant.

"The treating of vegetable or animal oils or fats in the described manner has the effect of at once developing any tendency to thicken, so that when the thus thickened oil or fat is thinned to the desired consistency by combination with the mineral oil it forms a superior lubricant, having less tendency to thicken when in use.

"The thickening of the vegetable or animal oils or fats, which is believed to be due to oxidation, makes them better adapted for saponification and other uses besides that of forming lubricants."

The specification, dated 7th April 1874, as amended 24th September 1886 under the Patents, Designs, and Trade-Marks Act, 1883, set forth the nature of the invention in the following terms, the deletions made at the amendment being within brackets and the additions in *italic* type:—

"My said invention has for its object the treating of oils and fats in an improved manner, and so as to render them more suitable for [various applications;] *making lubricants,* and it consists mainly in subjecting the oil, whether mineral, vegetable, or animal, or the fat to heat whilst exposed to the air in shallow layers.

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"One important object of my invention is to oxidise or thicken vegetable or animal oils or fats so as to render them better adapted for mixing with mineral oils to form lubricants of various qualities.

"The treating or oxidising of vegetable or animal oils or fats in the manner indicated is believed to have the effect of at once developing any tendency to thicken, so that when the thus thickened oil or fat is subsequently thinned to the desired consistency by being mixed with a suitable mineral oil it forms a superior lubricant, having less tendency to thicken when in use.

"[The thickening of the vegetable or animal oils or fats, which I believe to be due to oxidation, makes them better adapted for saponification and other uses besides that of forming lubricants.]

"In practically carrying out my said invention in dealing with vegetable or animal oils or fats, I prefer to expose them in shallow pans or dishes to the combined action of atmospheric air and heat, with or without the addition of water, for a lengthened time. The addition of water accelerates the process, but the colour of the oxidised oil or fat is generally paler if treated without water.

"The duration of the treatment has in practice to be regulated to suit the kind or quality of the oil or fat operated upon, and is best ascertained by trial. I may, however, state by way of example that if lard oil is exposed without water in a depth of one-half to three-quarters of an inch, and the heat is maintained at about 212 degrees Fahrenheit, it continues to increase in body and specific gravity for eight or ten days and nights. It is then of about the same body and specific gravity as castor oil, and will readily mix with mineral oil in any proportion.

"The mixing of a thickened or oxidised vegetable or animal oil or fat with mineral oil to form a compound of consistency and quality suitable for a lubricant is a part of my invention, irrespective of the precise means adopted for thickening or oxidising the oil.

"In the case of mineral oil [whether] to be used for forming a lubricant [or not], I add to the oil an alkali or alkaline salt or alkaline earth, by preference in solution or suspended in water, and then expose the oil to the action of atmospheric air and heat, and the treatment has the effect of removing the blueness or fluorescence which is considered objectionable in mineral oils, and of rendering the oil more suitable for combining with a vegetable or animal oil or fat to make a good lubricant. Owing to the great variety in the sources and modes of production of mineral oils and their various qualities and degrees of purity, the treatment requires to be adjusted by means of practical trials to each kind. I may however state as an example that with most Scotch shale oil, which has been well refined, ten to fourteen days will suffice for a depth of oil of a few inches, the temperature maintained being about 212 degrees Fahrenheit. The proportion of alkali required is very small, and if caustic alkali is used it will be sufficient if when it is well mixed with the oil its presence is barely detected by the taste. In treating mineral oil the depth need not be limited, but a better result as regards colour is obtained when the oil is heated in shallow layers.

"Having thus particularly described my said invention, and the manner of performing the same, I have to state that what I believe to be novel and original, and claim as the invention secured to me by the hereinbefore in part recited letters-patent, is,—

"1. The subjecting of oils and fats in shallow layers to the joint action of air and heat, substantially as and for the purposes hereinbefore described.

"2. The combining of oxidised or thickened vegetable or animal oils or fats with mineral oils, *substantially as and for the purpose hereinbefore described.*"

The pursuers averred;—(Cond. 3) "It has recently come to the pursuers' knowledge, and it is the fact, that the defenders have for many years past, without any right or liberty to do so, been using the said invention and infringing the said letters-patent. In particular, they have for several years past been regularly and habitually buying, using, and selling large quantities of vegetable and animal oils and fats which had been treated and oxidised or thickened in the manner described in the specification of said letters-patent, or in a manner substantially the same. They have thus infringed the said letters-patent. They have also for many years past, in their premises in Glasgow, been combining oxidised or thickened vegetable or animal oils or fats with mineral oils for the purpose and in the manner, or in a manner substantially the same as that described in the specification of said letters-patent; and they have thus made and they have also sold large quantities of lubricants of various qualities in violation of said letters-patent. When so buying, using, selling, and combining oils and fats as aforesaid the defenders were well aware of the pursuers' said letters-patent, and that the said oils and fat so bought, used, and sold by the defenders had been made or treated in infringement of the pursuers' said patent, and that the defenders in buying, using, selling, and combining as aforesaid, were infringing the said letters-patent."

The defenders averred;—(Stat. 2) "The only thickened or oxidised oil or fat which the defenders, so far as they knew, have purchased, or used or sold, or mixed or combined with mineral oils to form a lubricant, is a substance known as lardine. . . . The said substance has been in common and extensive use, and has been a familiar article in the market for many years, and known to be so by the pursuers. Lardine was offered to the defenders by first-rate manufacturers in the ordinary course of business through their respective agents or travellers . . . The said manufacturers are Messrs Charles Price & Company, London, Messrs Palmer & Company, London, Messrs C. H. Handyside & Company, Dalkeith. The said substance, as the defenders are now informed, consists of seed oil oxidised or thickened, but not by the process or method of treatment set out in the said Robert Hutchison's specification. The defenders had no means of ascertaining, and it cannot be ascertained from any examination of the said substance as purchased and used by the defenders, by what process or method of treatment it was made or prepared. The substance was bought and used by the defenders in the limited quantities mentioned, in good faith and in entire ignorance of the pursuer Robert Hutchison's patent. . . ." (Stat. 3) "The letters-patent granted to the said Robert Hutchison are invalid,—(1) The alleged invention, at least in so far as regards the combining or mixing of oxidised or thickened vegetable or animal oils or fats with mineral oils to form lubricants, being the second part set out in the foresaid amended specification, was not the subject-matter of a grant of letters-patent within the meaning of the Patent Acts. There is no ingenuity or invention displayed in the said second part. (2) The specification, even as amended, was disconform to the provisional specification lodged by the said Robert Hutchison with his petition on or about 10th October 1873, and claims an invention different from or not embraced in that disclosed in the provisional specification. There is no sufficient distinction between what was old or was in use and known at and prior to the date of the said letters-patent, and what was new or claimed as new by the said alleged inventor. Further, there is claimed as new, inventions which were old and well known at the date of the said patent. (3) The specification, as amended, was insufficient, and was unintelligible. It does not particularly disclose the nature of the invention and in what manner it is to be performed. (4) The alleged invention was not new or original. At least material parts of the said alleged invention were not new or original. The said Robert Hutchison was not the first and true inventor of the alleged invention described in the said letters-patent and relative specifications, and it was not first published in Great Britain by him. It was published and was publicly known and used in Great Britain prior to the date of the said letters-patent. . . . The subjecting of oils and fats to the joint action of air and heat for the purpose of oxidising or thickening them, so as to render them more suitable for making lubricants, was not novel or original, having been used prior to the date of the said patent and down to the present time by the foresaid Messrs Price & Company," and others, "at their respective works aforesaid, and by manufacturers generally in Scotland and England. Further, the combining oxidised or thickened vegetable or animal oils or fats with mineral oils, for forming lubricants, was not novel or original. Oxidised or thickened oils or fats, vegetable or animal, have been commonly used from a period long prior to the date of the said letters-patent down to the present time, for combining with mineral oils to form lubricants, and for other purposes, by the foresaid Messrs Price & Company, and by oil refiners and merchants generally, and by members of the public throughout Scotland and England."

The pursuers pleaded, *inter alia*;—(1) The defenders having infringed the said letters-patent as aforesaid, and having thereby caused loss to the pursuers, the defenders are liable therefor.

The defenders pleaded, *inter alia*;—(1) The pursuers' averments not being relevant or sufficient in specification of particulars of the alleged infringements, the action should be dismissed with expenses. (2) The said alleged letters-patent being invalid in respect of (*a*) disconformity between the provisional specification and the final specification as amended relative thereto, (*b*) insufficiency and unintelligibility of the said final specification as amended, the defenders should be assoilzied, with expenses. (3) The alleged invention for which the said alleged letters-patent were granted not being, at least *quoad* a material part thereof, competently the subject-matter of a grant of letters-patent within the meaning of the Patents Acts, the said letters-patent are not valid or effectual. (4) The said alleged letters-patent are not valid or effectual in respect (*a*) the said Robert Hutchison was not the first and true inventor of the alleged invention described in the said letters-patent and specification; (*b*) the alleged invention was publicly known prior to the date of the said letters-patent; (*c*) the alleged invention was publicly used prior to the said date; (*d*) the alleged invention is of no public practical utility. (5) The material averments of the pursuers being unfounded in fact, the defenders should be assoilzied, with expenses. (7) The defenders not having infringed the letters-patent granted to Robert Hutchison, assuming the same to be valid, should be assoilzied.

On 12th March 1887 the Lord Ordinary (Kinnear) pronounced this interlocutor:—"Finds that, in so far as regards the second head of the claim in the complete specification, No. 6 of process, the said specification does not set forth a new and original invention with sufficient clearness and precision to sustain a patent: Finds that, in so far as regards the said second head of the claim, the complete specification claims an invention larger than and different from that disclosed in the provisional specification: Therefore finds that the patent is void in law: To this extent and effect sustains the defences, dismisses the action, and decerns: Finds the defenders entitled to expenses," &c.*

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* "OPINION.—The pursuer's patent is challenged on various grounds, which involve disputed matters of fact. But the objection taken to the second head of the claim arises upon the construction of the specification alone; and I think the validity of the objection may be determined without subjecting the parties to the expense of a proof.

"By this second head the pursuer claims as part of the invention secured to him by the patent, 'the combining of oxidised or thickened vegetable or animal oils or fats with mineral oils, substantially as and for the purpose hereinbefore described.' There is no question that the purpose of the combination is to make a lubricant. But the only part of the specification in which the supposed invention of a combination of oils for that purpose is described, is a single sentence at page 3, line 13, where the patentee says,—'The mixing of a thickened or oxidised vegetable or animal oil or fat with mineral oil, to form a compound of consistency and quality suitable for a lubricant, is a part of my invention, irrespective of the precise means adopted for thickening or oxidising the oil.' These last words appear to me to be the material words to consider in construing this claim. In the previous part of the specification the patentee had described a particular method of treating vegetable or animal oils or fats for the purpose of oxidising or thickening the oil so as to make it suitable for a lubricant; and in the immediately following paragraph he describes a particular method of treating mineral oil for the same purpose. These processes are the inventions claimed under the first head of the claim; and if the patent is good it will protect the pursuer against the unauthorised use of oils prepared in the manner described, whether the animal or vegetable and the mineral oils are used separately or in combination. But when he comes to describe the mixture which he claims under the second head, he does not confine his claim to oils which have been treated by his own methods, but claims as part of his invention the mixing of oils of the kind described irrespective of the means by which they have been prepared or made suitable for mixing. It appears to me that this part of the specification does not set forth a new and original invention with sufficient clearness and precision to sustain the patent; because the process of mixing oils which are supposed to be suitable for being mixed either requires no invention at all, or, if it does require invention, the process is not disclosed.

"The specification assumes that in order to be suitable for a lubricant the compound must be of a certain quality and consistency. But the patentee gives no information as to the means by which the necessary consistency and quality are to be obtained.

"If it depends entirely on the original quality or treatment of the separate oils, there is no invention in bringing them together and mixing them. If it depends upon any adjustment of proportions or upon any process in making the mixture which it requires study or ingenuity to discover, there is no explanation of the process to be found in the specification. It is not immaterial that in describing his own treatment of the oils the patentee alleges that it is one of the advantages of his system that it makes the animal and mineral oils respectively more suitable for combining with one another. I assume that the process for which he claims this advantage is a novel and meritorious invention. But he does not say that it is the only means of preparing oils so as to be suitable for mixing. On the contrary, he assumes that there may be other methods, because he makes his claim for the compound wide enough to include oils which have been thickened or oxidised by some other method than his. The assumption of the claim therefore is, that the manufacturer may be possessed of oils which are not only suitable for mixing but which have been specially prepared for that purpose, either by means that are known to all the world or by some method which he has discovered by his own ingenuity, and yet that he cannot mix them without infringing the pursuer's patent. It does not seem likely that there should be any difficulty in mixing oils which are suitable for mixing.

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The pursuers reclaimed.

On 29th June 1887 the Second Division recalled the Lord Ordinary's interlocutor, and remitted the cause to the Lord Ordinary.

The Lord Ordinary allowed a proof.

The evidence led by the defenders shewed that long prior to the date of the pursuers' patent a process for thickening fat oils with a view to mixing them with mineral oils, similar to but not identical with theirs, had been in use at the works of Messrs Price & Co. in London. The details of the evidence on this point are given in the Lord Ordinary's opinion, *infra*, p. 652, note. With reference to the question how far the nature of this process became known to the public, the evidence quoted below was given.* There was no evidence that this process was in use at any other works than Price's prior to the date of the pursuers' patent.

But if there is, the patentee has not explained where it lies or how it is to be removed.

"Another construction of the specification was suggested, by which the patentee's invention was supposed to be the thickening or oxidising of oils, irrespective of the precise means by which they might be thickened or oxidised. And if this were so, he might be entitled to include in his claim all oxidised or thickened oils, whether used separately or in combination. But then the patent would be bad as a patent for a principle independently of any method for carrying it out. And, accordingly, the patentee has sufficiently guarded against this misconstruction by the first head of his claim, when he makes it clear that his invention does not consist in thickening or oxidising oils, but in subjecting them, for that purpose, to a particular process, which he describes.

"If I am right in thinking that by the second head of his claim the pursuer claims as part of his invention the mixing of oils which have been treated by other methods than those claimed under the first head, the complete specification claims a different invention from that set forth in the provisional invention, which is confined to one particular process for oxidising oils, by exposing them to the joint action of air and heat."

* Mr John Harvey, one of the partners of Price & Company, gave this evidence:—"We did not at first offer to the trade the thickened oil in an unmixed state, because we supplied consumers with the compound and not manufacturers of lubricants. In fact, so long as we could keep the process pretty well to ourselves it paid us better to get both profits by supplying the total compound than by supplying thickened oil to the manufacturer, who would proceed to make the compound and get his profit out of that. We managed for a long time to keep the matter to ourselves. At the same time, as regards this process which was going on in our works, it was not in any way kept secret any more than any other process in the works. It was patent to all the workmen who were concerned in it, and we sold the manufactured oil all over the world. We used to treat probably from eight to ten tons at a time in each tank. In a busy season we can treat sixty or seventy tons of the heavy oil in a week. About 1869 we did about forty tons a-week. Eventually the method was more widely promulgated. One of our employees was dismissed, and he disclosed the secret to a rival firm. After that we found that these thickened oils were put largely into the market by other people than ourselves. The term lardine was invented by a French clerk whom we had for the purpose of selling thickened oil on the Continent."

Mr J. D. Palmer, managing partner of Palmer & Company, oil merchants, London, deponed,—"It was in 1880 that we first began to blow oil in the way we have been doing lately. A man came to our office one day bringing with him two samples of oil, and asked me whether I would be inclined to employ him. He said he was able to take the one sample, and by processes of which he was the master turn it into the other. The one sample was evidently much more viscous than the other. He stated that he had been in Price & Company's works, but had ceased his connection with them. We accordingly

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The patent expired in October 1887.

On 10th January 1888 the Lord Ordinary pronounced an interlocutor assoilzieing the defenders from the conclusions of the action.*

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allowed him to put up machinery with the view of doing that. He did not communicate the process to us in the first instance. He asked employment to carry out the process secretly himself, and said he would divulge it if we gave him an agreement for a certain number of years. This we eventually did, and he then divulged it. He told me it was a process which he had brought from Price & Company's place. We put up machinery and proceeded to blow oil. These oils became thicker, and we mixed them with mineral oil and sold them in the trade. I never heard of pursuer's patent till this case arose."

* "OPINION.—The object of the pursuer's invention, as expressed in the specification, is the treatment of oils and fats in an improved manner, so as to make them more suitable for lubricants. In his evidence he says that prior to 1873, when his invention was made patent, the lubricating oils known to the trade were very unsatisfactory. Animal and vegetable oils, which are known as fat oils, were dear; and they had a tendency to thicken in use from the action of the atmosphere, so as to clog the machinery which they were intended to lubricate. Mineral oils which had recently come into use were too thin, except for very light machinery; and mineral oils and fat oils could not be advantageously mixed, because the fat oils, with one exception, were not of sufficient gravity to bear dilution with the thinner mineral oil. The one exception was castor oil; and from causes which have not been explained, castor oil is not soluble, or only imperfectly soluble, in mineral oil. In that condition of matters the pursuer says that he set himself to discover a method of thickening the mineral oil so as to obtain as the result an oil of sufficient gravity for heavy machinery, which should be free from the tendency of fat oils in their natural condition, to thicken in use. And his case is that he has discovered a method of treatment for that purpose, by which he thickens fat oils in such a way as to enable them to be advantageously mixed with mineral oil, and to form a satisfactory lubricant. The process which he has thus discovered is described in his specification as consisting 'mainly in subjecting the oil, whether mineral, vegetable, or animal, or the fat to heat while exposed to the air in shallow layers.' But he explains that the main purpose for which he subjects mineral oil to this process is to remove what he describes in the specification as the blueness or fluorescence, which is considered objectionable in mineral oils; and the purpose with which he subjects fat oils to the same treatment is to thicken or oxidise them.

"I do not think it at all doubtful that the pursuer's process, which he has protected by his patent, has in fact the valuable effect which he ascribes to it. The oil by being exposed to the air in the manner described becomes oxidised, and it has been proved by experience that this oxidised oil may be produced of any thickness or gravity that may be desired up to the gravity of castor oil; that the oil so treated is readily mixable with mineral oil, and that the mixture has no tendency to thicken in use. Whether the thickening of the oil is entirely due to oxidation does not appear to be certain, but the thickening and oxidation, according to the evidence, are always found together; and, at all events, it is not disputed that the result which the pursuer desired to obtain, and has obtained successfully, is due to the exposure of the oil to the combined action of air and heat, which causes oxidation.

"The product, according to the evidence, is of considerable commercial value, and the pursuer alleges that his invention has had a great effect upon the trade; that it has enabled mineral oil, which before could not be used for lubricating work at all, to be used in enormous quantities when mixed with thickened vegetable oil, and that the thickened oil has been so largely used that it has come to be known in the trade by a special name which has been given to it, and is called lardine.

"The defenders are said to have made use of this invention and infringed the patent by purchasing lardine, manufactured according to the pursuer's method by Messrs Price & Company, Messrs Palmer & Company, and Messrs

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The pursuers reclaimed, and argued;—(1) On the question of *prior use*.—Down to 1876 Price & Company had applied air and heat to animal and

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Handyside, and combining it with mineral oils to form a lubricant, or selling it for the purpose of being so combined. There can be no doubt that the lubricant purchased by the defenders, and manufactured by these London firms, and sold under the name of lardine, is a thickened vegetable oil, or that the thickening is produced by a process by which the oil is oxidised by the combined action of air and heat. But it is an entirely different process from that described in the pursuer's specification, and before considering whether it falls within the scope of his patent or not I think it is desirable to see exactly what the process is, and what is the history of its use by the firms in question.

"The evidence upon both of these points is perfectly distinct. The process in question was adopted first by Messrs Price & Company of London. It differs from the pursuer's process in this respect, that instead of being exposed, as he directs, in shallow layers, the vegetable oil is put into circular vessels 10 feet in diameter by 6 feet 6 inches deep; in the interior of these vessels there is an arrangement of pipes for conducting air, steam, and cold water; the oil is heated by the application of steam, and air is blown through the heated oil, which, under this treatment, becomes oxidised so as to enable it to be mixed advantageously with mineral oil. I think it proved that this is a more expeditious and economical method than the pursuer's, because it enables larger quantities of oil to be treated in a given time. But it undoubtedly resembles the pursuer's in this respect, that the oil so treated is oxidised by the action of heat and air alone; and being so oxidised, it is found to possess the advantages which he claims as the special merits of his process.

"I think it proved that this process has been in use in Messrs Price & Company's manufactory for many years before the pursuer began his experiments in 1873. Mr Harvey, a partner of that firm, says that he found it in operation when he joined the firm in 1869. Mr Colls, who has been in their employment since 1871, says that it has been in operation during the whole time of his service; and Mr Dodd, their general manager, says that it began so far back as 1862. He says that in the winter of 1861-62 he was present at a conversation between Mr Price, a former partner of the firm, and Mr Keats, their consulting chemist, who is now dead, in the course of which they discussed a lecture about to be given by a Mr Hubbard on the thickening of oils by oxidation; that Mr Keats attended the lecture, and afterwards made certain experiments, and ultimately instructed the witness to fit up an apparatus of the kind now in use; that this was done; and that since this first beginning in 1862 the firm has been carrying on the process continuously and with success.

"It is suggested that the process thus described was borrowed from that disclosed in Dunn's patent of 1843, for 'purifying and bleaching oils and fats'; and that its true purpose was not to thicken but to purify the oil. All of the witnesses whom I have mentioned say that they never heard of Dunn's patent; and, what is more important, they all state most positively that their purpose was not to bleach but to thicken. If this is true, and I see no reason to doubt their testimony, it is of no consequence whether their process was originally borrowed from Dunn's or not. Nor should I have thought it very material, even if it were shewn that Messrs Price & Company's apparatus was originally constructed for the purpose of bleaching, provided it has been used in fact for the purpose of oxidising, and so of thickening, for a period beginning before 1873. That their process is in fact identical with Dunn's there can be no doubt. But they carry it on further than he directed, for the purpose of producing an effect which he did not foresee or did not disclose. He describes a process of blowing air through oil, for the purpose of bleaching and not of thickening. But it is in evidence that it is impossible to bleach effectually without thickening to a certain extent; that thickening is an essentially progressive process; and that the greater or less extent to which the oil may be thickened depends upon nothing but the quantity of air blown through it.

"The question, therefore is, Whether this process was in fact employed by

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vegetable oils only for the purpose of bleaching, and not for the purpose of thickening, and as the pursuers' patent was dated in 1873, there had

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Messrs Price & Company before 1873, for the purpose of oxidising animal or vegetable oils, so as to produce a lubricant, either to be used alone, or to be mixed with mineral oils? The evidence, to my mind, leaves no room for doubt that it was so used, and with a view to the advantages described in the pursuer's specification. Mr Harvey says that since he joined the firm in 1869, they have been in the habit of treating fat oils in the manner described, of mixing the oils so treated with mineral oils, and of selling the compound to a very large extent in their business. And the evidence of the two managers is to the same effect. It is true that in the earlier years they did not thicken to the same extent as they do now; but that is not of material importance, because thickening to an appreciable extent will involve an infringement or an anticipation of the pursuer's patent, provided it be produced by a process which will fall within his claim. Taking the gravity of rape seed or cotton oil, in their unoxidised condition, Mr Harvey's evidence is that in 1869 they used to thicken to 930 or 940, whereas they now thicken to the gravity of castor oil (969), which is given in the pursuer's specification as an example of the effect of his process, and to much higher gravities. He cannot give the exact date when they began to use the higher gravities. But the material considerations are that the advance is not due to any new discovery, but to the natural progress of the manufacture, and to a great increase in the number of mineral oils available for mixing; and, secondly, that the process of which the pursuer complains as an infringement is exactly the same as that in use in 1869. The only difference is that the oil is treated for a longer time, so that a greater quantity of air may be blown through. . . .

"It is said, however, that the evidence as to Messrs Price & Company's process is not trustworthy. This is a question of credibility, as to which it is enough to say that I see no reason to doubt the veracity of the witnesses, and that I accordingly accept their testimony as true. Their statement is in no way inconsistent with the evidence as to the great increase which is said to have taken place in recent years in the consumption of lardine. The pursuer has failed to prove that this is to be ascribed to his invention. It is not unimportant that the name of 'lardine,' which he says has been given to his product, appears to have been invented by a French clerk of Messrs Price & Company to denote the blown oils of that firm. But it is more material that there is no evidence that the pursuer's patent, or the process which it describes, had become known to manufacturers or dealers in oils until shortly before this action was raised. Lardine had undoubtedly become known as an article of commerce, but his invention was not known; and it is certain that it was not from his invention that Price & Company and Palmer & Company, who would appear to be the largest manufacturers, have borrowed their process.

"If this view of the facts is correct, the question which has been raised as to the construction of the specification is of little importance; because if Messrs Price & Company's process differs substantially from the invention which is claimed to be novel, there is no infringement. And, on the other hand, if it does not substantially differ, the patent is invalidated by the prior use, which in that case must be held to be established. But since the question of fact is in controversy, it may be proper to consider also the question of construction. It is said that the pursuer's invention consists—first, in the discovery that it is possible to thicken fat oils without decomposition and without the addition of any foreign substance, by heat and air alone; second, in the discovery that it is possible to mix oils so thickened with mineral oils, so as to form a lubricant; and, third, in the elaboration of a particular process for applying the discovery in practice. The invention that is claimed as novel is therefore said to be the thickening of oils by exposing them to air and heat, either by the method described or by any other method which operates exclusively by air and heat. I am unable to adopt this reading of the specification. Without taking Messrs Price & Company's process into consideration at all, there is evidence that before thus been no prior use by Price & Company in point of fact. The Lord Ordinary had taken a wrong view of the evidence. But admitting that the

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1873 it was known generally that the exposure of fat oil to air would have the effect of thickening it, and also that the process would be accelerated by heat. I do not think it proved that this was generally recognised as a principle which could be applied to any practical effect, so as to produce an article of commercial value. But it is proved by the evidence of Mr Allan and Mr Falconer King that these general facts were known. I do not think if the pursuer's specification be fairly construed with reference to the statements which he gave in the box as to the experiments which he made and the purpose of these experiments, that he represents himself to have discovered either of these facts as an entirely new principle. I think that what he does claim to have discovered is —first, that fat oils may be thickened by treating them in the particular manner which he describes—that is, by subjecting them to heat and air in shallow layers; and secondly, that when animal or vegetable oils have been so thickened or oxidised, they will mix with mineral oils. And accordingly, when he comes to define what is novel and original in the process which he describes, he states his claim under two separate heads; the first of which relates to the treatment of unmixed oils and fats; and the second to the mixing of oxidised or thickened vegetable or animal oils with mineral oils. But under the first head he limits his claim in clear and distinct terms to the subjecting of oils and fats in shallow layers to the joint action of air and heat, substantially as and for the purposes described. That is not a claim for the oxidation of oils by any other method than that described; it is a claim for the particular process described for the purpose of oxidising or thickening. It may still be a perfectly good claim for a new invention, which is a fit subject for a patent, even although it be proved, as I think it is, that a different method of oxidation had been publicly used by Messrs Price & Company before the pursuer's invention was made patent; and it follows that Messrs Price & Company's process would not be an infringement if it were later than the pursuer's patent.

"It is said that the second claim is intended to cover any method of oxidation which operates by heat and air exclusively; but the second claim is not for the treatment of unmixed oils, but solely for the mixing of fat oils, already treated in the manner described by the pursuer, or oxidised in some other manner, with mineral oils. There can be no infringement under this second head of the claim, unless the oil, thickened or oxidised in whatever manner, has been mixed. There is no infringement by merely oxidising or thickening. In construing this second claim without the information which is now to be obtained from the evidence as to the nature of the process which is described, it appeared to me objectionable for the reasons stated in my former opinion. The special subject of this claim is not the treatment of the oil, but the mixing of the oil after it has been treated. The assumption of the claim therefore is, that the manufacturer is possessed of oils which have been treated in such a way as to make them fit for mixing; and that being so, the pursuer goes on to say, 'If he mixes the oils which have been so treated, then he infringes my invention.' It appeared to me that the process of mixing oils, already treated in such a way as to render them suitable for mixing, either involved no invention, or skill, or ingenuity at all, and in that case there was no proper subject for a patent; or else, that it did involve some skill, ingenuity, or special knowledge, and in that case the process was not described; and the evidence which has been led has not, in my opinion, displaced that objection. I think the pursuer has proved, and so far I agree with his view of the evidence, that in the great majority of cases there is no difficulty in effecting the mixture, which required any further explanation by the patentee than that which he has given. But if that be so, then the mere process of mixing is not a subject for a patent. But then it is said, and there is evidence to that effect, that in the case of oils of certain specific gravity there is so great difficulty in mixing them that it cannot be known without experiment in what proportions they will effectually mix. If that is sufficient to create a serious difficulty then the process is not explained by the

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Lord Ordinary was right on that point, the prior use had been a secret not a public use, and in order to invalidate a patent the method of the invention must have been matter of public knowledge. It was plain from Harvey's evidence that Price & Company kept their process secret as long as they could, and Palmer's evidence shewed that it did not become public until 1880. Prior use meant prior publication, the theory of the patent law being that in return for the benefit which the public obtained from the publication of the invention the State gave the inventor protection under certain conditions.[1] (2) On the *construction of the patent.*—The patent was a patent for a product—or rather for three products—a thickened vegetable or animal oil, a better coloured mineral oil, and the combination of the two. One who invented a new result or application of a known principle was entitled to patent his invention, and must specify one method of producing the result, but he was not tied down to that method—his patent covered other methods not specified.[2] That being so, there was no disconformity between the provisional and the complete specification, and the defenders' method of thickening was covered by the pursuers' patent.

Argued for the defenders;—(1) On the question of *prior use.*—The Lord Ordinary had taken the sound view of the evidence; there had in fact been prior use,—assuming, that was to say, that the defenders' process was within the pursuers' patent. Further, there had been no such secrecy about the defenders' working of their invention as to deprive this prior use of its legal effect.[3] (2) On the *construction of the patent.*—The defenders' process of oxidising fat oils was admittedly not the same as the pursuers'; consequently in order to bring the former process within their patent they were compelled to construe their first head as a patent for a product and not for a process. But in the first place, if it was merely oxidised fat oil that they sought to patent, the patent was bad on the ground of want of novelty—for that fat oil would oxidise under the influence of air and heat was perfectly well known long before the pursuers obtained their patent. Then, secondly, the first head of their specification really embraced two totally different products—thickened or oxidised fat oil and clarified mineral oil; that shewed that what they really patented was a process by which these two products might be obtained. Their case also failed on the second branch of their claim, on the ground of disconformity between the provisional and the complete specification, for the former was limited to the combination of fat oils thickened in a particular way with mineral oils, while the latter claimed to cover the combination of fat oils thickened by any process with mineral oils.

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patentee. If the specification is to be construed as claiming a product, that will not remove the objection, because in that case the patent would cover every mixture of mineral oil and oxidised fat oils, irrespective of the method of oxidation.

"For these reasons I am of opinion that the defenders ought to be assoilzied."

[1] Sykes v. Wilson, Feb. 2, 1866, 4 Macph. 349, 38 Scot. Jur. 181; Smith v. Davidson, March 11, 1857, 19 D. 691, 29 Scot. Jur. 237; Hancock v. Somervell, 1851, Newton's London Journal, vol. 39, p. 158,—see also Higgin's Digest of Patent Cases, p. 82; Neilson v. Harford, June 9, 1841, 1 Webster's Patent Cases, 331; Heath v. Smith, Jan. 23, 1854, 3 Ell. and Blackb. 266.

[2] Neilson v. Househill Coal Co., March 6, 1843, 2 Bell's Apps. 1, 15 Scot. Jur. 524.

[3] Tennent's case, 1802, 1 Webster's Patent Cases, 125; Stead v. Williams, 1843, 2 Webster's Patent Cases, 126; Carpenter v. Smith, 1842, 1 Webster's Patent Cases, 540.

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At advising,—

Lord Justice-Clerk.—This case, which relates to the existence of a patent right, has been the subject of a very full investigation, and we have a very exhaustive opinion from the Lord Ordinary in regard to the questions at issue. We have now to decide those questions.

When the case first came before us we found that the Lord Ordinary had decided it on the construction of the patent itself, that is, on the provisional specification and the final specification—and the conclusion to which he had come was that the patent was not a good but a bad patent. It was our view however that the whole facts of the case should be disclosed, and accordingly we recalled the judgment of the Lord Ordinary, and remitted the cause to him to allow a proof.

The Lord Ordinary has now pronounced a judgment after hearing the proof, in which he adheres to the view that he formerly took upon the legal import of the patent, and he has also come to be of opinion that there has been a prior use of the alleged invention, or of a part of it, which was covered by the patent, and also that there had been no infringement of anything to which the pursuers had a patent right. He has accordingly assoilzied the defenders.

I have come to be of opinion, and that very clearly, that upon both these points the Lord Ordinary has arrived at the sound conclusion. I shall only add a sentence or two to the very full exposition of his views with which the Lord Ordinary has favoured us.

An inventor who desires to patent his invention has sometimes rather hard measure dealt to him. His invention may be very useful and very profitable to those who use it, and yet he may have so expressed himself in his specifications as not to be entitled to obtain the protection for which the patent was intended to provide, and that either from discrepancies between the provisional and the complete specification, or from flaws or omissions in the words in which he describes his claim. Here, however, while I feel that Mr Hutchison is a meritorious inventor, or a meritorious observer of the results which he has patented or endeavoured to patent, I rather think that his difficulties have arisen from the very nature of the operation itself, and of the subject-matter to which the patent applies.

There were two results which Mr Hutchison endeavoured to protect by patent, both of which were decidedly meritorious. In dealing with fat, *i.e.*, animal, or vegetable oils, the difficulty which oil merchants seem to have found was that these oils got coagulated and were therefore unfit for use as lubricants—or rather that in the use of them as lubricants this coagulation or viscosity was generated, so that the machinery to which they were applied became clogged. From observation and experiment Mr Hutchison found that if these fat oils were exposed to the influence of the air and of heat in open vessels for a certain time, and at a certain temperature, the result was to thicken them and to remove any tendency to further thickening. In the second place he found—and this was a remarkable part of the invention—that after the fat vegetable or animal oils had been treated in this manner, they were capable of combination with mineral oils. The fat oils had been found to be incapable of such a combination in their ordinary condition, but after being treated according to Mr Hutchison's method they became suitable for that purpose, and as mineral oil had come to be a very large article of commerce, and was comparatively inexpensive, but by itself was unsuitable as a lubricant from its thinness, it was of course desirable that traders should be able to thicken it by mixture with fat oil.

It was to protect these two results that this patent was obtained, and the question in the first place is, is this patent a good one? Is it a good patent according to the rules by which such rights are ordinarily judged? The object of a patent is to give a monopoly or protection to the inventor. That means that it gives him a right to prohibit all other persons from doing what the inventor has protected by his patent. A patent is a monopoly and a prohibition.

The Lord Ordinary has decided that this patent is bad, and he has given the reasons which have led him to that conclusion at considerable length. I shall endeavour to summarise the more important of these reasons.

I rather think that on a construction of the documents themselves there is a variance, and a fatal variance, between the provisional specification and the amended specification. The provisional specification evidently contemplated the obtaining of a patent for a process—the mechanical means of attaining a particular end—and the particular end was the attainment of the twofold results I have already mentioned. Accordingly, Mr Hutchison in his provisional specification says that his invention consists in the exposing of the oils to the atmosphere. He says,—"This invention has for its object the treating of oils and fats in an improved manner and so as to render them more suitable for various applications, and it consists in subjecting the oil whether mineral, vegetable, or animal, or the fat to a temperature about equal to that of boiling water for eight or ten days, the oil or fat being exposed to air in layers of about half an inch in depth." That is the first paragraph of the provisional specification, and in the last paragraph he concludes by saying,—"The thickening of the vegetable or animal oils or fats which is believed to be due to oxidation makes them better adapted for saponification and other uses besides that of forming lubricants." But when he comes to enlarge his specification, and to amend it after the patent had been obtained, it is quite plain that his view in regard to that had changed. The claim which he makes in the amended specification is not for a process. The process of the shallow layers and the application of heat is not treated as an essential part of the invention. On the contrary he says,—"In practically carrying out my said invention in dealing with vegetable or animal oils or fats I prefer to expose them in shallow pans or dishes to the combined action of atmospheric air and heat, with or without the addition of water, for a lengthened time. The addition of water accelerates the process, but the colour of the oxidised oil or fat is generally paler if treated without water." That is a way in which the oxidation, which is the essence of the operation and of the alteration of the fat oil, may be carried out, but he only says that he prefers to carry it out in that particular manner, and when he comes to speak of the mixing of the fat oils with the mineral oils he says,—"The mixing of a thickened or oxidised vegetable or animal oil or fat with mineral oil to form a compound of consistency and quality suitable for a lubricant is a part of my invention, irrespective of the precise means adopted for thickening or oxidising the oil." I am of opinion that this variance exposes the patent to very great hazard. It is not a patent for the application of a principle, because the application of heat or atmospheric air is not a principle, at all events it is not a principle specified here. It is not said to be a necessary part of the invention, and that for the plainest possible reason, that the oxidation might be brought about in a great variety of ways

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besides that particular mechanism suggested but not patented on the part of this patentee.

Without going any further I should have come to that conclusion. I think this patent as it stands is not a patent of a process. It is not a patent of a principle. It is a pointing out of an advantageous method of dealing with ordinary mechanical agents not invented by the patentee. This pointing out is not exclusive; it might embrace a great variety of modes not comprehended in this patentee's description.

I think the views I have now expressed lie at the very foundation of the claim which is here made. The only novelty is in the second branch of the claim, where the mixing of the fat and the mineral oils is claimed, but if that is intended to be a claim for a process the pursuer neither shews what the difficulty is in mixing mineral oils with fat oils, nor does he shew any mode in which he claims that that can be done.

I think that the views of the Lord Ordinary, which he has elaborated with great care, will be found truly to turn on the pivot I have mentioned.

Then as to the prior use, the novelty and the infringement, I concur with the Lord Ordinary. I think it very doubtful whether any case of infringement is relevantly libelled here—much less proved. The Lord Ordinary heard the evidence and saw the witnesses, and has expressed himself satisfied with that branch of the defenders' case, and I have heard nothing from the bar to induce me to reach another result.

On the whole matter, I think we should adhere to the Lord Ordinary's interlocutor.

Lord Young.—I am of the same opinion. I hesitate to add anything to what your Lordship has said, concurring with the Lord Ordinary, but I think it right to point out this, that the pursuer does not seek protection for his patent. His patent has now expired—has expired for more than a year. It was on the eve of expiry when the action was brought, for it expired in October 1887 and the action was raised in December 1886. The action therefore is not for an interdict, but concludes for damages for alleged infringement.

I desire also to say that I share your Lordship's doubt as to whether the statement of the alleged infringement here is relevant so as to found an action of damages. The only averment on that head is contained in condescendence 3, and I think it is of very doubtful relevancy indeed.

Two questions were argued to us. One of these regarded a matter of fact: Whether the process described or referred to in the specification, and of which the invention was said to consist, was new at the date of the patent—that is, whether this gentleman was the first and true inventor, or whether there had been prior use. The Lord Ordinary in the note to his second judgment, which proceeded on the evidence, says,—"The question therefore is, whether this process was in fact employed by Messrs Price & Company before 1873, for the purpose of oxidising animal and vegetable oils, so as to produce a lubricant either to be used alone, or to be mixed with mineral oils. The evidence to my mind leaves no room for doubt that it was so used, and with a view to the advantage described in the pursuer's specification." It was conceded by the learned counsel for the pursuer—and indeed could not be denied—that there is evidence to that effect abundant and conclusive, if the witnesses who gave that evidence are to be believed; and if the fact be so upon the evidence then the

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patent is bad. Upon that matter the Lord Ordinary expresses himself thus :— "It is said however that the evidence as to Messrs Price & Company's process is not trustworthy. This is a question of credibility, as to which it is enough to say that I see no reason to doubt the veracity of the witnesses, and that I accept their testimony as true." Reasons were urged and arguments were stated to us why we should disbelieve those witnesses who were examined in the presence of the Lord Ordinary, and whom he believed. Of course we attended to the reasons urged to that end and to the argument stated to us. The result in my mind is the same as in your Lordship's—that on this question of credibility I agree with the Lord Ordinary,

That concludes the case upon the facts. Upon the question of law I am of opinion with the Lord Ordinary and your Lordship that the patent is bad in law, and that for the reasons so fully explained by the Lord Ordinary.

LORD RUTHERFURD CLARK.—I am satisfied that the pursuer made independently an important discovery when he found that animal and vegetable oils, oxidised or thickened by the action of air and heat, readily combined with mineral oil so as to make a good lubricant. So far there may be material for a patent. But the defenders maintain that the patent is bad on various grounds.

In the argument which we heard the pursuer maintained that his patent was a patent for a product, or rather for three several products. As this was the construction which the pursuer adopted, I take it to be the most favourable that could be advanced on his behalf. Viewing the patent in this light, I find that the products are—1st, vegetable or animal oil thickened or oxidised by the action of air and heat; 2d, mineral oil clarified by the same process; and 3d, the compound formed by the mixture of the thickened or oxidised oil with mineral oil. It follows that as each of these products is claimed as falling within the patent, each of them must be a novelty or invention. If not, the patent is necessarily bad.

I shall now consider the first product.

I should have great difficulty in believing that at the date of the patent it was not known that vegetable and animal oils could be oxidised or thickened by the action of air and heat. It seems to be the obvious and necessary result of the application of these agents. But this matter is not left in doubt. For Mr Falconer King says,—" It was known long before 1873 that vegetable and animal oils would thicken by exposure to air. It was also known that heat would accelerate the process." It was not suggested by the pursuer that this statement was not true, and for my part I cannot see any reason to doubt its truth. If this be so, the product which the pursuer claims as his invention is not new; and if it be old, the patent is invalid. There is neither novelty nor invention.

But the pursuer, as I understood, maintained that the product was claimed with a qualification, inasmuch as the words of the first claim run thus :—" The subjecting of oils and fats in shallow layers to the joint action of air and heat substantially as and for the purposes hereinbefore described." If the patent be for a product, as the pursuer contends, and if the words which I have quoted qualify or limit the claim, the meaning must be that the pursuer claims the product when made in a particular way and for a particular use. But he very expressly disclaimed all novelty in the process, and apart from this disclaimer I can see neither novelty nor merit in it. If, therefore, the process were part of

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the invention which is claimed by the pursuer there would be much to say against the validity of the patent. But if the process be put aside, there only remains the specified purposes or uses.

It would seem to be the law that there cannot be a patent privilege for a new use of an old invention, even though there be merit in the discovery of the new use—*Kay* v. *Marshall*, H. L., 6 Clark & Finelly, 425. But putting that question aside, let me consider what the uses are which are specified by the pursuer. I have said that he discovered that the thickened oil would combine with mineral oil so as to make a good lubricant. That is not the only use in connection with which the thickened oil is claimed as a novelty. The claiming clause uses the plural, "the purposes hereinbefore described." What are these purposes? One undoubtedly is to combine the thickened oil with mineral oil. The other, so far as I see, can be nothing else than to use it by itself as a lubricant. The specification sets out:—"The said invention has for its object the heating of oils and fats in an improved manner, and so as to render them more suitable for making lubricants, and it consists mainly in subjecting the oil, whether mineral, vegetable, or animal, or the fat, to heat, while exposed to the air in shallow layers." Further, it says,—"One important object of my invention is to oxidise or thicken vegetable or animal oils or fats so as to render them better adapted for mixing with mineral oils to form lubricants of various qualities." Reading these sentences together, it is plain enough that the preparation of the animal and vegetable oils so as to make them better adapted for mixing with mineral oils is not the sole invention which the pursuer claims. The words "one important object," as well as the plurality in the claiming clause, are conclusive on that point. If so the vegetable and animal oils are treated in the manner described in the specification with a view to a use apart from the admixture of mineral oils, or, in the words of the specification, "for making lubricants." I take that to mean that the thickened oil is itself to be used as a lubricant. There is no other use suggested, and if the use was to be a part of the claim the pursuer was bound to specify it. It is certain, as I have already said, that the thickened oil is claimed as being adapted to more than one use.

The result, in my opinion, is that the product claimed by the pursuer as his invention is a known product, manufactured by a known process, and intended for a known use. For I do not think that it can be said that there can be any novelty or invention in using thickened oil as a lubricant.

For these reasons I think that the patent is bad, and I have stated them in order that I might deal with the argument which was submitted to us, but I have further to say that I concur in the view expressed by the Lord Ordinary in his note.

LORD CRAIGHILL was absent.

THE COURT adhered.

DAVIDSON & SYME, W.S.—GREGOR MACGREGOR, S.S.C.—Agents.

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Walker, Hunter, & Co. v. Hecla Foundry Co.

WALKER, HUNTER, & COMPANY, Complainers (Respondents).—*D.-F. Mackintosh—Ure.*

HECLA FOUNDRY COMPANY, Respondents (Reclaimers).—*Jameson—Younger.*

Copyright of designs—Infringement—Registration for "shape or configuration"—Patents, Designs, and Trades-Marks Act, 1883 (46 *and* 47 *Vict. cap.* 57),

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sec. 58.—A design was registered for shape or configuration under the 60th section of the Patents, Designs, and Trades-Marks Act, 1883, the application being for "a range door, with moulding on top, moulding forming front of range, shape to be registered." The drawing shewed a moulding on the top of the door fitting into the moulding on the front of the range, and flush with it. The merit of the design lay in attaching the moulding to the door instead of to the fire-cover, the arrangement formerly in use in convertible kitchen ranges. *Held* that another design, which differed from the above in this, that the moulding on the door overlapped the moulding on the front of the range, was, except in certain immaterial respects, an "obvious imitation" of or identical with the registered design, and an infringement of it.

1st Division.
Lord M'Laren.
M.

(Vide *ante*, *Walker, Hunter, & Co.* v. *The Falkirk Iron Co.*, July 20, 1887, 14 R. 1072.)

Messrs Walker, Hunter, & Company, of the Port-Downie Iron-works, Falkirk, brought a suspension and interdict against the Hecla Foundry Company, and the individual partners thereof, in which they prayed the Court to interdict the respondents "from infringing the copyright of a registered design for kitchen range fire-doors, No. 16,596, the property of the complainers, conform to certificate of registration, dated 10th November 1884, granted in pursuance of the Patents, Designs, and Trades-Marks Act, 46 and 47 Vict. c. 57, and, in particular, from making, vending, or using any fire-doors for kitchen ranges having a moulding, cast or fixed, thereon, in manner shewn in the design, a copy of which is annexed to the said certificate of registration, or in manner substantially the same, and from infringing the copyright of said registered design in any other manner of way."

The design in question had been registered by the complainers under the Patents, Designs, and Trades-Marks Act, 1883, and the 60th section thereof, for "shape or configuration," the application being for "a range door, with moulding on top, moulding forming front of range, shape to be registered"; and it had been held by the Court to be a proper subject of registration in the case at the instance of the complainers against the Falkirk Iron Co., July 20, 1887, 14 R. 1072.

The respondents, *inter alia,* stated that the fire-door of their range which it was sought to interdict was entirely different in shape from that of the complainers.

The complainers pleaded;—(1) The respondents having infringed the complainers' copyright as above condescended on, and having refused to discontinue said infringement, the complainers are entitled to have interdict as craved.

The respondents, besides stating various pleas against the validity of the exclusive privilege claimed, pleaded;—(6) The respondents not having infringed any rights of the complainers, the note should be refused.

The result of the proof is fully set forth *infra,** and in the opinion of the Lord Ordinary (M'Laren).

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* Mr J. T. King, a patent agent and consulting engineer, who was examined for the respondents, deponed in regard to the distinctions between Nos. 14 (the complainers' design) and 15 (the respondents' design), as follows:—"I have examined Nos. 14 and 15 with a view to arriving at an opinion whether No. 15 is an infringement of the design shewn in No. 14. My opinion is that No. 15 is not the same design as No. 14, and does not resemble it. In the first place, the shape of the moulding on the top is not the same; the moulding in No. 15 projects, whilst in No. 14 it is flush or cut off. The two sides and bottom of No. 15 are not the same as No. 14; No. 15 has an ogee moulding on the sides and bottom, while No. 14 is simply beaded or rounded. Then the hinges are not of the same outline, nor

His Lordship, on 16th November 1887, pronounced this interlocutor:—"Finds it proved that the respondents have infringed the suspenders' exclusive privilege, by making for sale fire doors of the pattern produced: Therefore suspends the proceedings complained, interdicts, prohibits, and discharges, in terms of the prayer of the note of suspension and interdict, and decerns," &c.*

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rivetted on with the same number of rivets; in No. 14 the straps are straight, with lancet points, whilst in No. 15 they are cut away narrow, and terminate in much longer lozenge points, and they are fastened by three rivets in place of two; and, what is not represented in No. 14, there are two screws in No. 15 fastening the moulding on the top. That leads to another distinction, that in No. 15 the moulding is cast separate and fastened to the door, whilst in No. 14 the door-plate and moulding are cast in one. And there is still a further difference, that in No. 15 the moulding stands out from the face of the door, and, therefore, is not in line with the moulding in front of the range. (Q.) Do you consider that a material difference in design? (A.) As far as I am capable of forming a judgment, the design is entirely different. There was about as much thought required to devise or design the one as the other."

* "OPINION.—This is the second action at the instance of Walker, Hunter, & Company, for contravention of the exclusive privilege which they claim under the Registration of Designs Act.

"The design was for a door for a convertible range, and it has been shortly described as a rectangular door with a moulding on the top of it. It appears that in these convertible kitchen ranges the fire is opened by lifting or sliding back the fire-cover, and opening the fire-door in front of the bars, and then there is, I think, a bar that folds over; but when the fire-place is closed, then according to the usual construction of these ranges, a moulding was cast on the fire-cover or fall-bar which might or might not be continuous with the moulding on the other part of the grate, but generally was of the same pattern or design. The practice has been to put the moulding upon the fire-cover or fall-bar, but, for reasons which I need not discuss, this was found inconvenient, and it occurred to the complainers as an improvement that the moulding might be cast upon the door, with the result that, when the door was closed, the appearance of the range was exactly the same.

"In a former action the validity of the exclusive privilege claimed was contested. It was contested upon three different grounds. First, it was said, having regard to the evidence in support of the exclusive privilege that it was rather the subject of a patent than of a certificate under the Designs Acts, if it was of any value at all. Then I think it was also said to be of no value, or that the improvement was so inconsiderable and so obvious as not to be entitled to protection. And then, further, the validity of the claim was disputed on the usual ground of anticipation, and there were, I think, two cases of anticipation brought forward, neither of which however was established. In the opinion of the Court on a reclaiming note from my judgment, all those objections to the exclusive privilege were rejected, and interdict was granted against the attempted infringement. If this had been a patent case, the questions to which I have referred could not have been tried again; because I should unquestionably have granted a certificate in terms of the Act that the validity of the patent had been in question in the former case. But as the special provisions to which I am referring have not been made part of the copyright law, the respondents in this case were entitled to raise these questions over again. It had been intended, I understand, to try the question of anticipation; but for reasons which I stated in the course of the discussion, I held that no such question could be tried under this record.

"With regard to the other objections, to wit, that this design is unworthy of legal protection at all, or that if entitled to protection, it should be given by means of letters-patent, I need do no more than refer to the judgment of the Inner-House in the former action—a judgment which unreservedly disposes of

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The respondents reclaimed, and argued;—The design fell to be looked at as a whole, and there was no infringement unless it was exactly copied.*

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these objections, and which I conceive to be authoritative on this question, superseding the necessity of any further consideration of these points by myself.

"There remains therefore only the question of infringement, whether the design of the door, which is undoubtedly made by the Hecla Company, is an infringement of the complainers' exclusive privilege? Now, the respondents' door is a rectangular door surmounted by a moulding; and except that the moulding has a different section from the moulding of the complainers, if those two doors were looked at in face as represented in the drawing (or in the manner of an elevation) then I say that, except in the particular which I have just noticed, I think there is really nothing to distinguish the two designs. But when you come to look at the respondents' door in section, a difference becomes apparent, because the door is so attached to its hinges that instead of fitting into the space between the adjoining plates of the range, it lies over them, and the moulding, instead of fitting into the space left between the mouldings at the two sides, overlaps them, having its corners rounded off so as to make a transition more agreeable to the eye than if they had been cut off square. The difference that I refer to does not come out by comparing the respondents' drawing with the design for which the certificate was granted. It only comes out when the door is seen in section, and when the manner of its superposition upon the grate is considered.

"Now, upon the question of whether there is here an infringement, nothing was said to the contrary of the complainers' proposition, that mere differences in the outline of the moulding would not take the respondents' design out of the protected copyright. That seems to me perfectly clear, because there is nothing original in the moulding, and in the claim of registration it is made evident that the registration was claimed not for the particular moulding, but for the material form given by placing a moulding—any suitable moulding—upon a fire-door in the described position. Well, then, I have to consider if there was no exclusive privilege claimed for the particular pattern of moulding, whether the exclusive privilege is limited to the case of a moulding which exactly fits into the adjoining mouldings, so as to present a continuous flowing surface; or whether it is not a privilege granted for putting such a moulding upon a fire-door in such a manner as to exclude air and to accomplish the object which had previously been accomplished by putting the moulding upon the fire-cover or fall-bar. It occurred to me, as one way of testing the question, to consider whether it would be possible for the respondents to obtain any right by registration of their design consistently with the right already given to the complainers. There is evidence to the effect that the respondents' pattern had been independently devised, and that they had not wilfully copied the complainers' design. But of course that will not avail them if the copyright obtained by the complainers is good. I think the true way of looking at the question is, to assume or suppose, for the sake of the argument, that the respondents had been aware of the registered design, and with that knowledge had set about to make a design of their own, which should not copy, or colourably imitate, the complainers'. Now, if they had set about making a design in that view, and had produced the complainers' design, with this difference, that the moulding of the door overlapped the adjacent mouldings at the side instead of fitting between them, the question is, whether that design involves the exercise of any inventive skill at all, and whether it is capable of being distinguished from the complainers' design as a design?

I think that in this case the difficulty, if there is any, is in finding out the

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* The Patents, Designs, and Trade-Marks Act, 1883, sec. 58, provided that "During the existence of copyright in any design (*a*) it shall not be lawful for any person, without the licence or written consent of the registered proprietor, to apply such design or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale," &c.

The case of *Houldsworth* v. *M'Crea*[1] was an authority to that effect, although that case arose under the previous Act of 21 and 22 Vict. cap. 70. In the reclaimers' door the moulding stood out from the face, and was not in line with the moulding in front of the range. In the other it was flush with it. To constitute an infringement the design must be the same, or an obvious or fraudulent imitation of the original.[2] The outline here was different, and that was sufficient to take the case out of the category of imitation.

The respondents' counsel were not called upon.

LORD PRESIDENT.—The question which we have now to decide is entirely one of infringement of patent. In the former case, at the instance of the present complainers against the Falkirk Iron Company (14 R. 1072), we held that the design for the door of a kitchen-range was a "new or original design," and was in consequence a proper subject for registration under the Patents, Designs, and Trade-Marks Act, 1883. Assuming that to be so, the only question remaining is whether the respondents' design is an obvious imitation of the design which has been registered by the complainers. I think it is. I think the difference between the two is absolutely immaterial, and the ground of judgment I am disposed to adopt is that which has been well stated by the Lord Ordinary in his opinion, as follows:—"Upon the question of whether there is here an infringement, nothing was said to the contrary of the complainers' proposition, that mere differences in the outline of the moulding would not take the respondents' design out of the protected copyright. That seems to me perfectly clear, because there is nothing original in the moulding, and in the claim of registration it is made evident that the registration was claimed not for the particular moulding, but for the material form given by placing a moulding—any suitable moulding—upon a fire-door in the described position." I think that that was distinctly the subject of the complainers' claim, and that the improvements registered by them consisted just in what is there described by his Lordship. It seems to me that that description equally embraces the one door and the other. The respondents' design is either an obvious imitation of the other, or, as the Lord Ordinary says in the conclusion of his opinion, it is identical with it, except in certain respects, which are absolutely immaterial.

LORD SHAND.—I am of the same opinion, and I am quite satisfied with the

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question for consideration; because, when that is once stated, I think it carries its own answer. If it be the question whether, in the assumed knowledge of the complainers' pattern, and wishing not to imitate it, the respondents have successfully achieved their object in making the door which is the subject of complaint, I think no one can doubt that the attempt is a failure—that to present what is a mere copy of the complainers' door, but to place it so that the moulding overlaps instead of fitting in between the adjacent parts, is not an independent design, but a very plain and obvious imitation of the complainers' design. I do not call it a colourable imitation, because I rather think it is the identical thing. It is either directly and literally the complainers' design, or it is in my judgment a very obvious imitation of it, and that being my view of the facts, I shall give decree in the terms sought, interdicting the respondents from making, vending, or using fire-doors of the description complained of, with expenses."

[1] Holdsworth v. M'Crea, June 25, 1867, 2 L. R. Eng. and Ir. Apps. 380 (Lord Chancellor Chelmsford, p. 384, and Lord Westbury, p. 387).

[2] Barran v. Lomas, May 7, 1880, 28 Weekly Reporter, 973.

No. 121.

May 25, 1888.
Walker, Hunter, & Co.
v. Hecla
Foundry Co.

view of the case which has been taken by the Lord Ordinary. I think the two designs are the same. There is no doubt a difference when they are looked at in section, but this difference is slight, and indeed trifling, and beyond it I see none. Such is my view upon the question of fact, and as that is the only matter which has been submitted to review I need say no more.

There is one portion of the Lord Ordinary's opinion which seems to give countenance to a view with which I do not entirely concur. His Lordship appears to indicate that wilful imitation is necessary in order to bring a person in the position of the respondents within the provisions of the 58th section of the Patents, Designs, and Trade-Marks Act, 1883. I do not think that this is required. If the design complained of is the same, or is substantially the same, as the design registered, it appears to me that the owner of the copyright is entitled to be protected against the infringement of his right. There may be a right on the part of one claiming to be the true proprietor of the design to set aside the registration, but this cannot be done in defence to an action of interdict for infringement.

Lord Adam concurred.

Lord Mure was absent.

The Court adhered.

Auld & Macdonald, W.S.—J. & J. Ross, W.S.—Agents.

No. 122.

May 26, 1888.
Molleson v.
Hope.

James A. Molleson (Hope's Judicial Factor), Petitioner (Respondent).—
Sol.-Gen. Robertson—Don Wauchope.
James Hope and Cecil Arthur Hope, Respondents (Reclaimers).—
Murray.

Trust—Trusts (Scotland) Act, 1867 (30 *and* 31 *Vict. cap.* 97), *secs.* 3 *and* 4, *and Trusts (Scotland) Amendment Act*, 1884 (47 *and* 48 *Vict. c.* 63), *sec.* 2—*Authority to sell trust-subjects—"Expedient for the execution of the trust."*—A trust-deed conferred upon the trustees a power of sale, either by public roup or by private bargain. A judicial factor, who had been appointed on the estate, applied, under the Trusts Acts, 1867 and 1884, for authority to sell privately for £2100 certain feuing ground belonging to the estate, which at that time yielded £18 a-year. The liferenter approved of the proposed sale, but the fiar objected, and urged delay until the demand for building ground improved. After a report from men of skill that the offer should be accepted, the Lord Ordinary (Trayner) granted the prayer of the petition. On a reclaiming note the Court recalled the Lord Ordinary's interlocutor and *refused* the petition, on the ground that the proposed sale might be prejudicial to the interests of the fiar.

1st Division.
B.

Miss Frances Jane Hope died in 1880, leaving a trust-disposition and settlement, in which she directed her trustees to hold the residue of her estate for behoof of Miss Anne Hope Johnstone and Mrs Charlotte Hope or Mackinnon, and the survivor of them in liferent, and thereafter to pay the residue to the youngest surviving child of her brother, Mr James Hope, W.S., alive at the death of the longest liver of the two liferenters. Under the deed the truster gave her trustees full power and authority to sell and dispose of her heritage, either by public roup or private bargain.

Among the subjects belonging to the trust-estate were four separate pieces of ground, the largest being somewhat over two acres, all in close proximity to a villa situated near Edinburgh, called Wardie Lodge, which belonged to the trustees of the late Professor Hope, and of which Miss Frances Jane Hope had had a liferent.

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Professor Hope's trustees having resolved to sell Wardie Lodge, Mr Molleson, C.A., who had been appointed judicial factor on Miss Frances Hope's trust-estate, presented a petition, under the Trusts (Scotland) Acts, 1867 and 1884,* for authority to sell the four pieces of ground, either by public or private sale, stating that he was satisfied "that it is expedient and for the benefit of the trust-estate under his charge that the said heritable subjects should be sold."

No answers were lodged by Mr James Hope nor by the sole surviving liferentrix, upon both of whom the petition was served, but upon a remit having been made by the Lord Ordinary (Trayner) to Mr H. B. Dewar, S.S.C., to inquire into the circumstances set forth in the petition, and to report, Mr Hope put himself in communication with the reporter.

Mr Dewar reported that lot IV. of the subjects in question was necessary to the beneficial enjoyment of Wardie Lodge, and recommended that it should be exposed to public sale along with the house at £2700, being £2300 for the house, and £400 for the ground. As to lots I., II., and III., he reported that they were not necessary to the amenity of Wardie Lodge, and that the view of the men of skill whom he consulted was that they would sell better apart from it and No. IV. than along with them. It further appeared that a neighbouring proprietor, Mrs Boswell, had offered either to bid at a public sale £1800 for the three lots, or to give £2100 for the three lots together by private sale. The reporter concluded that he was of opinion that the judicial factor "should be authorised to accept of Mrs Boswell's offer of £2100 by private bargain." †

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* The Trusts (Scotland) Act, 1867 (sec. 3), provided that "it shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof, ... (1) to sell the trust-estate, or any part of it."

Section 4 provided that "all powers of sale conferred on trustees by the trust-deed, or by virtue of this Act, may be exercised either by public roup or private bargain, unless otherwise directed in the trust-deed or in the authority given by the Court."

The Trusts (Scotland) Amendment Act, 1884, sec. 2, provided that "in the construction of the Acts recited therein, including the foresaid Act 30 and 31 Vict. cap. 97, 'trustee' shall include tutor, curator, and judicial factor."

† The report bore, *inter alia*,—"At the date of the remit in this case, when these 4½ acres (lots I., II., and III.) were lying unoccupied and almost waste, the reporter felt much difficulty as to the practical course that he should recommend to your Lordship. The men of skill considered that they should be let at about £4 an acre to a neighbouring dairyman. They thought that if they were exposed to public sale no offer would be got for them, as there is no demand at present, nor any early prospect of a demand, for building ground in that neighbourhood. Moreover, Mr James Hope, on behalf of the fiars, with whom the reporter has had meetings on the subject, strongly objected to any endeavour to force a sale of these 4½ acres of feuing-ground. Accordingly, the position was, that the interest of the liferentrix and the interest of the fiars seemed to be directly opposed to each other. On the one hand, for the liferentrix to get only £18 a-year for these three pieces of ground was like sacrificing her interests. On the other hand, as there is undoubted prospective value in the ground in question, as building ground, it seemed hard to sell the ground for what it would bring, at a time when there seemed absolutely no demand for such ground.

"Happily, however, as the reporter ventures to think—a neighbouring proprietor, Mrs Boswell . . . . . has made an offer to purchase the

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The Lord Ordinary (Trayner), on 14th March 1888, pronounced an interlocutor in terms of the report, authorising the exposure of lot IV. to public sale, and the sale by private bargain of lots I., II., and III.

Subsequently Mr James Hope and his son tendered answers to the petition, which the Lord Ordinary allowed to be received and seen. In these they stated their willingness to concur in the public sale of lot IV., on condition that the sale of the other lots should not be insisted in. "As regards the other portions there is no immediate necessity for sale. There is at present no demand for building ground, and to sell these portions now is simply to sacrifice the interests of the fiars in order to give a small increase of income to the liferentrix, a lady of seventy-one years of age. The respondents particularly object to the prayer of the petition, as to these portions, being granted *de plano*. They are of opinion—First, That any sale ought to be deferred till after the sale of Wardie Lodge. Second, That, ... no sale should be allowed till an attempt has been made, after due advertisement, &c., to test the market at a considerably higher upset; and third, That, in any view, the sale ought to be by public roup and not by private bargain."

They reclaimed against the Lord Ordinary's interlocutor, and argued;—The petitioner's proposal was unreasonable. To sanction it would be to construe the words "expedient for the execution of the trust" as meaning "expedient for the interests of the liferenter." Before the passing of the Trusts Act, 1867, the Court required that a case of necessity should be made out.[1] It was true that now only a case of expediency was needed, but that meant that there must be some purpose which could not be attained without a sale, which was not the case here.[2] As regarded the opinion of the valuators, they valued as for an immediate sale. They admitted that the present was a bad time to sell.

Argued for the petitioner;—If this had not been a lapsed trust, and there had been trustees in office, they would not have needed to come to the Court. The powers of judicial factors were largely enhanced by the Acts of 1867 and 1884, and were now very nearly assimilated to those of trustees. The respondents' view was entirely unsupported, the view of the men of skill being all the other way, and the course suggested by the reporter, and approved by the Lord Ordinary, was the best for both liferentrix and fiar.

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whole of lots I., II., and III. Her offer is alternative—either to undertake to bid at a public sale £1800 for the three lots, or separately £400 for lot I., and £700 for each of lots II. and III.; or to give £2000 for the three lots together by private sale. If £2000 were got, this invested at four per cent would give the liferentrix £80 a-year in place of £18, and would give to the fiars within £100 of the joint valuation obtained in August last. The reporter communicated personally with the men of skill as to this offer. He asked them whether, if they themselves were the owners of the ground, they would accept of the £2000. Without any hesitation, each of them said that he certainly would. The reporter pointed out that £2000 was £100 less than their valuation; but they said that they were satisfied that no one else than Mrs Boswell would bid for them. Mrs Boswell has since increased her offer, by private sale, to £2100, being the full amount of the joint value of August. Mr James Hope, however, does not see his way to the fiars giving any consent to that sum being accepted. The reporter, however, is humbly, but clearly, of opinion that the offer is a fair and favourable one, even in the interests of the fiars, and that the interests of the liferentrix make it eminently desirable that the offer should be accepted. . . ."

[1] Auld, Feb. 5, 1856, 18 D. 487, 28 Scot. Jur. 182.

[2] Weir's Trustees, June 13, 1877, 4 R. 876; Downie, June 10, 1879, 6 R. 1013; Morrison v. Wedderspoon, Dec. 1, 1855, 18 D. 132.

No. 122. At advising,—

May 26, 1888. Molleson v. Hope.

Lord President.—This application is presented at the instance of the judicial factor on the trust-estate of the late Miss Frances Jane Hope. It relates to the sale of four separate lots of ground belonging to the trust-estate which are adjacent to Wardie Lodge, a house belonging to the trustees of the late Professor Hope, and of which the late Miss Hope had a liferent. They are situated in a locality well adapted for building purposes, but the ground has hitherto been unbuilt upon, and its present annual value is very small, amounting to about £18 a-year.

Miss Hope's settlement is of this nature. She left her estate to be liferented by two ladies, Miss Hope Johnstone and Mrs Mackinnon, and the survivor of them. The latter of these ladies is dead, but the former still survives. The fee of the estate after the death of Miss Hope Johnstone is to go to the youngest surviving child of the brother of the testatrix, as at the time of the death of the survivor. The presumptive fiar is Mr Cecil Arthur Hope, Mr James Hope's youngest child, but his succession depends on his surviving Miss Hope Johnstone. The sums offered for the different portions of land are (1) £400 for lot IV., which it is proposed to sell by public roup, along with Wardie Lodge, and as regards that lot there is no dispute. It is the view of all concerned that that piece of ground should be sold along with Wardie Lodge. But it is proposed to sell the three remaining lots by private bargain, and an offer of £2100 for the three lots has been received from a neighbouring proprietor. The result of the acceptance of that offer would be very favourable to the liferentrix, because it would raise her income from £18 to £80 per annum, and accordingly it is to the interest of the liferentrix that we should grant the power which is asked. But the interest of the prospective fiar, whoever he may be, requires to be attended to, and no doubt this is a very bad time for selling property of this description. Besides, it is not improbable that the money market may improve before the death of the liferentrix, and therefore the interest of the prospective fiar would be sacrificed by a sale at the present time, which would be all for the benefit of the liferent interest. Hence the difficulty and the puzzle which we have to solve.

The Trusts Act, 1867, authorises the Court to grant the authority which is asked, "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the execution thereof," that is, that instead of its being required that a case of necessity should be made out, it is enough that the applicant shall set forth a case of expediency. In the present case, trustees were appointed by Miss Hope with a power of sale, but in consequence of the failure of the trustees and the appointment of a judicial factor, it is necessary to see whether a power of sale ought to be granted to him.

That being so, it appears to me that the petitioner has not made out his case. It is no doubt expedient in one sense that the subjects should be sold, because the sale would increase the annual income and benefit the liferentrix. But, on the other hand, the interests of the fiar would be sacrificed by a sale. Can we say in these circumstances that it would be "expedient for the execution of the trust" that we should authorise the sale? It will not facilitate the administration of the trust in any way to grant the power. I am quite impressed with the value of the opinion of the men of skill who were consulted, and with the sufficiency of the price offered, and if one were dealing with an estate which belonged in fee-simple to an existing individual, it would probably be a very doubtful thing to reject such an offer. But in that case the owner would get an immediate benefit. That is not the case here. He gets no immediate benefit, in short he gets no benefit at all, and may be subjected to a future and not improbable loss; so that as the interests of the prospective fiar may in this way be sacrificed, I am for refusing the prayer of the petition.

Lord Adam.—With reference to the three lots of ground which are not contiguous to Wardie Villa, it does not seem to me to be necessary that they should be sold. Neither do I think it is "expedient for the execution of the trust," in the sense that it would facilitate its execution, that they should be sold. In fact I think the judicial factor will just as easily carry out the purposes of the trust in the case of their not being sold as in the case of their being sold.

The reporter states the case as follows,—"At the date of the remit in this case, when these 4½ acres (lots I., II., and III.) were lying unoccupied, and almost waste, the reporter felt much difficulty as to the practical course that he should recommend to your Lordship. The men of skill considered that they should be let at about £4 an acre to a neighbouring dairyman. They thought that if they were exposed to public sale no offer would be got for them, as there is no demand at present, nor any early prospect of a demand, for building ground in that neighbourhood." It is thus clear that an unlimited fiar would not think of selling the subjects in the present state of the property market. Indeed no one would sell them unless he absolutely required to do so. But a private offer to purchase lots I., II., and III., has been made by Mrs Boswell, who resides in a neighbouring house. No doubt that offer is made with reference to the present unsaleable nature of the subjects. Probably, however, if there was a desire to sell on the part of all those interested, it would be wise to accept that offer. But that is not the position in the present case. There is a competition of interests between the fiar and the liferentrix, the result of a sale at the present time being that the liferentrix would be immediately benefited by a rise of income from £18 to £80 a-year. It appears to me, however, the substantial and permanent interest is with the fiar, that of the liferentrix is subsidiary, and so far as I can see a sale would lead to the detriment of the fiar's interest. I accordingly think that the petitioner has not made out a case to warrant our granting authority to sell.

Lord Kinnear concurred.

Lord Mure and **Lord Shand** were absent.

The Court pronounced this interlocutor:—"Recall said interlocutor in so far as it authorises the sale by private bargain of the lots of ground consisting of those second and third described in the prayer of the petition; *quoad ultra* adhere to the said interlocutor: Find no expenses due," &c.

Tods, Murray, & Jamieson, W.S.—James Hope, W.S.—Agents.

No. 123.

May 26, 1888.
Clarke v. M'Nab.

DAVID WILKIE CLARKE, Complainer (Respondent).—*C. S. Dickson.*
MRS JANE M'NAB AND OTHERS, Respondents (Reclaimers).—*G. W. Burnet.*

Process—Expenses—Modification—Suspender not insisting in suspension.—While a note of suspension of a charge upon a bond and disposition in security was in the Bill-Chamber, the complainer, in respect of the decision of the Inner-House refusing a petition for recall of an inhibition used by the charger, which raised the same question as the suspension, moved the Lord Ordinary to refuse the note. The Lord Ordinary refused the note, found the complainer liable in expenses, and modified the same to five guineas. The respondent reclaimed. The Court *held* (following *Hare* v. *Stein*, June 8, 1882, 9 R. 910) that the Lord Ordinary was entitled to modify the expenses, and in the circumstances *refused* to alter the sum at which he had modified them.

Bill-Chamber.
1ST DIVISION.
Lord Trayner.
M.

IN January 1888 David Wilkie Clarke presented a petition to the First Division praying for recall of inhibition used against him at the instance of Mrs Jane M'Nab and others, on the ground that they had no title to sue. The inhibition was used with reference to a debt of £2000 contained in a bond and disposition in security granted by Clarke in favour of Mrs M'Nab and others.

On 24th January 1888 Clarke was charged on the bond and disposition in security, and warrant thereon, at the instance of Mrs Jane M'Nab and others.

On 31st January 1888 Clarke raised a suspension of the charge on the same ground as that on which he sought recall of the inhibition.

On 10th March the First Division refused the petition for recall of inhibition (*Clarke* v. *M'Nab*, March 10, 1888, *ante*, p. 569).

On 14th March the Lord Ordinary in the Bill-Chamber (Trayner) pronounced this interlocutor:—"The Lord Ordinary, on the motion of the suspender, refuses the note of suspension: Finds the suspender liable in expenses: Modifies the same to £5, 5s. sterling, for which sum decerns."

It appeared from the interlocutor that both parties were represented by counsel when it was pronounced.

On 16th March the respondents' agents wrote to the complainer's agents stating that the amount of their account was £18, 5s. 2d., and stating that the respondents had good reason to complain of the modification of expenses made by the Lord Ordinary, as he had dealt with the question of expenses "without hearing counsel or knowing the case sufficiently to warrant his deciding the point in the arbitrary way he did"; they therefore requested that the whole amount of the account should be paid, and stated that if that was not done they would reclaim to the Inner-House.

The complainer having refused to pay the account the respondents reclaimed.

Argued for the reclaimers;—The suspension was recalled, because it raised the same question as that which was settled in the petition for recall of inhibition. They did not deny that in such circumstances the Lord Ordinary could act as auditor, and tax the amount of the account, but he must give some grounds for the amount of the modification at which he had arrived, and not merely name an arbitrary sum as he had done here. The sum here allowed was not sufficient to pay the mere outlay in a case which had gone so far as the present. In *Hare* v. *Stein*[1] the Lord Ordinary had exercised this power, but he had given reasons for the amount of his modification.

Argued for the respondent;—The two processes, viz., the petition for recall and the suspension, were in reality only one—the papers were duplicates, and one set of instructions did for both. The sum allowed by the Lord Ordinary was, therefore, sufficient in the circumstances. The case of *Hare* v. *Stein* was precisely in point.

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[1] Hare v. Stein, June 8, 1882, 9 R. 910.

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LORD PRESIDENT.—I am not prepared to interfere with the Lord Ordinary's interlocutor. I cannot distinguish the present case from *Hare* v. *Stein* (9 R. 910). In that case Lord Shand and I both said in effect that the Lord Ordinary in such circumstances as were there present is entitled to fix a sum of expenses so as to avoid the further expense of remitting the successful party's account to taxation.

LORD SHAND.—It appears to me that what the Lord Ordinary really did here was to tax the account at a sum which he thought would cover the expenses incurred. If the case were one in which there were no considerations tending to cut down the claim, I should have had some difficulty in adhering, for it is clear that in ordinary circumstances the sum of £5, 5s. would not have been a sufficient award to cover even outlay where there had been so much procedure as there has been here. But this is one of two cases in which there were duplicate papers and instructions, and the Lord Ordinary thought himself entitled to take that into account in his taxation. I should perhaps myself not have fixed so low a sum, but in the circumstances I am not inclined to alter it.

LORD ADAM.—In the special circumstance of the case I agree in your Lordship's decision. At the same time I think this power which is undoubtedly in the Lord Ordinary should be sparingly used, and only where there has been little expenditure, and where he really knows what expenditure there has been, and is in a position to judge as to what part of it should be allowed.

LORD MURE was absent.

THE COURT adhered.

J SMITH CLARK, S.S.C.—WATT & ANDERSON, S.S.C.—Agents.

SIR CHARLES TENNANT AND OTHERS, Pursuers (Respondents).—
D.-F. Mackintosh—Jameson.
JANE H. SMITH AND ANOTHER (Napier Smith's Trustees) AND OTHERS,
Defenders (Reclaimers).—*Asher—Watson.*

No. 124.

May 31, 1888.
Tennant v. Napier Smith's Trustees.

Servitude—Real burden—Ground-annual.—Where a disposition to a piece of ground conferred on the disponee a right to take water for manufacturing purposes from an adjoining canal on the disponer's ground, and to use the canal for navigation, it being stipulated that the disponee should be bound to bear jointly with the disponer the cost of maintaining the canal in good order in so far as it adjoined his ground, *held* that this obligation was a condition of the servitude, and that singular successors of the disponee could not retain the servitude without implementing the condition.

In and subsequent to 1824 the proprietor of a piece of ground held burgage conveyed a part of it to purchasers in various lots by contracts of ground-annual, in which he obliged himself to make a canal through the remainder of his ground for the use of the works to be erected on the several lots. He made this canal, which communicated with others, and was suitable for navigation by barges. The contracts of ground-annual gave the disponees "the privilege of taking water from the" canal "for the use of the works to be erected on the said lot of ground, provided the said water be returned into the said" canal, "and not suffered to run to waste, and that no impurities be suffered to run into the" canal, "together with the right of using the said canal

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as a navigation . . . under the conditions and provisions hereinafter written." It was further stipulated that each disponee "shall be obliged to be at the expense of maintaining and keeping in good order and repair the . . . bank of the said side-cut or canal, which will bound the said lot of ground," (the disponer binding himself to keep in good order the other bank), and "both parties being jointly obliged to defray all other expenses of maintaining and keeping in good order and repair" the said canal, so far as it bounded said lot; and that the stipulated ground-rent and grassums, "and also the proportional expense of maintaining and keeping in good order and repair the said" canal "as aforesaid . . . are and shall be real liens and burdens affecting the ground so conveyed, and each part and portion thereof," and should be inserted in future transmissions.

In 1886 an action was raised at the instance of the representative of the original disponer, who was proprietor of the *solum* of the canal, and the proprietors of several of the lots, to have it found that the owners of the other lots, who were singular successors of the original purchasers, were bound to concur with the pursuers in cleaning out and maintaining the canal, which had become much silted up with mud and refuse. It was proved that navigation on the canal had ceased for nearly forty years, but could be profitably resumed if the canal were cleaned out, and that the privilege of taking water for manufacturing purposes from the canal had been all along exercised. The defenders, while insisting in their right to take water from the canal, pleaded that the obligation sought to be enforced was an obligation to pay an indefinite sum of money, and therefore not capable of enforcement as a real burden. *Held* that the obligation was a counterpart of the privilege conferred upon the defenders' authors, and that they were not entitled to maintain the privilege without submitting to the obligation, and therefore that the pursuers were entitled to decree.

2D DIVISION.
Lord Fraser.
M.

IN 1824 Messrs Charles Tennant & Company were owners of a piece of ground at St Rollox, Glasgow, which they exposed for sale in lots suitable for the erection of public works. The ground (which was held burgage) lay between the Monkland Canal and the Forth and Clyde Canal, and Tennant & Company, in the contracts of ground-annual in which they disponed the various lots to purchasers, bound themselves to construct upon ground retained by them adjoining the lots a canal communicating with the above-mentioned canals. In implement of this obligation a canal was formed, which was navigable by small barges, and bore the name of the St Rollox Canal.

In October 1886 an action was raised by Sir Charles Tennant, the representative of Tennant & Company, and proprietor of the *solum* of the canal and of one of the lots, and D. Y. Stewart & Company and others, proprietors of other lots, against Napier Smith's trustees, William Syme, and others, proprietors of the remaining lots, for declarator that the defenders were bound to concur with the pursuers in maintaining and keeping in good order the sides of the canal, so far as it bounded the respective properties of the defenders, and in "cleaning out the said canal so as to leave a channel of not less than 15 feet in width, and 5 feet 6 inches in depth, and in rendering the said canal fit for navigation by boats and vessels, and the water therein available and sufficiently pure for the use of the pursuers' works, and are bound to defray along with the pursuers the expense of the operations necessary for the maintenance and cleaning of the said St Rollox Canal as aforesaid, the amount to be defrayed by the defenders being the one-half of the expense required for cleaning and maintaining, as aforesaid, the portion of the said canal *ex adverso* of their respective properties."

The pursuers founded on the obligation contained in the contracts of ground-annual which formed the basis of defenders' titles. The contracts of ground-annual held by the various defenders were practically identical.

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and the contract of ground-annual entered into in March 1829 between Charles Tennant & Company as first party, and John M'Aslan, iron liquor maker, as second party, may be taken as a specimen. By that contract the first party conveyed to the second party one of the lots of ground—"declaring that upon the ground belonging to the said first party to the north of the lot before disponed it is proposed to make a side-cut or canal, the south bank whereof will form the north boundary of said lot as after mentioned of the width of 15 feet, and of the depth of 5 feet 6 inches, to join the canal or cut of junction between the Forth and Clyde and Monkland Canals, and which side-cut or canal, with a recess as after mentioned, the said first party bind and oblige themselves to complete within six months of the date hereof, and to face and cope the same in a sufficient manner with stone and lime, at least on the south side, all conformably to a plan thereof and of said lot of ground, docqueted and subscribed by the parties as relative hereto." The contract then defined the boundaries of the lot and declared it to be conveyed "with the privilege of taking water from the said side-cut for the use of the works to be erected on the said lot of ground, provided the said water be returned into the said side-cut, and not suffered to run to waste, and that no impurities be suffered to run into the said side-cut; together with the right of using the said side-cut as a navigation to and from the said cut of junction, under the conditions and provisions hereinafter written." It fixed a certain ground-rent and grassums as payable under it, and further provided that "the said John M'Aslan shall be obliged to be at the expense of maintaining and keeping in good order and repair the south bank of the said side-cut or canal, which will bound the said lot of ground on the north; and the said Charles Tennant & Company, and their successors, being bound to be at the expense of maintaining and keeping in good order and repair the north bank, and the parties hereto being jointly obliged to defray all other expenses of maintaining and keeping in good order and repair the said side-cut or canal so far as it bounds said lot of ground. . . . Which ground-rent and grassums, and also the proportional expense of maintaining and keeping in good order and repair the said side-cut as aforesaid, and the said bridge and stop-gates, are and shall be real liens and burdens affecting the ground above conveyed, and each part and portion thereof, and on the houses and other buildings erected and to be erected thereon, and as such shall be inserted in the instrument of sasine to follow thereon, and in all the future transmissions and investitures of the premises, otherwise the same shall be void and null." It was further provided that "the said John M'Aslan hereby binds and obliges himself, and his heirs, executors, and successors whomsoever, to content and pay . . . the ground-annual . . . and also to . . . perform the whole other prestations, conditions, and obligations incumbent on them by these presents."

The various provisions above quoted were inserted or validly referred to in the series of titles.

All the lots of ground were built upon or otherwise occupied for the purposes of public works.

The pursuers averred that the St Rollox Canal was valuable to them as a means of communication with the Forth and Clyde Canal, that it had been so used by them, and might again be so used if cleaned out, that it was specially suitable for coal and other barges of a small size; further, that the right of drawing water from it had always been exercised by them, and was of great value to their works; that the bed of the canal had from time to time become much silted up, and had been several times cleaned out, on which occasions much difficulty had been occasioned in collecting the outlay from the various proprietors; that it had again become much choked up, so that navigation had become impossible, while the quantity of water available for the pursuers' works had become much reduced and its quality much deteriorated. "The whole canal has been nearly reduced to the condition of a stagnant ditch. To render it fit for the uses for which it was intended, and to which the pursuers are, in terms of their titles above quoted, entitled to apply it, and to make it wholesome to the neighbourhood, it is necessary that it should be thoroughly cleaned and cleared out, and restored to its original dimensions of 15 feet in width and 5½ feet in depth in all its length, or at least in so far as it bounds the properties of the pursuers and defenders respectively."

The defenders admitted that the canal had become silted up in certain places, and that they had refused to contribute to the expense of cleaning out the canal. They explained that it had not been used for navigation for forty years, and that it was unsuitable for use by barges of the size which plied on the Monkland or on the Forth and Clyde Canal. They stated that it was of no use or benefit to them, and had not been used by them for any purpose for many years. They admitted that the pursuers had exercised their right to draw water from it.

The pursuers pleaded;—(2) It being in present circumstances necessary for the maintaining and keeping in good order and repair of the St Rollox Canal that it should be cleaned out as concluded for, the pursuers are entitled to have the same cleaned out accordingly, and to recover from the defenders their respective shares of the expense of such cleaning, as concluded for, with expenses.

The defenders pleaded, *inter alia*;—(1) The pursuers have no title or interest to sue this action. (5) The defenders ought to be assoilzied in respect that the obligations in the titles of the defenders' authors relative to maintaining and repairing the canal are personal obligations, and not enforceable against the defenders as singular successors. (6) The obligations founded on not being such as can by law be made real burdens on property, and not being conditions of the grant, and *separatim*, the same not having been effectually transmitted against the defenders, absolvitor should be pronounced. (7) Assuming the obligations founded on to have been inserted in the titles of the defenders' authors with the view and intention of maintaining the use of the canal for purposes of navigation, they are inapplicable to present circumstances, and cannot now be enforced by action. (8) The defenders not having in any way contributed to the accumulation of mud and rubbish in the canal, and the cleaning out of the canal being an operation which would be of no benefit to the defenders, they are not chargeable with the expense of the cleaning.

The Lord Ordinary (Fraser), on 18th March 1887, found and declared in terms of the declaratory conclusions, and ordered the cause to the roll for further procedure.*

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* "OPINION.—The object of the present action is to enforce liability to clean out the St Rollox Canal at Glasgow, against various persons, the owners of the property through or by which it runs.

"Charles Tennant & Company, of the St Rollox Chemical Works, Glasgow, were owners of the ground at St Rollox, which they resolved to dispose of in lots for the erection of public works. To afford inducements to intending purchasers they resolved to make what is termed in the titles a 'cut or canal' through the grounds, so as to afford to the persons purchasing the lots a means of communication with the Forth and Clyde and Monkland Canals. The St Rollox Canal accordingly was formed, though not until after some of the lots had been disposed of; and in reference to these the matter is stated as follows in the contract of ground-annual between Charles Tennant & Company and John M'Aslan, dated 16th and 17th March 1829,—'Declaring that upon the

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The defenders having obtained leave, reclaimed.

The pursuers obtained leave in the Inner-House to amend the record,

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ground belonging to the said first party [Tennant & Company], to the north of the lot before disponed, it is proposed to make a side-cut or canal, the south bank whereof will form the north boundary of said lot, as after mentioned, of the width of 15 feet and of the depth of 5 feet 6 inches, to join the canal or cut of junction between the Forth and Clyde and Monkland Canals, and which side-cut or canal, with a recess as after mentioned, the said first party bind and oblige themselves to complete within six months of the date hereof, and to face and cope the same in a sufficient manner with stone and lime at least on the south side, all conformably to a plan thereof and of said lot of ground, docqueted and subscribed by the parties as relative hereto.' In the later contracts the canal was referred to as having been finished. There were in all fifteen lots given off; and the persons who obtained these lots did so under very special conditions as to upholding the banks of the canal *ex adverso* of the lot of each, and of keeping them and the canal in good condition. It is not necessary to refer to these conditions in any detail. They are identical in all the contracts, except in immaterial particulars, and one of them only need be referred to. In the 5th article of the condescendence there is an excerpt from the contract of John M'Aslan, already mentioned, in the following terms:—'And farther, the said John M'Aslan shall be obliged to be at the expense of maintaining and keeping in good order and repair the south bank of the side-cut or canal, which will bound the said lot of ground on the north, and the said Charles Tennant & Company, and their successors, being bound to be at the expense of maintaining and keeping in good order and repair the north bank, and the parties hereto being jointly obliged to defray all other expenses of maintaining and keeping in good order and repair the said side-cut or canal so far as it bounds said lot of ground.'

"Thus, then, there was imposed upon the owners of the lots an obligation to defray the expense of maintaining and keeping in good order and repair the cut or canal. This is the important clause, the enforcement of which is sought in this action.

"Then the conditions of the contract are made a real burden in the following terms:—'Which ground-rent and grassums, and also the proportional expense of maintaining and keeping in good order and repair the said side-cut as aforesaid, and the said bridge and stop-gates are and shall be real liens and burdens affecting the ground above conveyed, and each part and portion thereof, and on the houses and other buildings erected and to be erected thereon, and as such shall be inserted in the instrument of sasine to follow hereon, and in all the future transmissions and investitures of the premises, otherwise the same shall be void and null.'

"The persons who took the lots, or their successors, erected upon them, on the banks of the canal, buildings according to their wants. The canal at various times got silted up, so that the navigation of barges in it was impeded, and its usefulness as a water supply was very much impaired. To remedy this state of matters voluntary contributions were made from time to time for the purpose of meeting the expense of cleaning it out. Some of the owners of the lots paid; and others did not; and as the canal has got into a very bad state again, this action has been brought in order, by means of a decree of the Court, to compel contributions to be made by all parties who may be liable thereto.

"The pursuers of this action are—(First), Sir Charles Tennant of the Glen, who is now the representative of Charles Tennant & Company, and is the owner of the *solum* of the canal and of one of the lots; (secondly), three other persons who are proprietors of lots on the banks of the canal, and who are interested in having it cleaned and made navigable. The whole owners of the lots have now been called as defenders by this action and by a supplementary action, which latter brought into Court a number of persons who were omitted from the first action.

"The defenders are singular successors of the persons who had originally obtained the lots of ground from Charles Tennant & Company, and they plead and they added this averment, viz., "The obligations sought to be enforced under the conclusions of the summons are imposed upon the

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that they ought to be assoilzied, 'in respect that the obligations in the titles of the defenders' authors relative to maintaining and repairing the canal are personal obligations, and not enforceable against the defenders as singular successors.' Take the case of the defenders the trustees of Napier Smith and the defender William Syme as a typical instance. They are the singular successors of John M'Aslan. It is said that it is M'Aslan alone who was obliged to defray any part of the expense of maintaining and keeping in good order and repair. But assuming that this were the case, an obligation by him is incumbent on his representatives without any special clause. And there is such a special clause —'The said John M'Aslan hereby binds and obliges himself, and his heirs, executors, and successors whomsoever, to . . . perform the whole other prestations, conditions, and obligations incumbent on them by these presents.' The real question is whether the obligation is of such a character as could be made a real burden,—or a condition of the grant which can be enforced against a singular successor.

"Now, the object of the obligation was one upon which the very existence of the canal depended. The canal required constant supervision, and periodical cleaning out and repairs. In the case of the *Tailors of Aberdeen* v. *Coutts* (3d August 1840, 1 Rob. App. 296), a distinction was drawn between such a continuous obligation and an obligation which was to be extinguished by a single act of payment. The former, although not declared a real burden, could be enforced against a singular successor if it had reference to the *naturalia* of the grant, where the latter would not. The matter is stated in the opinion of Lord Corehouse and other Judges. After stating that it is incompetent to burden heritage unless the sum be specified and not left indefinite, it is added,—'Thus also, if the obligation is to be performed, and so extinguished, by a single act, the presumption is that the granter of the feu-right meant to impose it on the grantee and his heirs exclusively, and not to extend it against singular successors; the case being the reverse of those where the obligation has a continuance, and is comparatively of little use unless it remains attached to the subject.'

"Such a case as is here suggested of the performance of the obligation by a single act is illustrated very clearly by the case of the *Magistrates of Edinburgh* v. *Begg* (20th December 1883, 11 Ret. 352), where a singular successor was assoilzied from a claim at the instance of a superior, who demanded from him payment of a proportion of the expense of making a roadway, founding upon a stipulation in the feu-charter that the feuars should pay the expense upon the completion of the roadway. The roadway was completed, and liability for payment of the debt immediately accrued. In these circumstances, it was held that the superior not having recovered the money from the feuar, who was the proper debtor in it, he could not come against a singular successor acquiring the property long afterwards. But such is not the present case. The obligation to keep the canal in good order is perpetual. One payment will not suffice.

"It is next said that this cannot be enforced, because the sum to be paid is indefinite; and it cannot, it is further said, for the same reason, be looked upon as a real burden. The obligation, it is said, is one not to repair but to 'defray the expenses of maintaining and keeping in good order and repair the said side-cut or canal.' But what is this but an obligation to repair? and undoubtedly if it be so, it can, being an obligation *ad factum prœstandum*, be made a real burden, and effectual as a standing obligation. The matter is thus referred to again in the case of the *Tailors of Aberdeen* v. *Coutts*, and almost the very case that this record presents is dealt with. 'It may be proper to explain,' said the Judges, 'that an obligation *ad factum prœstandum* may be enforced, and is so every day, though indirectly and practically it may resolve into payment of an indefinite sum. Thus it is one of the usual mill services, that the vassals of the sucken shall bring home mill-stones when required, and clear out the aqueduct when it becomes filled with mud and rubbish. This, in general, can only be done by hiring labourers to perform the work, whose wages the vassals pay, in defenders by the titles conveying the said subjects to them respectively"; and this relative plea,—"The obligations sought to be enforced in the present action having been validly imposed upon the defenders by their respective titles, the defenders are bound to implement the same."

The Inner-House, without expressing any opinion on the construction

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proportion to the extent of their feus or the nature of their thirlage. But these obligations are unquestionably real burdens, because the fact to be performed is in itself specific, whatever means the vassal may resort to for his own convenience in accomplishing it. There is accordingly a finding in the interlocutor proceeding on that familiar distinction. An obligation to pay a proportion of the expense of keeping certain wells in repair is of the same nature.' The clearing out of an aqueduct and the keeping wells in repair do not differ from the cleaning out of a canal either as regards the law applicable to them or the facts.

"Therefore, holding that this is a continuous obligation, the only point remaining to be considered is whether the pursuers of this action have a right to enforce it. A question apparently presenting in some respects the same features as the present occurs in reference to the right of one feuar to enforce building restrictions against a neighbouring feuar in whose titles these restrictions occur. The case of *Hislop* v. *MacRitchie's Trustees* (23d June 1881, 8 Ret. (H. L.) 95), indicates how, under certain circumstances, the title to sue would there be dealt with. The House of Lords in that case held that one feuar, merely because he was a neighbour of another feuar in whose title there were restrictions, had no right to enforce these restrictions. But, at the same time, in pronouncing this judgment the House of Lords recognised the doctrine that there would be a title to sue if there was mutuality and community of rights and obligations established between the feuars, 'which,' said Lord Selborne, 'can only be done by express stipulation in their respective contracts with the superior, or by reasonable implication from some reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves.' Now, all these things concur in this case. There is mutuality and community of rights of the most strict character existing amongst the owners of the lots of ground at St Rollox. All the owners are taken bound in the same way to keep the canal in good order opposite their respective lots, and if one fails in doing so, the work of the others becomes useless, their expenditure a waste, and the canal itself ceases to be a canal.

"But further, there is in the present case what there was not in the case of *Hislop*. It was not disputed in that case that if the superior himself had sued he could have enforced the restrictions against his contracting feuar. Now, here one of the pursuers is the owner of the *solum* of the canal, being the representative of the owners of the St Rollox ground, who contracted with each of the allottees. That contract he has a title to enforce although the title of the other pursuers should be denied. An averment is made by the defenders to the effect that 'the silting up of the canal has been mainly caused by the operations of the pursuers,' which is an averment of too vague a character to be attended to. But then the defenders proceed to aver that one of the pursuers, D. Y. Stewart & Company, by their operations, have polluted and rendered unnavigable the canal. That may or may not be, but in any view this would only operate as a personal bar to their obtaining decree against the defenders. It cannot stand in the way of the other pursuers obtaining the remedy they ask.

"As regards the condition of the canal, the pursuers give a rather depressing account of it in the 9th article of the condescendence, and the answer to this is,—'The pursuers' statement of the present condition of the canal is admitted to be generally correct.' If this answer had been a little more specific, the Lord Ordinary would have at once, in terms of the second conclusion of the summons, authorised the pursuers, at the sight of some person of skill to be appointed, to execute the operations necessary for cleaning out the canal, without any previous report by an engineer. But before taking such a step he has appointed the case to be put to the roll in order that parties may state their views as to the future course of action."

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of the titles, recalled the interlocutor of the Lord Ordinary, and remitted the cause to his Lordship to allow the parties a proof of their averments.

A proof was then taken. The following were the facts established at the proof:—

The canal was navigated down to the year 1851, when navigation, which had for some years before that been very slight, entirely ceased. This was attributed in part to the existence of other means of transit to the works on it, and in part to its becoming somewhat silted up. At the time of the proof it was so much silted up with mud and refuse of various kinds as to make navigation quite impossible. The water was also very filthy. It had been used by certain of the pursuers for their manufacturing purposes. It was proved that if the canal were cleaned out it would be valuable to the pursuers, both as a means of navigation and as a water supply. It had been cleaned out four times at the expense of the allottees—once in 1850, again in 1858, again in 1874, and again in 1878.

The Lord Ordinary found and declared in terms of the declaratory conclusions, and authorised the pursuers, at the sight of Mr Barr, C.E., "to execute all such operations as may be necessary for cleaning out the channel of St Rollox Canal, to the depth of 5 feet 6 inches, and to the width of 15 feet: Finds the pursuers and the defenders liable in the expense of such operations, according to the proportions to be hereafter ascertained and fixed after the said operations are completed, and the whole cost thereof ascertained, and decerns."

The defenders reclaimed, and argued;—(1) On the proof the defenders had shewn that not they but one of the pursuers themselves was responsible for the state of the canal. But (2) the defenders were not by their titles laid under the obligation sought to be enforced on them as singular successors of the original allottees. It was sought to have the obligation to pay "the proportional expense of maintaining and keeping in good order" the canal enforced as a real burden on the defenders. But that was an obligation for an indefinite sum of money, and therefore, however much it was declared by the titles to be a real burden, it could not be enforced as such.[1] The case of *Coutts* had been always followed, and was precisely in point. That decision was entirely contrary to the doctrine of the Lord Ordinary's judgment. This was not an obligation *ad factum præstandum*, but clearly, on the very words of the contract, an obligation to make an indefinite payment. This construction derived force from the nature of the thing demanded. One party could not alone clean out the canal *ex adverso* of his ground. It must be a joint operation followed by a subsequent division of the expense which might be incurred. If, then, there was no real burden, was there a personal obligation? There was no connection by tenure, for the properties were held burgage.[2] The connection must therefore be by contract, if at all. What Sir C. Tennant was attempting was what Gardyne in vain attempted against the Royal Bank.[2] But *Gardyne's* case settled that while the original grantee under the ground-annual must be liable, because it was his contract, the singular successor was not. He took the subject, but the obligation did not transmit to him, there being, as already shewn, no real burden. *Millar's* case[2] shewed that the personal obligation remained with the person who undertook it, though he

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[1] Tailors of Aberdeen v. Coutts, Dec. 20, 1834, 13 S. 226, H. L., May 23, 1837, 2 Sh. and M'L. 609, and Aug. 3, 1840, 1 Rob. Ap. 296; Magistrates of Edinburgh v. Begg, Dec. 20, 1883, 11 R. 352.

[2] Gardyne v. Royal Bank, March 8, 1851, 13 D. 912, and H. L., May 13, 1853, 1 Macq. 358; Small v. Millar, Feb. 3, 1849, 11 D. 495, March 17, 1853, 1 Macq. 345.

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might choose to part with the land. (3) But, in any view, the obligation was not one which the Court would enforce in the circumstances. There had been no navigation since 1851, and very little for many years before that. When the pursuers had allowed a complete change of circumstances to begin and to continue so long, the Court would not disturb the arrangement which the parties had so long consented to. Restrictions on the use of property, *e.g.*, building restrictions, formed a good illustration.[1] Suppose the obligation had been to maintain a road, and that all interested in using that road had for many years used a different road, allowing the *solum* of the old one to be used for some other purpose, the Court would not thereafter allow the creditor in the obligation to enforce it. It would hold that by his actings he had abandoned it.

In answer to the Court the defenders stated that they did not abandon the rights in the canal conferred on them by their titles.

Argued for the pursuers;—(1) The proof very clearly established that the pursuers had an interest to enforce the obligation. Drawing water had been always continued by them, and navigation had again become important in the existing state of railway rates, and would be resumed when the canal was cleaned out. *Coutts'* case did not apply, for the obligation here was *inter naturalia* of the grant. Besides, the words imported, not an obligation to pay an indefinite sum, but to be at the expense of it, *i.e.*, either do it or refund the person who did. Indirectly and practically, as was shewn by the Judges who agreed with Lord Medwyn in *Coutts'* case, such obligations resolved themselves into a payment, and the Court would not extend the fine distinction which prevailed with the House of Lords. (2) The attempt here made was to enjoy the right and yet escape from the conditions on which it was given. The question of personal obligation could not arise in the case of *Coutts*, for the terms of the titles there did not admit of that. In *Gardyne's* case neither the plea of personal obligation nor that of *jus quæsitum tertio* arose, whereas here the former plea favoured Tennant and the latter the other pursuers. The obligation was a perpetual contract right, and the delay in getting the canal cleaned was immaterial, for the right was *res meræ facultatis*. Cases like *Campbell* v. *Clydesdale Bank* were not in point, for there it had become impossible to enforce the condition sought to be enforced equally on all. Here, on the contrary, it was quite possible.

At advising,—

Lord Justice-Clerk.—If I thought that the case before us really raised the more important points which have been argued to us, I should have desired to take more time for consideration of the authorities. But I am quite satisfied that at least the more difficult of them do not truly arise. The issue to be decided is an issue outside the category to which much of the argument addressed to us belongs.

I shall briefly state the grounds on which I think we ought to adhere to the interlocutor of the Lord Ordinary. The circumstances are somewhat unusual. So far back as 1824 the then proprietors of St Rollox projected and formed a canal which joined the Monkland Canal, which itself communicates with and is fed from the Forth and Clyde Canal. The works at St Rollox were even then important and valuable, and the main object of the formation of the canal by the proprietors was that of transit. They gave off ground at the sides of the cut, which in course of years was made, to various persons. In the titles

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[1] Campbell v. Clydesdale Bank, June 19, 1868, 6 Macph. 943, 40 Scot. Jur. 539; Duke of Bedford v. Trustees of British Museum, July 6, 1822, 2 Mylne and Keen, 552; Sayers v. Collier, Nov. 6, 1884, L. R., 28 Ch. D. 303.

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to these pieces of ground certain privileges were given to the riparian proprietors, as I may call them, which were a right of navigation and a right of taking water. As the counterpart of these privileges over their property, Tennant & Company put the riparian proprietors under an obligation to maintain the banks and to clean out the canal itself. It is quite manifest that the commercial state of the country which then existed made it quite worth the proprietors' while to incur the expense of these operations. But, at the same time, these operations made their property of additional value to those proprietors of the lots which had been given out. In process of time the canal became disused, railways and other modes of transit rendered it antiquated, and therefore there has been no navigation by it for many years—since 1851 indeed. But there was another use to which it was put, and which has been manifestly of great value to some of the pursuers. The allottees were all entitled to take water out of it for their works, but were under an obligation to restore the water, and clean out the canal and maintain it. Now, it seems that while the privileges of taking water are still maintained by the feuars, some of them, the defenders here, say that they are not bound by the conditions on which their rights were granted, and, in particular, that they are not bound as singular successors to clean out the canal or maintain the bank. This contention is founded on the phraseology of their contracts of ground-annual and on the analogy of the case of *Coutts*, and the decisions which come under the same category of law. This case does not, I think, depend in any respect on that branch of law. The obligation to clean out the canal and to maintain the bank is a counterpart of the right of navigation and of taking water from the canal. We are not driven, I think, to consider subtle distinctions between obligations *ad facta præstanda* and money payments. The obligation to clean out the canal may result in a money payment on the part of the disponee who is under the obligation. In the same way the obligation to maintain the bank must be in the same position. But the question is, whether a disponee can take the privilege without implementing the obligation which is the condition of it. That was not the question in the case of *Coutts*. The question there was not the nature of the right. The obligation was a specific obligation separate from the right. It was found that it did not run with the lands. I should rather think, if driven to a consideration of that case, that the principle enunciated in that case which would apply to this one is that which is thus described by Lord Brougham. He says, speaking of the obligation in the case of *Coutts*, "In a matter confessedly of some nicety, and on which I have had great doubts, it seems the safe course to consider this obligation as it directly and apparently is—an obligation to pay an indefinite sum unconnected with the *naturalia* of the right. The obligation to pay the expense, or any proportion of the expense, of repairing immediately connected with the subject granted would clearly stand in a different predicament." That latter sentence, I think, states the position in which the obligation here stands. Meantime, however, I consider the case solely in view of the grant by the proprietor of a privilege on certain conditions, and do not inquire whether the granter, on the one hand, is bound in perpetuity to give it, nor whether, on the other, the disponee is entitled to renounce it, or what the effect would be in either case. The disponees, on the question being put to them, maintained without hesitation their right to take water and to navigation. If so, they must obey the condition on which they obtained their rights.

On these grounds I am for adhering to the judgment of the Lord Ordinary.

LORD YOUNG.—I am of the same opinion. The only difficulty I ever entertained was whether the obligation sought to be enforced had not ceased in respect that the canal with regard to which it existed had ceased to be a canal for navigation substantially for more than half a century, and literally in the sense that there had been no navigation at all for thirty-six years. That difficulty has on further argument and consideration disappeared. I think the canal still exists as a canal, and it is the subject with respect to which the obligation sought to be enforced was imposed. That being so, I think the case is clear. There is no feudal relation between the parties. The property is held burgage. Sir Charles Tennant, as the successor of Tennant & Company, holds the *solum* of the canal by burgage tenure. The defenders hold their property on the south side of the canal by burgage tenure also. The canal is their north boundary, and no part of their property extends over it. They hold that burgage property under an obligation to pay a certain ground-annual, a rent-charge as it would be called in England, to Sir Charles Tennant and his heirs. They hold and assert a right over his property—the *solum* of the canal—adjoining theirs. I put the question pointedly at the end of the discussion whether they repudiated any right over it or claimed any such right. The answer was that the case must be decided on the footing that they claimed a right.

The contract referred to as a specimen of the rights of the disponees was that in favour of M'Aslan. The right conferred on him, and to which the defenders now assert their right, is "the privilege of taking water from the said side-cut for the use of the works to be erected on the said lot of ground, provided the said water be returned into the said side-cut and not suffered to run to waste, and that no impurities be suffered to run into the said side-cut, together with the right of using the said side-cut as a navigation to and from the said cut of junction under the conditions and provisions hereinafter written." That is a valuable right over a neighbour's property. It is a servitude, and the dominant tenement is the property on the south side. It is the right to use this piece of ground covered with water, taking the water out of it on certain conditions, and also navigating it on certain conditions, and these conditions are that "M'Aslan shall be obliged to be at the expense of maintaining and keeping in good order and repair the south bank of the said side-cut or canal, which will bound the said lot of ground on the north . . . and the parties hereto being jointly obliged to defray all other expenses of maintaining and keeping in good order the said side-cut or canal, so far as it bounds said lot of ground, . . . which ground-rent and grassums, and also the proportional expense of maintaining and keeping in good order and repair the said side-cut as aforesaid . . . are and shall be real liens and burdens affecting the ground above conveyed and each part and portion thereof, and on the houses and other buildings erected and to be erected thereon, and as such shall be inserted in the instrument of sasine to follow hereon, and in all the future transmissions and investitures of the premises, otherwise the same shall be void and null." That is to say, a servitude, a right to use an adjoining property in a certain manner, is conferred on certain conditions. The owner of the dominant tenement is asserting his right to exercise the servitude, but refuses to comply with the conditions, and hence this action. I think there is no answer to it. There is no question of real burden in my opinion. On the ordinary principles of law I think the conditions ought to be enforced. Mr Asher put the case of the defenders thus,—"The obligation is a condition of my right, good against my

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author, who parted with the right to use Sir Charles Tennant's property in this way, and transferred it to me, the disponee; but the condition, the obligation, remains with him, the disponer." That was maintained to us as a proposition in the law of contract, for, as I have said, there is no feudal relation. It is said that the right of the grantee of the property now belonging to the defenders has been transferred to the defenders, the obligation which is the condition of it remaining with the disponer of it. No one could so read the contract without having a feeling of amazement. The right to use Sir Charles Tennant's property has been transferred to the defenders by the title on which they hold their adjoining property, and they maintain that the right is transferred but that the obligation which is the condition of it is not. I think it a plain case for the enforcement of the condition, and I think it ought to be enforced, and that the defenders are liable to have it enforced against them.

Lord Rutherfurd Clark.—I am of the same opinion.

Lord Craighill was absent.

The Court adhered.

F. J. Martin, W.S.—Morton, Neilson, & Smart, W.S.—Agents.

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June 1, 1888.
Baird's Trustees v. Lord Advocate.

The Trustees of the Baird Trust, Pursuers (Reclaimers).—*Murray—C. S. Dickson.*

The Lord Advocate, Defender (Respondent).—*Lord-Adv. Macdonald—Sol.-Gen. Robertson—A. J. Young.*

Revenue—Income-Tax—Income-Tax Act, 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 105, *and sec.* 88, *Schedule C, Rule Third—Exemption—" Charitable purposes only."*—The words "charitable purposes," as used in the exempting clauses of the Income-Tax Act, 1842, are to be interpreted in their ordinary and popular signification as meaning the relief of poverty, and do not cover purposes of general benevolence and of public utility.

By trust-deed a truster provided a fund of £500,000 for the promotion of religion and the mitigation of the "spiritual destitution" which prevailed "among the poor and working population of Scotland." The income of the fund was principally applied towards the building and endowment of churches. *Held* that it was not exempt from the payment of income-tax as a "trust established for charitable purposes only," in the sense of the 105th section and sec. 88, schedule C, of the Income-Tax Act, 1842.

1st Division.
Lord Fraser.
M.

Under a trust-deed executed by the late James Baird of Auchmedden, on 24th July 1873, the truster made over to the trustees a sum of £500,000 in the following terms, and for the following purposes, *inter alia,*—"I, James Baird of Auchmedden, . . . feeling deeply impressed with the extent to which spiritual destitution prevails among the poor and working population of Scotland, and being satisfied that this proceeds in a great measure from the want of properly organised and endowed territorial work; and considering also that there appears to be a tendency to a departure from the truth, and to an exclusion of religion in the teaching of the young, and that the means available by law are insufficient to provide for the faithful preaching and teaching of the word of God, and for the exposure and refutation of error, and for the support of church, and educational and other purposes of a religious character; and being satisfied that under existing circumstances the evils foresaid cannot properly be met, nor the objects before mentioned attained, without the aid of

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private benevolence, and additional organisations, and fresh influences, I have resolved . . . to provide a fund of £500,000 sterling, &c., . . . Declaring, as I hereby declare and direct, that the said funds shall be expended for the support of objects and purposes in connection with the Established Church of Scotland, all of a religious character, as after described, and for the aid of institutions having the promotion of such purposes in view, my grand object being to assist in providing the means of meeting, or at least as far as possible promoting the mitigation of, spiritual destitution among the population of Scotland, through efforts for securing the godly upbringing of the young, the establishing of parochial pastoral work, and the stimulating of ministers and all agencies of the said Church of Scotland, to sustained devotedness in the work of carrying the gospel to the homes and hearts of all. And as such spiritual destitution exists to the greatest extent in populous places it is my wish that the operation of this trust be directed in the first instance chiefly to such populous places," &c.

The funds in the possession of the trustees were all lent out or invested in various ways in the United Kingdom, partly on heritable security and partly in stocks, annuities, and debentures of various railway and other public companies. Upon the whole of the annual returns of these investments, income-tax was deducted by the debtors before paying over the annual proceeds of the investments to the trustees.

The expenditure of the trust from the yearly income of the trust-funds for the year from 1st January to 31st December 1886 was as follows:—Grants, viz.,—1. Towards church building, £14,350. 2. Towards church endowing, £3292. 3. Towards augmentation of stipend, £690. 4. Miscellaneous, £200. Baird lectures—Rev. Professor Milligan, £200. Allowance to Baird Trustees, £500. Amounting in all to £19,232. The income of the trust was only slightly larger.

The income-tax paid upon the investments of the trust for 1886-87 was £691, 5s. 4d. Of that sum £46, 6s. 8d. represented the tax upon the abovenamed three items, viz. £690 granted in augmentation of stipend, £200 for the Baird lectures, which were both paid free of income-tax, and £500 allowed to the trustees, in which case the tax was deducted before payment.

Of the remaining sum of £644, 18s. 8d., the trustees claimed repayment from the Lord Advocate as representing the Inland Revenue in this action. They founded upon the 105th section and schedule C, therein referred to, of the Income-Tax Act, 1842,* maintaining that the payment in question

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* The 105th section of the Income-Tax Act, 1842, provided,—"Any corporation, fraternity, or society of persons, and any trustee for charitable purposes only, shall be entitled to the same exemption in respect of any yearly interest or other annual payment chargeable under schedule D of this Act, in so far as the same shall be applied to charitable purposes only, as is hereinbefore granted to such corporation, fraternity, society, and trustee respectively, in respect of any stock or dividends chargeable under schedule C of this Act and applied to the like purposes, and such exemption shall be allowed by the Commissioners for special purposes on due proof before them; and the amount of the duties which shall have been paid by such corporation, fraternity, society, or trustee, in respect of such interest or yearly payment, either by deduction from the same or otherwise, shall be repaid under the order of the said Commissioners for special purposes in the manner hereinbefore provided for the repayment of sums allowed by them in pursuance of any exemption contained in the said schedule C."

Section 88, schedule C, rule 3d, provided,—"The stock or dividends of any corporation, fraternity, or society of persons, or of any trust established for

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fell within the terms of the exempting clauses. They stated that the claim for exemption had been allowed every year from the commencement of the trust up to 1886.

The Lord Advocate stated in answer that the funds in question had not been proved to have been applied to "charitable purposes only," and further founded upon the terms of exemption contained in Rule 6, schedule A, section 61 of the Income-Tax Act, 1842.*

The pursuers pleaded;—Upon a sound construction of the provisions of the Income-Tax Acts, the pursuers are entitled to the exemptions claimed, and decree ought to be pronounced in terms of the conclusions of the summons, with expenses.

The defender pleaded;—On a sound construction of the said trust-deed, and of the provisions of the Income-Tax Acts, the pursuers are not entitled to repayment as claimed.

The Lord Ordinary (Fraser), on 14th March 1888, assoilzied the defender.†

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charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, shall be applicable by the said corporation, fraternity, or society, or by any trustee, to charitable purposes only, and in so far as the same shall be applied to charitable purposes only, or the stock or dividends in the names of any trustees applicable solely to the repairs of any cathedral, college, church, or chapel, or any building used solely for the purposes of divine worship, and in so far as the same shall be applied to such purposes, provided the application thereof to such purposes shall be duly proved before the said Commissioners for special purposes by any agent or factor on behalf of any such corporation, fraternity, or society, or by any of the members or trustees."

* Under schedule A (duties on lands and heritages), section 61, No. 6, of the Income-Tax Act, 1842, allowance was authorised to be made for the duties charged "on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes." It was further provided that the said allowances were "to be granted on proof before the Commissioners for special purposes of the due application of the said rents and profits to charitable purposes only, and in so far as the same shall be applied to charitable purposes only."

† "OPINION.—By the 105th section of the Income-Tax Act of 1842 (5 and 6 Vict. cap. 35), continued by subsequent Acts, it is enacted, that '. . . . Any trustee, for charitable purposes only, shall be entitled to the same exemption in respect of any yearly interest or other annual payment chargeable under schedule D of this Act, in so far as the same shall be applied to charitable purposes only, as is hereinbefore granted to such . . . trustee . . . in respect of any stock or dividends chargeable under schedule C of this Act and applied to the like purposes.

"Now, schedule C thus referred to enacts that the stock or dividends 'of any trust established for charitable purposes only, or which, according to the rules or regulations,' of any deed of trust or will shall be applicable 'to charitable purposes only, and in so far as the same shall be applied to charitable purposes only,' shall be exempted from the duty. The pursuers of this action aver that they are trustees holding funds for 'charitable purposes only,' and have paid duty upon trust-funds in their hands which they have applied to charitable purposes only, viz., (1) towards church building, £14,350; (2) towards church endowing, £3292. They now claim a return of the duty paid in regard to these two sums, the same being, according to their contention, exempted from duty by the statute.

"This raises simply the question, What is the construction to be put upon the words 'charitable purposes only'? According to the pursuers these words have the wide interpretation given to them by the Court of Chancery in England, in interpreting the statute of 43 Elizabeth, cap. 4 (commonly called the Statute

The pursuers reclaimed, and argued;—In order to succeed in their argument, it was not necessary for them to shew that the words "charit-

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of Charitable Uses), and the Statutes of Mortmain. In the case of *Morice* v. *Bishop of Durham* (9 Vesey, 405), Sir William Grant, Master of the Rolls, stated that the word 'charity' in the Court of Chancery in England derived its signification chiefly from this statute of Elizabeth. The title of this statute is 'an Act to redress the misemployment of lands, goods, and stocks of money heretofore given to charitable uses'; and the preamble of the Act is in the following terms:—'Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, have been heretofore given, limited, appointed, and assigned, as well by the Queen's Most Excellent Majesty, and her most noble progenitors, as by sundry other well-disposed persons, some for relief of aged, impotent, and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways, some for education and preferment of orphans, some for or towards relief, stock, or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants, concerning payments of fifteens, setting out of soldiers, and other taxes; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same: For redress and remedy whereof, be it enacted by authority of this present Parliament,' &c. Enactments are then made authorising the Courts to give redress against the frauds, &c., which called for repression. The Court of Chancery extended very much the list of charitable purposes contained in this preamble. Mr Jarman (Treatise on Wills, vol. i. p. 208) says,—'Charity is not confined to the objects comprised in this enumeration; it extends to all cases within the spirit and intendment of the statutes.' And he enumerates a vast number of cases (all established by decision of the Court) which have been held to be charitable uses, and of which these are examples:—Gifts for the erection of water-works; for the general improvement of a town; for the establishment of a lifeboat; or of a botanical garden; to the trustees, and for the benefit of the British Museum; to the Royal, the Geographical, and Humane Societies; keeping the chimes of a church in repair; for building an organ gallery in a church; founding prizes for essays; for deserving literary men who have been unsuccessful; for the increase and encouragement of good servants; for establishing and upholding an institution for the investigation and cure of diseases of quadrupeds and birds useful to man. The Statute of Mortmain (9 Geo. II. c. 36), which restricted the power of persons to make bequests to 'charitable uses,' adopted the wide definition of these words already recognised in the Court of Chancery in the interpretation of the statute of Elizabeth.

"Now the question arises whether these decisions have any application to the exemptions given by the Income-Tax Act, which is an imperial statute, and the Lord Ordinary thinks that they have not. His opinion is that the words 'charitable purposes' in the 'Income-Tax Act' (intensified by the addition of the word 'only') must be interpreted according to their ordinary and everyday familiar use. Charity in this sense does not mean 'goodwill,' or 'benevolence,' or 'the application of funds to public utility,' or for the promotion of learning. It has the restricted sense of 'liberality to the poor,' 'alms,' as given by Dr Johnson. In one sense it may be regarded as charity to devote a sum of money to paying ministers' salaries, and building churches for the spread of religion, even although wealthy agnostics may obtain the benefit of such spiritual instruction. But how is this teaching of religion anywise different from the granting funds in trust for the purpose of teaching science by means of a mechanics' institute, or giving literary instruction by hired lecturers? The income-tax

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able purposes" were synonymous with the words in the English Statute of Charitable Uses. The words "charitable purposes" had been used in other statutes, for instance in the Educational Endowments (Scotland) Act, 1882, sec. 10, and in the Customs and Inland Revenue Act, 1885, sec. 11, subsec. 3.[1] The "maintenance and promotion of religious ordinances and education" had been held to be a "charitable purpose" under the first of these Acts.[2] The words had also been used by the Lord President (Inglis) as applicable to a fund devoted to religious and other purposes in a recent case.[3] In that case his Lordship had used ordinary colloquial language in speaking as he had done. There being no interpretation clause in the Income-Tax Acts, the same meaning ought to be put upon the words when found there. It was matter of every-day practice in Scotland to construe the word charity as applicable to a case like the present. If the Lord Ordinary's view was sound, it would lead to a breaking up for income-tax assessment of the different purposes which a hospital served into assessable and non-assessable purposes. For instance, the funds devoted to education would not be held to be charitable, those devoted to housing, feeding, or clothing, would be charitable. Funds belonging to the poor of a parish were not necessarily applied to physical destitution.[4] The mere fact that funds applied to the repairs of a church were specially exempted in schedule C did not affect the question.

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plainly was not intended to be diminished by payments such as these. It is a tax upon everyone having a certain income, and it is only when the clamant calls of poverty and distress render it expedient to relax the incidence of the duty that such relaxation will be given. It was perfectly right to give a wide interpretation to the words 'charitable uses' in the statute of Elizabeth, looking at the object of that statute—to repress frauds that had grown very much in the application of trust-funds left for the purposes of public utility. But the very opposite mode of interpretation ought to be given in regard to an exemption contained in a statute imposing a general tax borne by the whole community who are able to bear it.

"The clause in schedule C itself affords conclusive evidence that the words 'charitable purposes' have not the wide meaning given to the words 'charitable uses' by the Chancery decisions; for besides giving the exemption to moneys applied for charitable purposes, the clause goes on to specify that there shall also be exempted from the duty 'the stock or dividends in the names of any trustees applicable solely to the repairs of any cathedral, college, church, or chapel, or any building used solely for the purpose of divine worship.' Now, such expenditure was not regarded as a charitable purpose, otherwise there would be no necessity for this special clause, and yet such expenditure for repairs upon a church is specially mentioned in the Act of Elizabeth as the application of money to a charitable use. Furthermore, by section 149 it is provided that the trustees of the British Museum shall be allowed the like exemptions 'in respect of any dividends of stock vested in such trustees, or any of them, or in any other for their use, as are granted to charitable institutions by this Act.' Therefore, money given to the British Museum was not a 'charitable purpose' falling under the clause in Schedule C, and would not have been exempt from duty but for this special clause; and yet it has been decided by the Court of Chancery that a gift 'to the trustees, and for the benefit of the British Museum,' was a charitable use within the meaning of the English Statutes (*British Museum* v. *White*, 2 S. and St. 595)."

[1] Incorporation of Tailors in Glasgow v. Inland Revenue, May 26, 1887, 14 R. 729.

[2] Ferguson Bequest Fund v. Commissioners on Educational Endowments, March 15, 1887, 14 R. 624.

[3] Grant v. Macqueen, May 23, 1877, 4 R. 734 (Lord President, p. 736).

[4] Hamilton v. The Minister and Kirk-Session of Cambuslang, Nov. 23, 1752, M. 10,570.

Argued for the Lord Advocate;—"Charitable purposes" in the sense of the Income-Tax Acts meant eleemosynary uses; the element of giving to those who had not must be present. The view of the reclaimers was that a much wider interpretation must be given; indeed they would make it equivalent to public uses. They had indeed avoided using any argument based on the Chancery use of the word arising out of the Statute 43 Elizabeth, cap. 4, and the Mortmain Acts. But, as the Lord Ordinary observed, the true purpose of the passing of the Act of Queen Elizabeth was to prevent the misapplication of trust-funds, and it was right to give a wide interpretation, looking at the object of the statute. The words "charitable purposes" in the Customs and Inland Revenue Act, 1885, were not there used in the wide sense which would include moneys devoted to purposes of public amelioration. Religious purposes were in that statute specially enumerated as separate from "charitable" purposes. The word "destitution" as used in the trust-deed had been founded on on the other side. But the destitution in question was spiritual destitution, and as such was not confined to the poorer classes of the community. The construction to be put upon the words used in the Income-Tax Acts must in a taxing statute be the popular one. The statute was an imperial one, and could not have one meaning in one part of the kingdom, and another in a different part of it. No assistance could be got from the cases which had been cited on the other side. In the *Ferguson Bequest* case there was no decision as to what constituted "charitable uses." In the *Heriot's Hospital* case[1] there was no attempt to define, nor was there in other cases which had raised the question of the Court's jurisdiction over charities.[2] In England, everything from the Royal Society to a Home for Lost Dogs had been held to be a charity in the sense of the Chancery Courts. Used in that sense, the proper Scottish equivalent for "charitable purposes" was "pious uses." All the considerations of probability and expediency were against the respondents. Dr Johnson's definition of charity as "liberality to the poor" was the best.

At advising,—

LORD PRESIDENT.—This is an action by the gentlemen known under the name of the Trustees of the Baird Trust to recover a sum paid by them as income-tax for the year 1886-7, and amounting in all to £644, 18s. 8d. The ground on which the action is laid is that the pursuers, the Baird Trust, are entitled to an exemption from income-tax under the clauses of the Income-tax Act of 1842.

The exempting clause under which the pursuers seek to bring themselves is thus expressed,—"Any trustee for charitable purposes only shall be entitled to the same exemption in respect of any yearly interest or other annual payment chargeable under schedule D of this Act, in so far as the same shall be applied to charitable purposes only, as is hereinbefore granted to such trustee in respect of any stock or dividends chargeable under schedule C of this Act, and applied to the like purposes." Schedule C which is thus referred to enacts that the stock or dividends "of any trust established for charitable purposes only, or which according to the rules or regulations" of the trust-deed shall be applicable to "charitable purposes only," and in so far as the same shall be applied to "charitable purposes only," shall be exempted from the duty. The sole question therefore before us is whether, under the provisions of the Baird Trust, the dividends which have been subjected to income-tax, and the income of the

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[1] Ross v. Governors of Heriot's Hospital, Feb. 14, 1843, 5 D. 589.

[2] Dundas, March 15, 1869, 7 Macph. 670.

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Trust generally, is applicable to "charitable purposes only," and has been applied to "charitable purposes only"? That is the only question before us.

The truster has expressed pretty distinctly in his deed that his object is to promote religion, and to make provision against the existing spiritual destitution, particularly among the poor and working population of Scotland. And accordingly the income of the year of taxation has been applied to a large extent, as we see in the record, towards the building of churches. The largest sum was applied to that purpose, and another sum of smaller amount has been applied towards the endowment of churches. There are some other subordinate items of expenditure which are of the same character; there is "augmentation of stipend," and "miscellaneous expenses" which are not very clearly defined, payment for "Baird lectures," and "allowance to the Baird Trustees." Now, are any of these purposes to which the money has been applied—strictly in terms of the deed as we must assume, and it is not disputed—"charitable purposes"?

It appears to me that in the construction of taxing Acts we must always take it for granted, where these Acts apply to the whole United Kingdom, that the words used by the Legislature are used in their popular and ordinary signification, and are not technical legal terms belonging to one system of jurisprudence which may exist in one part of the United Kingdom and not in another. The occurrence of such technical terms as these in a taxing Act would have the most disturbing and confusing effect, and it would be very difficult indeed to administer such a statute as applicable to the whole United Kingdom. And accordingly we always find in a taxing Act that the words used are words of ordinary meaning which are understood by everybody, whether in England, Scotland, or Ireland, in the same sense. To endeavour, therefore, to import into the construction of this statute the meaning attached to the word "charity" in certain classes of cases that have occurred in the Court of Chancery in England would be in direct contradiction to the principle which I have just stated. Of course, if the statute itself affixes a particular meaning or interpretation to a word of ordinary popular use, it must receive the meaning which the statute gives it, but if there is nothing to interpret it in the statutory sense—if there is no interpretation clause, and no context to shew that the word is used in other than its ordinary sense—then we are bound in administering the statute to give to it that ordinary sense, and no other.

It appears to me that "charity" and "charitable" have one sense, and one only, in ordinary familiar and popular use. Charity is relief of poverty, and a charitable act or a charitable purpose consists in relieving poverty, and whatever goes beyond that is not within the meaning of the word "charity" as it occurs in this statute. The Court of Chancery, as we know, has extended the use of the word "charity" to very different purposes—to purposes of general benevolence and of public utility—but I think it is quite impossible, where we are applying the proper rule of construction of a taxing Act, to give it any such meaning here.

Therefore, without adverting in the first place to the particular clauses of the statute to which the Lord Ordinary has appealed as supporting the construction he has put upon the words, I think *prima facie*, and reading this statute as we are bound to read every taxing Act, we must read this word "charity" in the sense which I have stated. I am not at all insensible to the strength of the Lord Ordinary's argument on the various clauses of the statute, and particularly on the extension of the exemption to purposes which in a wider sense of the

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word "charity" would be comprehended within it. I rather desire to rest my judgment upon the plain and broad ground that in an Act of this description, applicable to the whole United Kingdom, and for the purpose of levying taxation, we are bound to give to such a word as this nothing but its ordinary popular signification. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD SHAND.—I am entirely of the same opinion. The words in the statute to be construed by the judgment of the Court for the purpose of ascertaining what is the extent of the exemption are "any trust established for charitable purposes only"; and I am of opinion, apart from the considerations to which your Lordship has alluded, that in the statute itself we have the means of ascertaining the force and effect of these words. Schedule C, after the provision which your Lordship has read, proceeds to enact that "the stock or dividends in the names of any trustees applicable solely to the repairs of any cathedral, college, church, or chapel, or any building used solely for the purposes of divine worship," shall be subject to exemption. It appears to me to be clear that if the term "charitable purposes only" had been used in the large sense contended for by the trustees, so as to cover the building of churches, and indeed to include religious purposes generally, any provision of this kind as to the funds provided for the repairs of a church or chapel would be unmeaning and unnecessary. If the statute in an earlier clause has already provided that funds dedicated to religious purposes are to be regarded as given for charitable purposes within the meaning of that term as used in the statute, and that therefore expenditure on the building of churches and cathedrals, being of course directly for a religious purpose, is within the exemption, I cannot understand that it could possibly have been specially provided, as is here done by a later clause, that money spent on the repairs of such churches shall be exempt from the tax. The only inference that I can draw from this special provision that funds laid out in the way of executing repairs on churches or chapels or buildings used solely for the purpose of divine worship are to be so exempt is that the general exemption given under the head of charitable purposes does not cover or include religious purposes, and so does not include expenditure for building or endowing churches. And so, without going outside of schedule C of the statute, I am of opinion that we have a construction put upon the words "for charitable purposes only" which is conclusive against the argument maintained by the reclaimers, the Baird Trustees.

But I further agree with your Lordship that the true meaning of the words is as your Lordship has expressed it. It is said that we ought to adopt the more extensive meaning of the words "charitable uses" for which the trustees plead, because of the wide signification given to them in the English Statute of Charitable Uses, and the Statutes of Mortmain, and in the judgments of the Courts in England following on later statutes. But it is very evident that this argument goes a great deal too far for the purpose of the trustees who are seeking this exemption. If we were to give effect to it, the term "charitable uses" employed in these statutes,—obviously in an unusually wide sense so as to check the evils which the statutes were designed to remedy,—would embrace not merely institutions founded for the relief of the poor, but schools and educational institutions of every kind, and even funds left for the repair of bridges, ports, havens, causeways, seabanks, highways, and the like. Counsel for the reclaimers could not maintain that the terms used in this statute in a popular modern sense could receive an interpretation so wide. But if the words have not this extended meaning, where is the line to be drawn? It becomes necessary that the Court should draw the line. If the term cannot be carried to the length of covering all public uses, then is it to be carried to the extent of including funds dedicated for the promotion of colleges, schools, and educational endowments, and also for the promotion of religion? For that, I think, there is no warrant. I agree with your Lordship in holding that the term "charitable purposes only," used in a modern statute, in the absence of any other terms indicating that a wider meaning is intended, is to be taken in its ordinary sense as referring to funds given for the relief or pecuniary assistance of persons in poverty. I think it relates to funds dedicated to the relief of physical necessity or want,—to funds given as alms or as a provision for the relief of persons from physical privations or suffering arising from poverty, and that it goes no farther. It was maintained by the trustees that Mr Baird had in view assistance to the poor in reference to their religious necessities, for the evil which he avows it is his purpose to meet is "spiritual destitution." Even if the funds had been given entirely to overcome this evil in the case of the very poorest, the exemption claimed would not be within the provision of the statute. But further, a perusal of the deed shews, that while the religious benefit of the poor was one of the objects the truster meant to promote, the purpose he had in view really was to promote the extension of his own religious views among the rich as well as the poor—that he considered there was spiritual destitution to be met with in the one class as well as in the other—and that it was his purpose to remedy this by inducing all to agree in the particular creed which he has set forth at length in his deed.

The only other observation which I have to make is this, that I think there is much force in the argument presented to us on the terms used in the 11th section of the Statute 48 and 49 Vict. c. 51—the Customs and Inland Revenue Act 1885—which renders liable to duty the income of incorporations at certain fixed periods. That statute provides an exemption in favour of "property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." We find, therefore, that in a modern statute passed for the purpose of taxation, where an exemption is intended to be given with reference to funds which are used in connection with "any religious persuasion," that is specially provided in the statute, and that this provision is separate and distinct from what follows,—"any charitable purpose." There seems to me to be in that statute a clear distinction drawn between the two—the words are "any purpose connected with any religious persuasion or for any charitable purpose." The latter words alone would not have been sufficient to cover and include the former; and I draw the same distinction in the statute with which we are dealing, and hold that "any charitable purpose" will not cover "any religious purpose," as the trustees here contend that it does.

On these grounds, and concurring in all that your Lordship has said, I think that the judgment of the Lord Ordinary should be adhered to.

Lord Adam.—I concur in all your Lordships have said. It appears to me to be quite impossible to extend the term "charitable purposes" used in this Act so as to cover religious purposes, which is the nature of the expenditure here in question; and I have nothing to add.

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LORD MURE was absent.

THE COURT adhered.

WEBSTER, WILL, & RITCHIE, S.S.C.—SOLICITOR OF INLAND REVENUE—Agents.

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June 1, 1888. Graeme's Trustee v. Giersberg.

FRANCIS MORE (Graeme's Trustee), Pursuer (Reclaimer).—*H. Johnston.* MRS AMELIA A. GRAEME OR GIERSBERG AND HUSBAND, Defenders (Respondents).—*Sir Charles Pearson—Low.*

Bankruptcy—Trustee—Tantum et Tale—Assignation.—By antenuptial marriage-contract a lady who, with her husband, was domiciled in Germany, conveyed her whole estate, including *acquirenda*, to trustees, of whom her brother was one, for behoof of herself and her children. She subsequently succeeded to a legacy, which was arrested *ad fundandam jurisdictionem* in the hands of the representative of the donor (to whom the marriage-contract trust had not been intimated), by the trustee on her brother's sequestrated estate, for a debt alleged to be due by her to the latter.

Held (*diss.* Lord Shand) that the arrestments were bad, as the trustee had no higher right than the bankrupt, who could not have benefited by his failure to intimate the marriage-contract trust to the testamentary trustee to the prejudice of the beneficiaries under the trust, whose interests it was his duty to protect.

Observations (*per* the Lord President and Lord Shand) on Lord Westbury's opinion in the case of *Fleeming* v. *Howden*, 6 Macph. (H. L.) 113.

1ST DIVISION. Lord Kinnear. B.

CAPTAIN GIERSBERG AND MRS AMELIA ANNE GRAEME OR GIERSBERG were married in April 1874, and after their marriage were domiciled in Germany. By antenuptial marriage-contract Mrs Giersberg, with consent of her husband, assigned to certain trustees, of whom her brother, Patrick J. F. Graeme of Aberuthven, was one, "the whole estates, heritable and moveable, real and personal, wheresoever situated, now belonging to the said Amelia Ann Margaret Graeme, or which she shall conquest, acquire, succeed to, or become interested in during the subsistence of the said intended marriage." The purposes of the trust were to pay the annual income of the trust-estate to Mrs Giersberg exclusive of the *jus mariti* of her husband, and of the diligence of her creditors, as an alimentary provision. The fee of the estate was to be held for the children of the marriage, if there were any, and failing them, for Mrs Giersberg and her heirs and assignees.

Mr Graeme acted as a trustee.

Under the settlement of Mrs Oliphant of Gask, who died on 9th December 1886, Mrs Giersberg became entitled to a legacy of £4000.

In April 1887 the estates of Mr Graeme were sequestrated, and Mr Francis More, C.A., was appointed trustee. Immediately thereafter the trustee used arrestments in the hands of Mrs Oliphant's trustee, in respect of certain advances which he alleged had been made by Mr Graeme to his sister, and raised an action against Mrs Graeme and her husband, concluding for payment of £1509, 6s. 2d., being the amount of these alleged advances. These arrestments were used both to found jurisdiction and upon the dependence of the action.

The defenders, *inter alia*, stated that "the said legacy does not belong to Mrs Giersberg, cannot be available for payment of her debts, and cannot be arrested to the effect of founding jurisdiction against her, in respect that it falls under the conveyance by her to the trustees under her antenuptial contract of marriage, to be held and administered by them in terms thereof."

In answer the pursuer stated that at the date of the execution of the arrestments Mr and Mrs Giersberg's marriage-contract had not been intimated to Mrs Oliphant's trustee.

The defender pleaded, *inter alia* (1), No jurisdiction.

The Lord Ordinary (Kinnear), on 21st February 1888, sustained the defender's first plea, and dismissed the action.*

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* "NOTE.—The question of jurisdiction depends upon the validity and effect of an arrestment by which the pursuer has endeavoured to attach a legacy bequeathed by Mrs Oliphant of Gask to the defender Mrs Giersberg, in the hands of Mrs Oliphant's trustees.

"By her antenuptial contract of marriage, the defender conveyed to trustees the whole estate then belonging to her, or which she should conquest, acquire, or succeed to during the subsistence of the marriage; and the purposes of the trust are to pay the annual income of the trust-estate to Mrs Giersberg exclusive of the *jus mariti* of her husband, and of the diligence of her creditors, as an alimentary provision, and to hold the fee for the children of the marriage. If the trust had been brought into operation, therefore, so as to affect the legacy in question, it is clear enough that it could not be attached by the diligence which the pursuer has used, on the allegation that as trustee on the sequestrated estate of Mr Patrick Graeme he is a creditor of Mrs Giersberg. But it is settled by the case of *Tod* v. *Wilson* (7 Macph. 1100), and *Campbell's Trustees* v. *Whyte* (11 R. 1078), that such an assignation in an antenuptial contract must, like any other, be completed by intimation, in order to exclude subsequent assignees for onerous causes or the diligence of creditors; and the assignation in question was not intimated to Mrs Oliphant's trustees before the date of the arrestments. The only question, therefore, is whether the trustee on Mr Graeme's sequestrated estate was in a position to use this diligence as coming in place of the bankrupt.

"The objection is that Mr Graeme was himself a trustee under the marriage-contract; and it appears to me to be well founded. It is not disputed that Mr Graeme had accepted the trust, and it follows that, assuming him to be a creditor of Mrs Giersberg, he could not attach for payment of his own debt funds which it was his duty to protect from the diligence of her creditors for the benefit of the children of the marriage. But the trustee takes the personal rights of the bankrupt subject to the conditions under which he himself held them; and if the bankrupt, supposing him to have recovered the fund in question, would have been bound to hold it for the purposes of his trust, it would appear to me to follow that his trustee cannot recover it for payment of a debt due to the bankrupt himself. It is said that the doctrine by which the trustee takes the bankrupt's rights exactly as they stood in him applies only to property actually vested in him so as to be carried by the vesting clauses of the Bankruptcy Act, and not to the property of his debtors, which the trustee may recover independently of him by the use of the diligence which is open to any creditor. But the trustee can have no right independently of the antecedent rights of the bankrupt. He has no title to sue the defenders in respect of their alleged debt to the bankrupt except by virtue of a personal right of action in the bankrupt, which carries with it as an incident the right to use diligence; and if the bankrupt's right of action would not enable him to attach the particular fund in question by the diligence of arrestment, the fund must be equally protected against the diligence of the trustee. The pursuer's argument is that the trustee in a sequestration may recover, for payment of debts due to the bankrupt, a fund which the bankrupt himself could not have recovered or applied to that purpose without a breach of trust. This appears to me to be inconsistent with the principle laid down by the House of Lords in *Fleeming* v. *Howden*, 6 Macph. (H. L.) 113. The fund lies open to the diligence of Mrs Giersberg's creditors by reason of the bankrupt's failure to perform his trust; and that is an omission

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The pursuer reclaimed, and argued;—(1) The marriage-contract trust had not been intimated to Mrs Oliphant's trustee, and so the legacy fund which had been arrested had been attached by the diligence.[1] (2) It was no doubt true that as a general rule the trustee took an estate *tantum et tale* as it existed in the bankrupt. But to extend that doctrine to a case like the present would be a novelty. It was important to observe that the case arose in circumstances where the failure on the part of the bankrupt had taken place after the sequestration. The trustee in using such diligence as had been used here did not represent the bankrupt. The bar against the bankrupt did not affect the claim of debt, but merely the fund which was arrested. To exclude the trustee's diligence, the bar must not be personal to the bankrupt, but must be inherent in the title on which the claim was founded. The trustee had a right to use remedies which the bankrupt could not use. For instance, in the case of a loan heritably secured in the bankrupt's name without mention of a trust, the trustee took it over free of such conditions,—which were personal to the bankrupt.[2] Here there was a condition which did not attach to the property arrested. The Lord Ordinary had introduced an obligation or condition which was personal to the bankrupt as governing the right of the trustee to attach the property in question. His Lordship had extended the views of their Lordships in the House of Lords, and particularly of Lord Westbury in the case of *Fleeming*[3] too far in applying them to the circumstances of this case.

Argued for the respondent;—The cases which had been cited in support of the contention on the other side were all cases in which the public records were concerned,—such as dispositions *ex facie* absolute, with latent back-letters. In such questions relating to heritable property, the record was what ruled. It was on that principle that the case of *Fleeming* was decided in the Court of Session. It was held that the rights of parties as appearing on the record were not to be controlled by any latent personal obligation. But where the public records were not concerned any equity which was pleadable against the bankrupt was also pleadable against his trustee.[4] The maxim *assignatus utitur jure auctoris* clearly applied. The *dicta* of the House of Lords in the case of *Fleeming* were directly applicable. In the present case, the trustee was debarred from taking advantage of the neglect of the bankrupt to intimate the marriage-contract trust to Mrs Oliphant's trustee. The pursuer's right of action was therefore qualified by the terms of Mrs Giersberg's marriage-contract trust. It had been held in *Challis'* case[5] that a trustee was barred from taking advantage of the fraud of a bankrupt, and the principle of that case was applicable here.

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from which neither he nor his trustee can, in my opinion, take benefit, to the prejudice of the beneficiaries whose interests it was his duty to secure."

[1] Tod's Trustees v. Wilson, July 20, 1879, 7 Macph. 1100, 41 Scot. Jur. 616; Campbell's Trustees v. Whyte, July 11, 1884, 11 R. 1078.

[2] Bankruptcy (Scotland) Act, 1856, sec. 102; Bell's Comms. (7th edit.) I., 298, 301; Wylie v. Duncan, 1803, M. 10,269; Thomson v. Douglas, Heron, & Co., 1786, M. 10,299; Mansfield v. Inglis' Trustees, April 1835, 1 Shaw & Maclean's App. Cases, 203.

[3] Fleeming v. Howden, March 20, 1867, 5 Macph. 658, rev. July 16, 1868, 6 Macph. (H. L.) 113; *cf.* also Jeffrey v. Paul, May 15, 1835, 1 Shaw & Maclean's App. 767.

[4] Gordon v. Cheyne, Feb. 5, 1824, 2 S. 675; Redfearn v. Somervail, June 1, 1813, 1 Dow's Apps. 50, 5 Pat. Apps. 707; Scottish Widows' Fund v. Buist, July 14, 1876, 3 R. 1078.

[5] Molleson v. Challis, March 11, 1873, 11 Macph. 510, 45 Scot. Jur. 328.

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At advising,—

Lord President.—This action is raised by the pursuer as trustee on the sequestrated estates of Patrick James Frederick Graeme of Aberuthven. There is no doubt that if the debt in question is well founded the pursuer has a good title to sue. It is one of these claims for payment of debt which pass to the trustee in a sequestration. But the defender is not subject to the jurisdiction of this Court unless she has been made so by arrestments *ad fundandam jurisdictionem*. The question therefore is, whether these arrestments were well used and are effectual.

The debt sued for is for advances alleged to have been made by the bankrupt to his sister Mrs Giersberg from time to time, amounting now to £1509, 6s. 2d. The fund arrested is a legacy payable in terms of the settlement of Mrs Oliphant of Gask, to Mrs Giersberg.

By her antenuptial marriage-contract, executed long before the legacy in question fell due, Mrs Giersberg conveyed her whole estate, both present and which she might acquire, to trustees for behoof of herself in liferent, exclusive of the *jus mariti* of her husband, and of the diligence of her creditors, and for her children in fee. Now, it so happens that Mr Graeme was himself one of the trustees under the marriage-contract. If the marriage-contract had been intimated to Mrs Oliphant's trustee, the legacy would have been transferred by the conveyance therein contained to the trustees under the marriage-contract, and not to Mrs Giersberg. Unfortunately the marriage-contract was not intimated to Mrs Oliphant's trustee, as would have been necessary in order to make it effectual in a competition in ordinary circumstances. But then the Lord Ordinary says, and this is very important, that the bankrupt was himself to blame for the failure to intimate the marriage-contract to Mrs Oliphant's trustee. That opinion of the Lord Ordinary's cannot I think, as matter of fact, be disputed. The bankrupt was only one of several trustees, but the duty in question was incumbent upon all and each of the trustees. The view which the Lord Ordinary has taken of the arrestments in these circumstances is that they could not have been used by the bankrupt himself, as he was bound to hold the fund for the benefit of Mrs Giersberg and her children, *i.e.*, for the purposes of the marriage-contract, and it would have been a breach of trust on his part to arrest it for a debt due to himself by Mrs Giersberg. That is also I think indisputable.

The question consequently upon which this case hinges is, whether the trustee in the sequestration, who comes in the place of the bankrupt, can do diligence though the bankrupt could not? The Lord Ordinary answers this question in the negative, and I must say that after giving every attention to the argument which has been presented for the reclaimer I think the Lord Ordinary is right. The position of the trustee in a sequestration does not seem to me to differ from that of any other assignee as regards a claim of this kind. The claim is of the nature of a *nomen debiti*,—an incorporeal moveable right which passes by assignation,—and therefore the trustee is in no better position than an onerous assignee. The principle laid down in the House of Lords in the case of *Fleeming* v. *Howden* goes far to support this view of the Lord Ordinary. I agree with the principle so laid down, and generally with the opinions expressed by their Lordships in the House of Lords in that case on this matter, but I should only like to say that I am not inclined to go so far as Lord Westbury does in describing the position of a trustee in a sequestration as being the same as that of "a gratuitous alienee." I

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should rather put it in this way—that a trustee in a sequestration is in no better position than an onerous assignee who has bought a debt. The meaning of the maxim *assignatus utitur jure auctoris* has been so often and so lately commented upon in opinions which I have had occasion to deliver, that it is hardly necessary for me to refer to it again. I need only refer to my opinion in the case of the *Scottish Widows' Fund* v. *Buist*, 3 R. 1078, as to the meaning of the maxim. I agree with the Lord Ordinary in the present case that, as the bankrupt could not have used the arrestments without being guilty of a breach of trust, neither can his trustee. If the bankrupt had used the arrestments he would have committed a breach of trust, and I do not think the trustee can do what would have constituted a breach of trust in the bankrupt. He would have had no right to use the arrestments or any diligence against the fund in question, which would have had the effect of defeating the purposes of the marriage-contract trust.

LORD SHAND.—As my opinion in this case differs from that of your Lordship and the Lord Ordinary, I need not say that the question in dispute has had my best consideration. I have, however, been unable to change the opinion I formed in the course of the argument, and I think the judgment of the Lord Ordinary should be recalled, and the jurisdiction of the Court sustained, on the ground that the fund left by the late Mrs Oliphant to the defender Mrs Graeme or Giersberg has been attached by the pursuer's arrestments.

The pursuer, as trustee on the sequestrated estate of Mr Graeme, Mrs Giersberg's brother, has right to the whole of the estate, heritable and moveable, which belonged to the bankrupt on 7th April 1887. The act and warrant of confirmation of that date, in virtue of section 102 of the Bankruptcy Act of 1856, transferred to the pursuer, and vested in him the whole moveable estate and effects of the bankrupt Mr Graeme. Part of this estate, as the pursuer alleges, was a debt of £1509 due by the defender Mrs Giersberg to her brother the bankrupt in respect of money lent. The defenders dispute the existence of the debt which is now sued for in this action; but in the present question as to the validity of the arrestment used to found jurisdiction against Mrs Giersberg, who lives abroad, the existence of the debt must be assumed; and at least it is enough that the claim is made for recovery of a debt alleged to be due by her.

Now, it is admitted that the pursuer has right to the debt or claim which the bankrupt had against his sister, the defender Mrs Giersberg. It is admitted that the testamentary trustee of the late Mrs Oliphant of Gask is in possession of a fund exceeding the debt now claimed, left by that lady to Mrs Giersberg as a legacy, payable in June 1887; and farther, it is not disputed that the fund in Mr Oliphant's hands was liable to be attached by arrestment used by Mrs Giersberg's creditors. It is true that by her antenuptial marriage-contract, entered into in 1874, Mrs Giersberg had assigned to the trustees therein named, of whom her brother, the bankrupt, was one, the whole estate which she might acquire during the subsistence of the marriage, but this assignation was never intimated to Mr Oliphant, Mrs Oliphant's sole trustee and executor, so as to transfer the fund as a vested right to the marriage-contract trustees, and consequently it remained subject to the diligence of arrestment at the instance of Mrs Giersberg's creditors on the principles fully explained and to which effect was given in the cases of *Tod* and *Campbell*, referred to in the judgment of the Lord Ordinary.

The pursuer, as a creditor of Mrs Giersberg, has used arrestments in Mr Oliphant's hands to attach this fund, both to found jurisdiction against Mrs Giersberg, and also on the dependence of the action. But the Lord Ordinary has held that these arrestments are ineffectual. An arrestment at the instance of any other creditor of that lady would be effectual, for the fund was subject to her debts and deeds so long as the assignation contained in her marriage-contract was not intimated to the testamentary trustee. But it has been held by the Lord Ordinary that the pursuer is in this peculiar position, that although a creditor of Mrs Giersberg he cannot use an arrestment which would be effectual. In that view I find myself unable to concur.

The ground of the judgment I understand to be that because Mr Graeme, the bankrupt, could not have effectually arrested the fund, it follows that no more can the pursuer, as the trustee on his sequestrated estate, do so. It is said that Mr Graeme having been an accepting trustee—not by written acceptance but by his actings under the marriage-contract of his sister—was bound to intimate the assignation by Mrs Giersberg contained in that deed to the testamentary trustee of Mrs Oliphant, and that he could not be allowed in violation of this duty to arrest the fund for a debt due to himself; and it is further said that the same objection to use arrestment applies to the pursuer as trustee for Mr Graeme's creditors, because his rights have been derived from the bankrupt, and he cannot have greater rights than the bankrupt had.

Now, I agree in thinking that Mr Graeme could not have effectually attached the fund, but I do not agree in thinking that the same objection applies to the pursuer as trustee for his creditors, and the ground of my opinion may be shortly stated. It is this, that the reason why an arrestment by Mr Graeme would have been ineffectual is, that in his character as trustee under the marriage-contract it was his duty to intimate the assignation contained in that deed to Mrs Oliphant's trustee, and he would be barred from arresting the fund to secure a debt of his own in breach or violation of this duty or obligation as trustee. But this consideration, in my opinion, has no application to the pursuer, because there is no similar bar which can be effectually pleaded against him when he uses an arrestment. He has no trust duty arising out of the marriage-contract, and the fact that the bankrupt had and still has such a duty affecting him personally, which creates an obligation on his part to intimate the assignation, has no application to a trustee for his creditors using diligence to recover a debt, who has no such duty and no such obligation. It appears to me that, if the bankrupt has failed in a duty and obligation to the beneficiaries under the marriage-contract, this only raises a personal claim for any damage which has resulted and for which the parties injured must claim and rank in the sequestration in the ordinary way. These beneficiaries cannot, I think, on sound principles, protect the fund in Mrs Oliphant's trust from arrestment unless they can shew that the pursuer as trustee in bankruptcy had the same duty and obligation as the bankrupt, which clearly he had not. That trust was personal to Mr Graeme and the pursuer as trustee for his creditors was not even entitled in any way whatever to act in that trust.

The reasoning in favour of the judgment is rested on the supposed application of the principle *assignatus utitur jure auctoris*, and of the rule that a trustee in a sequestration takes the estate *tantum et tale* as it stood in the bankrupt. There are no rules or principles in our law in reference to the transfer of rights which I should more anxiously guard and preserve in full vigour and observance than these, because if they be violated, great injustice might often be done. But with great deference, I am humbly of opinion that these rules are here sought to be used in circumstances to which they have no just application. What did the pursuer take under his act and warrant of confirmation? Only the right to the debt due by Mrs Giersberg. That right was assigned or transferred to him by the Bankrupt Statute, and no doubt he could only take the right subject to any inherent qualification or condition affecting it in the bankrupt,—that is, subject to such conditions or qualifications as would limit its extent, or, it might be, define its character, shewing it to be a right of trust only. That is the full meaning and effect of the rules above mentioned. If the debt due by Mrs Giersberg had been due to the bankrupt as trustee for someone else, and his right had thus been qualified inherently by a trust, the trustee for his creditors could only take up the right *tantum et tale*, and so could not take right to the debt unaffected by the trust. This is the full result of the decisions and the *dicta* in the case of *Fleeming* v. *Howden*, including the *dicta* of Lord Westbury, in which I apprehend his Lordship was in error in saying that the right of a trustee in bankruptcy is that of a gratuitous alienee only, and also in the case of *Campbell*, 11 R. 1078. But here there was no inherent qualification limiting the right of the bankrupt to the debt due by his sister. His right was absolute, and that absolute right was transferred to the trustee for his creditors.

The right to raise action and do diligence for the recovery of debt is a legal incident of the right to the debt. It arises as a common law right in favour of all creditors against their debtors, and the pursuer in using the arrestment in question is availing himself of that right only. Having an unqualified right to the debt, why shall he be prevented from doing so? Because it is said the bankrupt could not have effectually used an arrestment. The answer to that argument—an answer which I humbly think sound—is this, that the objection to an arrestment by the bankrupt is personal—a personal bar, which applies to him individually, because of the duty or personal obligation which lay upon him to complete a title in the marriage-contract trustees to the fund by intimation; but although he has failed in his duty—and his failure might give rise to a claim of damages (which is by no means clear in this case, for the bankrupt has lived abroad ever since Mrs Oliphant's death)—yet (1) this obligation in no way affects or binds the trustee for his creditors, who is not bound to fulfil personal obligations by the bankrupt—least of all obligations arising out of the bankrupt's holding the office of a trustee; and (2) that the duty and obligation which affected and affect the bankrupt were not in any sense inherent qualifications of the right which the trustee in the sequestration acquired under the Bankrupt Statute. So there is nothing to deprive him of the ordinary remedy of a creditor for recovery of his debt. The right to the debt being absolute, an objection as to the remedy for recovery of it applying to the bankrupt and arising out of a trust he held, is, in my opinion, merely personal to him, and not an inherent qualification of the right transferred to the trustee. A personal obligation by a bankrupt under a contract of sale or otherwise to transfer an heritable property, though binding on him, does not affect the trustee in his sequestration, except as giving rise to a claim of damages, because it forms no inherent qualification of his right, and the same observation applies with even greater force in the case of such an obligation as attached to Mr Graeme as a trustee under the marriage-contract. Indeed it must be observed that such an obligation was independent of and altogether unconnected with the bankrupt's right to the debt

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due to him. It arose out of a relation having no connection with the relation of debtor and creditor, and could not therefore, in my opinion, affect or limit the power of an assignee for creditors acquiring right to the debt to sue and use diligence against Mrs Giersberg like any of her other creditors.

On these grounds I am of opinion that the arrestments were effectual, and that the plea of no jurisdiction should be repelled.

Lord Adam.—Mrs Giersberg is said to be indebted to Mr Graeme in the sum sued for, and his trustee has used arrestments in the hands of Mrs Oliphant's trustee for all sums due to Mr Graeme. The sum arrested is a legacy bequeathed to Mrs Giersberg by Mrs Oliphant of Gask, which is assigned under Mrs Giersberg's marriage-contract to her marriage-contract trustees. If followed out by a furthcoming that is the sum out of which payment would be recovered. It appears to me that the trustee as in right of Mr Graeme is not entitled to recover anything which Mrs Oliphant's trustee could not lawfully have paid to Mr Graeme, or which Mr Graeme could not have recovered from him. It is not disputed that Mr Graeme could not have recovered this sum, for the reason that his person was charged with a trust for the marriage-contract purposes, and it would have constituted a breach of trust in him to use arrestments in these circumstances. The trustee's title is rested solely and entirely on Mr Graeme, and can go no further. Consequently I have no difficulty in agreeing with your Lordship in the chair, and with the Lord Ordinary.

Lord Mure was absent.

The Court adhered.

Mylne & Campbell, W.S.—Murray & Falconer, W.S.—Agents.

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Heddle's Executrix v. Marwick & Hourston's Trustee.

Mrs J. F. B. Sinclair or Heddle (Heddle's Executrix), Appellant.—(Respondent).—*Asher—Strachan.*

Thomas M'Laren (Marwick & Hourston's Trustee), Respondent (Reclaimer).—*Gloag—C. N. Johnston.*

Partnership—Liability of assumed partner for debts incurred prior to assumption—Presumption.—When the whole estate of a going concern is taken over by a new partnership, the new partners contributing no capital, and the business being continued on the ~~same footing as before, the~~ presumption is that the liabilities are taken over with the stock, and that the new partnership undertakes liability for all the trade debts previously contracted.

The manager of a long-established business was taken, without a written contract, into a new copartnery, which continued the old business and took over the stock in trade. He contributed no capital, and the arrangement was that he was to be paid a certain salary and to have a share of the profits. On the bankruptcy of the firm, *held* that a creditor of the old firm was entitled to rank in the sequestration.

Observations (*per* the Lord President) upon the case of *Nelmes* v. *Montgomery*, June 15, 1883, 10 R. 574.

1st Division.
Lord Trayner.
M.

James Marwick, ironmonger, Kirkwall, died there in March 1873, intestate, and survived by his widow and five pupil children. He had established a large business as an ironmonger and general merchant, which it was arranged after his death that his widow should continue for the benefit of the family, Mr Peter S. Heddle, solicitor and banker, and Mr Irvine, also a banker, both in Kirkwall, undertaking to advise with her in the conduct of it, and to provide such pecuniary assistance as might be necessary for carrying it on.

In July 1878 Mrs Marwick took into partnership with her Mr William Hourston, who had been manager of the business for more than a year previously, the name of the new firm being Marwick & Hourston. No written contract of copartnery was entered into between them.

The firm carried on the business till 16th August 1886, when its estates and those of the individual partners were sequestrated, and Mr Thomas M'Laren, S.S.C., was appointed trustee.

Mr Heddle had died on 23d September 1884, and his widow as his executrix now claimed to be ranked in the sequestration of the firm (1) for £214, 5s., being advances made by her husband and herself to the firm from 1878 to 1886, and (2) for £4402, 13s. 7d., with interest, amounting *in toto* to £6642, 13s. 8d., being advances made by her husband to Mrs Marwick prior to 1878, under deduction of a contra account due by her to the firm of £1845, 6s. 0½d., thus leaving £5011, 12s. 7½d.

The trustee admitted the claim for £214, 5s., but rejected it *quoad ultra* so far as regarded the firm, admitting it, or the greater part of it, on the individual estate of Mrs Marwick only.

Mr Heddle's executrix appealed to the Lord Ordinary on the Bills, her contention being that she was entitled to rank in the firm's sequestration for the second of the two sums above mentioned.

A record was afterwards made up, in which the appellant stated that from the date of Mr Marwick's death (when there was a large amount of debt due to creditors), down to the formation of the partnership in 1878, the financial part of Mrs Marwick's business was conducted by Mr Heddle; that he advanced money for her and signed trade-bills with her, the whole drawings being paid to him by the managers of the business; that the new firm when constituted in 1878 took over the whole stock in trade, assets, and goodwill of the business, and also its debts and liabilities; that neither of the partners put any money into it, the capital consisting entirely of the stock in trade and other assets; that at that date there was a large balance due to Mr Heddle on his advances, and that the existence of that debt was well known to both the partners, as appeared also from a trial balance-sheet which was prepared when the copartnery was entered into; that while these advances had been made by Mr Heddle goods and furnishings had been supplied to him by Mrs Marwick, payment for which had never been demanded, although the account was rendered in 1884, the understanding being that Mr Heddle's debt should be gradually wiped out in that way.

The trustee stated in answer that the debt in question, the existence of which was unknown either to Mrs Marwick or to Mr Hourston, was not taken over by the firm.

The appellant pleaded, *inter alia*;—(1) The bankrupts having taken over the assets and liabilities of the business which had been carried on by Mrs ~~Marwick,~~ including the ~~debt due to Mr~~ Heddle, the appellant is entitled to be ranked on their estates for the amount of the said debt, with interest, in terms of her claim.

The respondent pleaded;—(3) The firm of Marwick & Hourston having incurred no liability for the debt in question, and it not being a debt incurred by the said firm in the course of its business, the judgment appealed against is well founded, and ought to be sustained, with expenses.

A proof was led, the result of which sufficiently appears from the note to the Lord Ordinary's interlocutor and from the opinions of the Judges.

The Lord Ordinary (Trayner), on 5th November 1887, pronounced this interlocutor:—"Recalls the deliverance by the respondent appealed against:

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Directs the respondent to rank the appellant as a creditor on the sequestrated estates of Marwick & Hourston for the debt claimed, when that debt has been constituted, or otherwise properly vouched: Finds the appellant entitled to one-half of the expenses of process, as the same may be taxed, down to the date of closing the record: Remits," &c.*

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* "NOTE.—The appellant claims to be ranked as a creditor on the sequestrated estates of Marwick & Hourston (on which the respondent is trustee) for the sums of £214, 5s. and £6642, 13s. 8d. respectively. The respondent has admitted the appellant's claim to rank for the first of these sums; but as regards the second, he has refused the appellant's claim to rank on the estates of the firm, but has admitted the claim to rank on the estates of Mrs Marwick, an individual partner thereof, subject to the condition 'that the cash accounts are properly vouched, and that the business accounts will be taxed by the auditor.' Against the latter part of this deliverance the present appeal is brought, the appellant contending that she is entitled to be ranked on the firm's estate (and not merely on Mrs Marwick's) for the full amount of the debt claimed.

"From the proof which has been led before me, it appears that, prior to 28th March 1873, the late James Marwick (who died of that date) carried on business as an ironmonger and general merchant in Kirkwall; that, from that date till July 1878, the business was continued by Mrs Marwick (who was her husband's executrix) for behoof of herself and her family; that in February 1877 Mr Hourston entered the employment of Mrs Marwick as manager of said business at a salary of £80 per annum; and that in July 1878 he became a partner in the business along with Mrs Marwick. No contract of copartnery was ever executed between Mrs Marwick and Mr Hourston, but it is stated that the latter was to get a third of the profits of the business. It is not clear on the evidence whether a proper balance-sheet shewing the condition of the business was prepared at the time when Mr Hourston joined the business as a partner; but from his acquaintance with the business as manager Mr Hourston had at least some knowledge of how the affairs of the business stood. When the partnership of Marwick & Hourston was formed, that firm continued the same business which had formerly been carried on by Mr Marwick and continued by his widow. The whole stock and assets of the old firm were handed over to, and traded with, and used by the new firm as the stock and assets of the latter. No new set of business books were opened, the old ones were continued. The only change which took place was, that a bank account was opened in the name of the new firm—the bank account for the business carried on by Mrs Marwick for some time prior to July 1878 having been kept in name of the late Mr Heddle, who was in effect the cashier and financial manager for Mrs Marwick. Farther, the whole debts due by the old firm (except the debt due to the late Mr Heddle) were paid by the new firm of Marwick & Hourston from the proceeds of their business; and the whole debts due to the old firm were collected and discharged by the new firm.

"The debt claimed by the appellant (so far as claim of debt may be established by her) was incurred to the late Mr Heddle in connection with and for behoof of the old firm. For several years he acted not only as the law-agent of Mrs Marwick, but also as financial manager and cashier of the business she was carrying on. I think there is no doubt that Mr Heddle made advances on behalf of Mrs Marwick's business, without which that business could not have been carried on.

"In this state of the facts I do not think the law is doubtful. It appears to me that the present case is not distinguishable in any essential particular from the cases of *Millar* (23 D. 359) and *M'Keand* (23 D. 846). In the latter case it was laid down by the Lord Justice-Clerk (Inglis) 'that when parties take up a going business in that way, and take the stock, they must also take the liabilities,' and that in effect was the judgment pronounced.

"The respondent sought to distinguish between this and the cited cases in three respects—(1) that Hourston paid in capital to the new firm; (2) that he did not know at the date when he became a partner that any debt was due by

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On 7th December 1887, the Court remitted to Mr Molleson, C.A., to examine the accounts in dispute and report, and on 6th March 1888 he

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the old firm to Mr Heddle; and (3) that whenever he became aware of the present claim he at once repudiated liability therefor. Each of these points deserves consideration. 1. Capital.—In his examination in the sequestration Mr Hourston stated that under his contract of copartnery he was to subscribe one-third of the capital. He certainly never did that. In his evidence in this case he says he paid into the capital of the business three sums, viz., on 22d February 1877, £46; on 18th February 1878, £20; and on 2d October 1882, £113. The first and second of these sums, it will be observed, were paid before the partnership commenced. Mr Hourston explains that these sums were due to him by Mrs Marwick, and that he allowed them to lie in the business as part of his capital. Assuming that statement to be true, it would only shew that Hourston had paid £66 towards purchase of one-third of the business, its stock and assets—an altogether inadequate price. The third sum (£113) is said to have been paid in on 2d October 1882. I am not satisfied that that sum was ever paid. There is no voucher for it, except an entry in the firm's books in the handwriting of Mr Hourston. The entry is written on an erasure, of which Mr Hourston can give no explanation, and the entry is not posted in the ledger. In my opinion it is not proved that Mr Hourston paid anything whatever towards the capital of the new firm. I have already stated what I think of the alleged payment of £113, and with regard to the other two small payments, I think they were, at the best, debts by Mrs Marwick to Mr Hourston, which may or may not have been imputed to capital some time after the partnership was formed. I incline to the view that the idea of imputing them towards payment of capital is quite a recent idea. But even taking them as payments towards capital, they are so trifling as to make no real difference between the present case and the cases I have referred to. 2. Ignorance of the debt.—It may be the fact that Mr Hourston did not know the amount of the debt due to Mr Heddle by the old firm, or that there was any debt due to him at all; but if Mr Hourston became a partner of the new firm under such circumstances as imposed a liability on it for the debts of the old firm, I fear his ignorance affords him no exemption from liability. He should have made sure of the extent of his liability before he became a partner. He knew quite enough, however, to put him on his inquiry—for he knew that while he was manager (from February 1877 to July 1878) Mr Heddle was financing the business; receiving all its drawings and paying all its accounts. I am bound to add that I am not satisfied that Mr Hourston was as ignorant of the debt due to Mr Heddle as he now represents himself to have been.

"3. Repudiation of the claim.—On this subject there is some conflicting evidence. It is said, on the one hand, that when the account now claimed for was rendered, Mr Hourston, along with Mrs Marwick and her son, did not dispute liability therefor, but, on the contrary, agreed that the account should be settled by the new firm continuing to supply goods to the representatives of Mr Heddle, to the extent of about £200 per annum, until the account was settled. The agreement is denied by Mr Hourston, Mrs Marwick, and her son, who say they never heard of such a proposal. If there was no evidence in the case on this branch of it, except the parole testimony, I should be placed in considerable difficulty; for not one of the witnesses on one side or the other (except the accountants, Garioch, Magnus Marwick, & Hewison), impressed me as being worthy of much confidence. There was, on the part of them all (except those I have specially named), such a want of recollection as to matters which they could not reasonably be supposed to have forgotten, and such pretended ignorance regarding things which they should have known according to all reasonable probability, that I formed the impression above stated. There is, however, a piece of real evidence which I think conclusive on the subject. In May 1886, after the account now in question had been rendered, Mr Hourston, as representing his firm, consulted Mr Thomson, solicitor, Kirkwall, with regard to the condition of his firm's affairs. What it was that immediately led to Mr Hour-

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reported that the parties had agreed that the balance due to Mr Heddle was £3820, 3s. 9d.

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ston consulting Mr Thomson, is not of much moment; the result of the consultation is of more importance. It resulted in Marwick & Hourston executing a trust-deed in favour of Mr Thomson for behoof of their creditors. Mr Thomson intimated that this had been done by a circular issued by him to the creditors of Marwick & Hourston, of which No. 69 of process is a copy. The circular, which had an 'approximate state of affairs' appended to it, stated that 'the annexed state of affairs shews the assets and liabilities of the firm, and brings out the former as shewing 10s. 4d. in the £'; that the firm solicited 'an arrangement on the basis of the state of affairs,' and added, 'if this arrangement, or a settlement of say 10s. 6d. in the £ be carried through, the firm will be enabled to continue its extensive business with benefit to all.' Turning to the state of affairs, I find that the debt now claimed by Mrs Heddle is entered among the liabilities of the firm. It is suggested now that that debt was entered in the state of affairs, not as a debt which the firm was bound to pay, but merely as an intimation to the other creditors that such a debt was claimed. I regard that suggestion as quite without foundation; it is distinctly negatived by the state of affairs. For it will be observed that it is by including the debt in question that the estate is shewn to yield only 10s. 4d. per £, and it is on the representation that that debt is the debt of the firm that a settlement is 'solicited' on a composition of 10s. 6d. per £. So far, therefore, from the debt in question being inserted in the state of affairs as an intimation merely that it was claimed (as distinguished from its being an admitted debt), the other creditors are solicited to make an arrangement on the footing that that debt has to be provided for by the firm, just as and no less than its other obligations. Indeed, on any other view, the circular and state of affairs were absurd. Exclude the debt in question, and the firm was solvent; its liabilities only amounting to £3496, 14s. 10d., and its assets to £4173. In such circumstances a trust-deed was unnecessary, and certainly, in such circumstances, the other creditors were not likely to yield to the solicitation for a settlement on a composition of 10s. 6d. per £.

"It is farther said by Mr Thomson, the local law-agent of the firm (who is the author of the suggestion I have been dealing with), that neither Mr Hourston nor Mrs Marwick ever saw or authorised the circular and state of affairs, and Mr Hourston and Mrs Marwick say the same thing. I cannot accept these statements as correct; they are contradicted by the contemporaneous entry in Mr Thomson's account, and Mr Thomson rather departs from his statement when pressed on examination (proof, p. 108).

"I come to the conclusion on this part of the case that the firm of Marwick & Hourston distinctly adopted the debt in question, and recognised their liability for payment thereof.

"The appellant has thus, in my opinion, failed in each and all of these three particulars to distinguish this case from the others above cited.

"I was referred to the case of *Nelmes*, 10 R. 974, in which, no doubt, an opinion was expressed opposed to some of the views expressed in *M'Keand's* case. But that case was decided upon grounds which leave the authority of *M'Keand's* case unaffected. I am of opinion that the firm of Marwick & Hourston are liable for the debt in question, not only because, being a debt of the old firm, they took it over as an obligation when they took over the old firm's business and assets, but also because they distinctly adopted it as their debt, and represented to their other creditors that it was so.

"Although I have arrived at the conclusion that the debt due to the late Mr Heddle is a debt against the firm of Marwick & Hourston, yet I am not in a position to order the respondent (as prayed for in the appeal) to rank the appellant on the firm's estate as a creditor to the extent claimed. The respondent has, I think, very prudently only admitted the ranking on the estate, even of Mrs Marwick, subject to the claim being properly vouched. That has still to be done.

"It appears from the deliverance appealed against that the respondent had

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Marwick & Hourston's trustee reclaimed, and argued;—I. *On the facts.* —Hourston only came to know of the debt in question in 1886. It was Heddle's duty to have disclosed it when the new copartnery was formed in 1878, and if Hourston was then induced by Heddle to enter the business under false representations, he was relieved of liability. Further, there was no ascertainable debt in 1877,—which was another argument against its having been taken over. II. *On the law.*—The cases of *Millar*[1] and *M'Keand*[2] were different, because in both the existence of the debts in question was disclosed at the date of the formation of the new copartnery. Besides, here the amount and character of the debt made the case a very exceptional one. The case of *Nelmes*[3] was in point,—particularly Lord Young's opinion there. In the absence of express contract, it was necessary to prove facts and circumstances shewing that the new partner had agreed to take over the debt in question.

Argued for Heddle's executrix;—I. *On the facts.*—It was not proved that Hourston had put any capital into the new business. Upon the evidence, it was clear that the new firm had taken over the assets of the old firm, and had paid many of their trade debts, and indeed had paid a portion of Heddle's debt, because they had paid Mrs Marwick's acceptance for a debt for which Heddle was liable to the bank. Hourston's evidence was unreliable,—and having been manager of the business for some time before he became partner, he could not but have known of the existence of the liability. II. *On the law.*—It was admitted that when a partner was assumed who contributed no capital, and the new firm took over the assets of the existing firm, the presumption was that the new firm became responsible for the debts of the old. The principle was stated in the opinion of the Lord President (then Lord Justice-Clerk) in *Millar's* case.[1] It would be a most inequitable result if a partnership by assuming a clerk as partner could thereby exclude all their old trade creditors. There was, no doubt, a slight difference between the Scottish and English law on the matter,—because according to the latter the question was whether the new partner had made himself responsible to the former creditors, which he could not do without novation.[4] But here the general question did not arise, because the new firm had not only taken over the assets of the old, but had paid part of their debts,—and no distinction could be shewn between these; knowledge of the special debt and of its amount was not required.

At advising,—

LORD ADAM.—The question in this case is whether Mrs Heddle, as executrix

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called on the appellant to produce evidence of the claim now made being a debt due by the firm, and that in answer to that call certain documents were produced. I cannot say that these productions were such that the respondent should at once, in respect of them, have admitted the claim; and therefore, although he has been unsuccessful on the question principally argued before me, I cannot hold him entirely accountable for the present litigation. I therefore find him liable to the appellant in one half of the expenses of this appeal down to the date of proof being allowed; and I mark my dissatisfaction with the evidence adduced on both sides by finding no expenses due to either party since that date."

[1] Millar v. Thorburn, Jan. 22, 1861, 23 D. 359, 33 Scot. Jur. 180.

[2] M'Keand v. Laird, March 30, 1861, 23 D. 846.

[3] Nelmes v. Montgomery, June 15, 1883, 10 R. 974; *cf.* also Guthrie's Bell's Principles, 371; Lindley on Partnership, 392.

[4] Rolfe and Others v. Flower, Salting, & Co., Feb. 1, 1866, L. R., 1 P. C. App. 27.

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of her husband the late Mr Heddle, is entitled to be ranked on the sequestrated estate of Messrs Marwick & Hourston for a sum now ascertained to amount to £3820, 3s. 9d. This sum consists of a sum of £2347, 7s. 5d. of principal due by Mrs Marwick as at 17th July 1878, when the firm of Marwick & Hourston was formed, and a sum of £1472, 16s. 4d. of interest to the 16th August 1886, when that firm was sequestrated. It is not disputed that Mrs Heddle is entitled to be ranked on the individual estate of Mrs Marwick, one of the partners of the firm, for the sum in question.

The facts on which the question depends would appear to be these:

Mrs Marwick's husband, the late James Marwick, had carried on a very considerable business in Kirkwall as an ironmonger and general merchant down to the date of his death on 28th March 1873. He left a widow, Mrs Marwick, and five young children. Mrs Marwick was decerned as his executrix. Mr Marwick died, if not insolvent, at least with no means to enable his widow to carry on the business, which apparently was the only resource she had to look to for the support of herself and her children. In these circumstances, Mr Heddle, who had been her husband's law-agent, and a friend of the family, came to her assistance and undertook to find the funds necessary to enable her to carry on the business. She carried it on by means of managers, who attended to the business in the shop, until 17th July 1878, when she took Mr Hourston into partnership. It appears that during this time the whole drawings of the shop, with the exception of some small payments, were paid over daily to Mr Heddle, who, on the other hand, paid the accounts for goods purchased for the business. While thus financing the business, Mr Heddle, on 7th April 1873, opened an account with the Union Bank in name of Marwick's representatives. This account was closed on 19th May 1873, and the balance carried over to a new account, which he opened in his name as trustee for Mrs Marwick. This account ceased to be operated on in April 1875, but various payments continued to be made in reduction of the balance due to the bank, and it was closed on 2d October 1875, when the balance due was £639, 19s. For this sum Mr Heddle drew a bill on Mrs Marwick, which she accepted, and the bill was discounted with the bank. Payments to account of this bill were made from time to time down to the date of the copartnery, and bills granted for the balance. At that date the amount of the bill current was £436, 16s. 10d. This bill was retired by Mr Heddle paying £25 to account and drawing a new bill with interest added for £418, 15s. 7d., which was accepted by Mrs Marwick. Payments were made from time to time to account of this bill, and renewals granted for the balance, which was ultimately paid. It is material to observe that all these payments were made by the firm out of the drawings of the business by cheques on their bank account.

When the account with the Union Bank ceased to be operated on in April 1875, Mr Heddle did not open an account in connection with the business with any other bank. He acted as banker, and intromitted with the funds through his own account, crediting the business with the cash received from the shop, and debiting it with the payments made by him for goods purchased, with the result that there is an admitted balance due by Mrs Marwick of £4053, 16s. 3d., but from this there is deducted a contra account due by Mr Heddle of £1706, 8s. 10d., leaving a balance of principal, as before stated, of £2347, 7s. 5d. due as at the date of the copartnership.

I do not think it can be disputed that this was a proper trade debt of the business. Mr Heddle's advances were made in connection with and for behoof of the business from the beginning, and without them it could not have been carried on.

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In February 1877 an arrangement was entered into with Mr Hourston, by which he entered Mrs Marwick's employment as manager of the business. He was to receive a salary of £80 per annum, and an interest in the business in proportion to the capital he might be inclined to put into it from time to time up to a third of the profits. He continued in this employment until July 1878, when he was taken into partnership by Mrs Marwick.

There was no written contract of partnership between them. It is difficult to discover what the terms of the arrangement were. Mr Hourston says that beside the salary which he was drawing he was to receive one-third of the profits. If this be so, the inference is that he was to pay for one-third of the assets, if any. Mrs Marwick says nothing about the terms of the copartnery. Mr Hourston further says that there was a balance-sheet prepared under the supervision of Mr Heddle with a view to the partnership which shewed the debts and liabilities which were to be taken over by the firm, and that this did not include Mr Heddle's claim. This alleged balance-sheet shews a surplus of assets of upwards of £1700. Mrs Heddle denies that any such balance-sheet was prepared prior to the formation of the partnership, and I am of opinion that it is not proved that any such balance-sheet was ever prepared and exhibited to Mr Hourston.

On the other hand, Mrs Heddle avers that a trial balance-sheet was prepared as at 16th July 1878 when the copartnery was entered into, and that in this balance-sheet the debt due to Mr Heddle was stated as amounting to £3468, 6s.; that this balance-sheet was prepared in order to shew the state of affairs at the date of copartnery, and that its contents were perfectly well known to the partners. According to this balance-sheet the liabilities of the firm, including the debt due to Mr Heddle, exceeded the assets by £1339, 6s. 2¼d.

I have no doubt that this balance-sheet was prepared as stated. But Mrs Marwick and Mr Hourston deny that they ever saw it, or were aware of its contents. However that may be, I do not think that it is proved that it was exhibited to them. But I agree with the Lord Ordinary that, looking to Mr Hourston's previous acquaintance with the business as manager, and the way in which it was worked, he could not well have been ignorant that there was an outstanding account between Mr Heddle and the business—although he might not have been aware how the balance stood, or what it was,—and that ought to have led him to inquire how matters stood. Mr Hourston says that if he had seen this balance-sheet he never would have entered into the partnership and undertaken liability for such a debt. I do not think, however, that in his circumstances, having, so far as appears, no means of his own, that was a consideration likely to weigh much with him.

Mr Hourston farther says that he put some money into the concern at the time of the partnership. The sums he refers to are a sum of £46, which he had paid in on 22d February 1877, and another sum of £20 on 18th February 1878. Undoubtedly he had these sums at his credit before the partnership was entered into and he allowed them to remain. He further says that on 2d October 1882 he made a payment to capital of £113. On the grounds stated by the Lord Ordinary, and which I need not repeat, I am clearly of opinion that it is not proved that he paid this sum.

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In this state of matters, it is material to see how the new firm was carried on. It appears to me that the only change which was made in the business was that the firm opened a bank account in their own name, on which they operated, in place of the former system, under which the drawings were paid to Mr Heddle and the accounts paid by him. In all other respects the business just went on as before. Mr Hourston drew his salary as before. He says,—"When the partnership was entered into we did not begin a new set of books, we just continued the old. So far as I know the business was carried on just as before. There was no change made in the stock, except what would be made from time to time as the demands of the business required. Marwick & Hourston paid the debts which had been incurred by the business before the date of the copartnery. All the trade debts which had been incurred by Mrs Marwick were paid by the new firm. Marwick & Hourston also uplifted monies due to the business as carried on by Mrs Marwick. The new firm collected all the monies due to Mrs Marwick and paid all the trade debts due by her."

The firm continued to carry on business until the beginning of May 1886, when they got into pecuniary difficulties in consequence of the bank refusing to make further advances, their account being largely overdrawn. This led to the execution of a trust-deed for behoof of their creditors. Mr Thomson, the agent whom they had consulted, intimated this fact to the creditors by a circular, which had an "approximate state of affairs" appended to it, stating that "the annexed state of affairs shews the assets and liabilities of the firm, and brings out the former as shewing 10s. 4d. in the pound," and that the firm solicited an arrangement on the basis of the state of affairs, and added, "if this arrangement, or a settlement say of 10s. 4d. in the pound, be carried through, the firm will be enabled to carry on its extensive business with benefit to all."

The debt now claimed by Mrs Heddle is entered in the state of affairs as a liability of the firm. The Lord Ordinary, for the reasons stated by him, in which I entirely concur, and to which I can add nothing, regards this as distinct evidence of the liability of the firm for the debt claimed. I also concur with the Lord Ordinary in thinking that the circular and state of affairs were seen and authorised by both partners.

There is only one other matter of fact to which I think it necessary to refer. It appears that the firm had an account against Mr Heddle for furnishings, extending over the whole period from 1873 till his death in 1884. The amount due by him at the date of the partnership was £682, 12s. 3d., and at his death £1706, 8s. 2d., and this sum has been deducted from the amount of Mr Heddle's claim now proposed to be ranked. It appears that notwithstanding the pecuniary difficulties of the firm, payment of this account was never asked, or the account rendered, during Mr Heddle's life. It is difficult to account for this otherwise than because the firm was aware of the large counter claim which he had against them.

These being the facts of the case, the question is whether the firm of Marwick & Hourston is in law liable for this debt.

I do not suppose that anyone will contend that when a new firm is constituted by a person becoming a partner in an existing business, whether carried on by an individual or a firm, the new firm becomes liable for the debt of the old business. Neither do I think that the mere fact of the new firm taking over the whole assets of the old business will *per se* render the new firm liable for the debts of the old business. I think in all cases it is a question of cir-

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cumstances, and that it must be established by presumption, or by proof of facts and circumstances, that the new firm agreed to adopt the old debts and to become liable for them. The Lord Ordinary refers to the cases of *Millar* (23 D. 359) and *M'Keand* (23 D. 846) as ruling the present case, which he thinks is not distinguishable from them in any essential particular; and he quotes from your Lordship's judgment in the latter case the opinion that "when parties take up a going business in that way and take the stock, they must also take the liabilities." We must therefore see what the "that way" was to which your Lordship refers, and the facts on which your Lordship and the Court proceeded in that case are thus summarised by your Lordship (23 D. 853). "Now, what was the true nature of the transaction? That comes to be the next question. It was just this, that Mr Laird being in business as a trader, and having apparently a pretty extensive business —whether it was a profitable one or not—thought it desirable, either after consulting with the appellants, or upon their suggestion—it does not appear very clearly which,—but at all events with their knowledge as his principal creditors, he thought it desirable to give his two shopmen a small interest in the business for the purpose of stimulating their zeal and energy in the promotion of the interests of his concern—not a very uncommon arrangement certainly in businesses of this kind; I might almost say a matter of everyday occurrence in such trades. But was it ever heard before that when a transaction was entered into, the beginning and end and whole meaning and distinctive character of which amounted to this, that the two shopmen were to have each one eighth share in the business as part of their remuneration for their services, that that constitutes a new company to the effect of handing over to the new firm the whole stock of the individual trader, and depriving the prior trade creditors of that individual trader of all recourse against his stock and property?" This case was before seven Judges, four of whom concurred with your Lordship. As I read the case, however, the two dissentient Judges—Lords Colonsay and Curriehill— did not differ as to the law, but only as to facts. The former says—"If I could have, along with your Lordships, thrown aside the contract of copartnery, and have treated this as a case in which two persons were admitted into a share of a going business without any contract of copartnery, I should not have had much difficulty in concurring with your Lordships."

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The interlocutor of the Court set forth the following findings in fact,—"1st, that the debt in dispute was originally incurred in connection with the drapery business carried on in Paisley, which was afterwards transferred to and carried on by the bankrupt under the name or firm of Robert Laird. 2d, That upon entering into the contract produced, of date 5th April 1850, the bankrupts obtained possession of the whole stock in trade which had been previously acquired for and used in the said business, then belonging to the said Robert Laird as an individual, and which greatly exceeded in value the capital of £600 mentioned in the said contract. 3d, That the bankrupts William Thomson and William Smith were neither of them possessed of any individual means and estate, and neither of them contributed anything to the stock or capital used in the said business, or to the funds comprehended under the sequestration of the bankrupts as a company trading under the foresaid firm. 4th, That the debt now in dispute was assumed, taken over, and all along dealt with by the bankrupts trading under the said name or firm as a debt of the said firm or company."

Now, in this case, as in that, the bankrupts in July 1878, on entering into

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the copartnery, obtained possession of the whole stock in trade which then belonged to Mrs Marwick as an individual. The bankrupt Mr Hourston was not possessed of any individual means and estate, and contributed practically nothing to the stock or capital used in the business, or to the funds comprehended under the sequestration of the firm, and I think that the facts clearly shew that the debt now in dispute was assumed, taken over, and all along dealt with as a debt of the firm.

I have referred to the case of *M'Keand* at some length, because I think it is a most authoritative judgment, and clearly applies to this case.

That case was followed by the case of *Millar*, reported before but decided after that of *M'Keand*. In that case your Lordship said this (23 D. 362),—"As a matter of general principle it seems absurd to hold that a person in trade by taking his son into partnership can do anything to injure the rights of his trade creditors; and the way in which the law interpones in such a case to prevent injustice is by holding that where a new firm takes over the whole stock and business of a going concern it is held also to take over the whole liabilities. In short, the business being taken over and not wound up, the business and its liabilities must be held to go together. That is matter of general principle which was established by the cases of *M'Keand* and *Ridgeway* (10 S. 105), and I see nothing to take this case out of it." Lord Cowan says (23 D. 362),—"I concur in the principle given effect to in the cases of *Ridgeway* and *M'Keand* that in the general case, where the whole estate of a company is given over to and taken possession of by a new concern or partnership, the business being continued on the same footing, the estate goes to the new company *suo onere*—that is, the liabilities go along with the effects. To sustain any other principle might result in the greatest injustice. This is the general presumption, although there may be special circumstances in particular cases not admitting of its application. In this case there are no such specialities. Of course private debts are not in the same position as trade debts."

In the present case I am of opinion that this general presumption does apply, and that there are no special circumstances not admitting of its application. But I think farther that there are facts and circumstances proved which clearly shew that the new firm took over the whole liabilities of the old business. In the first place, they paid the whole trade debts of the creditors of the business other than Mr Heddle. In the next place, they paid the bill accepted by Mrs Marwick for the balance of the debt due to the Union Bank, and for which Mr Heddle was liable to the bank. But this bill represented a debt due by Mrs Marwick to Mr Heddle for advances in connection with the business, which was contracted in precisely similar circumstances with the debt now claimed, and as the firm admitted liability for the one by paying it I do not see how they can repudiate liability for the other.

In the next place, the firm distinctly admitted liability for the debt in question in the circular and state of affairs, issued by their authority to the creditors of the firm by Mr Thomson, when the trust-deed was granted, and lastly the manner in which the account of the firm against Mr Heddle was dealt with can only be explained on the ground that they knew that he had a contra account against them to a larger amount. On the whole matter I am of opinion that Mrs Heddle is entitled to rank for the amount of the debt now ascertained to have been due by Mrs Marwick at the date of the partnership on the ground that the new firm assumed, adopted, and dealt with the debt as a debt of the firm.

LORD SHAND.—I entirely concur in the view which has been presented by Lord Adam, and in the grounds of his Lordship's judgment. I do not think that this case raises any question of general law, such as was presented for consideration in the argument. I hold that it has been established,—and clearly established in my judgment,—that the new firm in this case expressly undertook liability for the debt in question by their actings in relation to it. The debt was incurred in consequence of Mr Heddle having acted practically as banker in financing the business for a number of years; and therefore I do not think it can be disputed that it was a trade debt. Mr Hourston, when he came to the business and became a partner, was necessarily aware of it. He saw what was going on for a year while he was in the employment of the firm, and while Mr Heddle was financing the business, and it is impossible to doubt that he must have known that the account had to be cleared off when Mr Heddle ceased to act and the business was to be put on another footing. Mr Hourston says he did not know of the existence of this debt, and it was stated for him in the argument that if he had known the precise position of the affairs of this company he would not have joined it. But as Lord Adam has pointed out, Mr Hourston was not putting any capital into the business. And although it may be that for a time the business was not paying, and there was a balance standing against it, yet, on the other hand, it was an old-established business, and all parties seemed to think that, if well managed, it would in the end produce a large amount of profit.

I think a conclusive answer to the statement of the case presented by the defenders is this, that while no doubt Mr Hourston says he did not know of this debt, I can only accept that as meaning that he did not realise quite the amount of it. Mr Heddle is not here to speak for himself, for he is dead, but this fact speaks to me with a clearness that puts the matter beyond question, that from 1878 to 1884, a period of six years, the new firm went on supplying Mr Heddle with furnishings to the extent of about £200 a-year, and never asked for payment of any of this money. They were in difficulties during this time and desirous of getting money; that appears on the proof. If Mr Heddle was owing them upwards of £1000 for furnishings, it is impossible to doubt that they would have pressed for that money, and it would have been paid. It is admitted that there never was a payment of that kind made by him. In that state of the matter, the only explanation that occurs is that they were working off the balance of the debt that was due to Mr Heddle when Mr Hourston became a partner. So I am clearly of opinion that, taking the proof as a whole, and taking into account the different matters which Lord Adam summarised at the close of his opinion, the new firm undertook responsibility for this debt, just as they undertook responsibility for the other debts of the firm.

In regard to the general question of law, which has been so fully argued, I shall only say that I concur in thinking it must always be a question of circumstances whether a new firm becomes responsible for the obligations of the old. On the one hand, if an old-established firm, consisting of one or two partners, arranges to take in a clerk and give him a future share of the profits, or if one of the partners has a son who has just come of age and is taken into the business, and they arrange to give him a share of the profits of the new firm thereby constituted, it appears to me that, if the new firm takes over the stock in trade and the book debts and whole business of the old firm and the goodwill of that business, equity requires that they shall take over its obligations. If a person

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grants a universal disposition in favour of another party, in so far as this is gratuitous and not for value, it can only be under burden of the obligations for which that person is liable. It appears to me that in such a case as I have put, where you have practically a new copartnery, with the transfer of the whole assets of the business and goodwill of the old firm, the creditors must continue to have their hold upon these assets in the new firm. To hold otherwise would be to open a door to fraud. The assumption of a new partner it may be to-day, of another six months afterwards, and of a third six months after that, thereby cutting off the rights of creditors to share in the assets of each separate firm, would produce not only confusion but great injustice to the creditors. On the other hand, if a partner comes into a business, paying in a large sum of capital, and the other partners merely put in their shares of a going business as their shares of the capital, a different question might arise. In such a case as that, probably some special circumstance would require to be proved in order to impose liability on the new partner for transactions entered into prior to the date when he became a partner. Then, again, intermediate cases will occur between these two classes. In all of them I think it must be a question of circumstances, to be determined by the Court upon the facts, whether there has been liability undertaken, or adoption of the debt of the old firm. In this case I do not think such questions as I have pointed out arise, and I concur in the opinion of Lord Adam that Mr Hourston is clearly liable for the debt due to Mr Heddle's executrix.

LORD PRESIDENT.—I am of opinion with both your Lordships that the result of the evidence in this case is to shew that the new firm, and Mr Hourston as a partner of that firm, has adopted and taken over Mr Heddle's debt as part of the liabilities of the new firm. If that be the sound result of the evidence, it seems to me that this case presents no difficulty whatever in point of law.

At the same time, I cannot but express my entire concurrence in the view which Lord Adam has presented of the two cases of *M'Keand* and *Millar.* I think he has very accurately expressed what is the result of these cases. Although in the recent case of *Nelmes* opinions were expressed by some of their Lordships of the Second Division which the Lord Ordinary thinks are at variance with the views expressed in the two previous cases to which I have referred, I cannot help thinking that the difference is more apparent than real, and that if another case raising the same kind of question which occurred in the cases of *M'Keand* and *Millar* comes to be considered by the Court, it will be found that the law to be applied is very much the same as was enunciated by the Judges in the former cases, and was stated by two of the learned Judges in the other Division in the case of *Nelmes.*

LORD MURE was absent.

THE COURT pronounced this interlocutor:—"Adhere to the interlocutor reclaimed against: Refuse the reclaiming note, and remit to the trustee to rank the appellant as a creditor on the sequestrated estates of Marwick & Hourston for the amount of £3820, 3s. 9d.: Find the appellant entitled to the expenses since the date of the Lord Ordinary's interlocutor," &c.

JOHN WALLS, S.S.C.—D. MACLACHLAN, S.S.C.—Agents.

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June 5, 1888.
Partick, Hillhead, and Maryhill Gas Co. Limited v. Taylor.

PARTICK, HILLHEAD, AND MARYHILL GAS COMPANY, LIMITED, First Parties.—*Darling*—*Younger*.
ROBERT TAYLOR AND ANOTHER, Second Parties.—*Davidson*.

Company—Preference shares—Dividend—Payment of arrears out of subsequent profits.—Preference shares in a limited company were issued under special resolution of the company, "these shares to be entitled to a preferential dividend of 5½ per cent per annum." During two years there were no profits of the company wherewith to pay the guaranteed dividend. *Held* (1) that the preference shareholders were entitled to payment of the arrears of dividend out of the first profits made by the company, but (2) that interest was not due on the arrears.

1ST DIVISION.
B.

THE PARTICK, HILLHEAD, AND MARYHILL GAS COMPANY, LIMITED, was incorporated under the Companies Acts, 1862 and 1867.

Under article 6 of the company's articles of association power was given, "on the recommendation of the directors and with the sanction of at least three-fifths of the votes of the shareholders, voting in person or by proxy, at any general meeting of the company," to increase the capital of the company "by the creation of new shares, whether ordinary or preferential or special, and on such terms and conditions as the meeting determine." Accordingly, in or about the month of August 1873, the directors resolved to recommend an issue of preferential shares, and their annual report, dated 13th August 1873, contained the following passage:—"The directors now submit for the approval of the shareholders the accounts of the company brought down to the 30th of June last. It will be observed that in order to carry out the works authorised by the general meeting of shareholders on 27th August 1872 a considerable advance has been received from the bank in anticipation of the issue of additional stock, authorised to be created by the meeting of shareholders held on 29th October 1872. The amount authorised to be issued at that meeting was £50,000, and the directors are glad to say that fully the half of that sum has been subscribed; but in order to provide for the liability to the bank and other engagements, the directors are of opinion that preference stock should be created to the extent of £30,000, with a guaranteed dividend of 5½ per cent per annum, and they recommend the shareholders to agree to this." At a special general meeting of the company, held on 22d August 1873, the following special resolution (afterwards duly confirmed) was passed:—"That in terms of the recommendation of the directors, the capital of the company be, and is hereby increased by the sum of £30,000, to be issued in 6000 preference shares of £5 each, these shares to be entitled to a preferential dividend of £5, 10s. per centum per annum."

Mr Robert Taylor, Ashlea House, Partick, in answer to a circular dated 19th September 1873, applied for, and there were allotted to him, 100 of the preference shares, which were fully paid up.

Till June 1885 the dividend of 5½ per cent was duly paid. In June 1886 the accounts shewed a balance of profit of about £3000, but this balance was extinguished by being written off against losses which the company had sustained and which fell to be debited to revenue.

Accordingly, at the annual balance in June 1886 and again in 1887, the dividends on the preference shares were not paid.

In March 1888 a special case was presented to the Court to which the Gas Company were the first parties; and Mr Taylor and another, holders of preference shares, the second parties.

The above facts were stated in the case. It was further stated that it was expected that in June 1888 there would be a sufficient sum to pay

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the dividend for the current year on the preference shares, and possibly a portion of the arrears of dividend on those shares, assuming arrears were due. A copy of the articles of association was produced, and held to form part of the case.*

The following questions were submitted for the opinion and judgment of the Court:—"(1) Is the dividend on the preference shares cumulative, and does the dividend not paid in the years 1885-86 and 1886-87, or either of them, fall to be carried forward as a first charge on the free revenue of the year 1887-88 and future years? or Is the dividend on the preference shares for any one year chargeable only upon the free revenue of that year? (2) Is interest due on arrears of preference dividend, and if so, at what rate?"

Argued for the second parties;—The preference shareholders were entitled to be paid the arrears of their dividends from the first profits gained by the company. There was no case in point in our books, but in England the question had been answered in their favour.[1] In the Companies Clauses Act, 1863 (26 and 27 Vict. c. 118), secs. 13-16, preference dividends were in some cases made not cumulative; that shewed that it required a special legislative Act to make such a state of matters possible. That statute in point of fact assumed the law to be as it was laid down in *Henry's* case. In equity their contention was right, for, if the opposite view were given effect to, it would be for the interest of the ordinary shareholders (who were here, and in most other cases, the majority in the company) to prevent the preference shareholders getting their dividend, and rather to apply the profit in wiping off bad debts, &c., if there were not enough to pay the preference dividend and a fair dividend to the ordinary holders.

Argued for the first parties;—The case was taken out of the rule of the cases cited by the second parties by the terms of the articles of association. By article VII., sec. 18, subsec. (1),* the directors were bound to pay arrears on debts, but nothing was said with regard to arrears of dividends, the only direction being to pay the preferential dividends. That meant dividends of the current year. This was an element not present in any of the cases cited. As regarded the claim for interest, interest could only run from the date at which a debt ought to have been paid. Here it could not be said the dividends should have been paid when there were no profits out of which to pay them.

LORD PRESIDENT.—The second parties here are preference shareholders in the Gas Company, who are the first parties to the case. The shares which the second parties hold were created in 1873, in respect of a report by the directors of date 30th June 1873. The creation of the shares is thus recorded,—"At a special general meeting of the company held on 22d August 1873, the following special resolution (afterwards duly confirmed) was passed:—'That in terms of the recommendation of the directors, the capital of the company be, and is hereby increased by the sum of £30,000, to be issued in 6000 preference shares of £5 each, these shares to be entitled to a preferential dividend of £5, 10s. per centum per annum.'" Down to 1886 no difficulty was experienced in paying the dividend, but then misfortune came on the company, the effect of which (the particulars are of no moment) was, that though in June of that year there was according to the natural statement of the account a balance of profit of about £3000, that was more than extinguished by the arrangement by which the company wrote it off against losses sustained by them, and which fell properly to be debited against revenue. The consequence of this was that no dividend was declared in that year or in the following year. Now, however, it is stated that the company have recovered their position, that their losses are provided for, and that there is this year a prospect of a profit to be divided.

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* The articles of association provided, *inter alia*,—"VII.—Application of Earnings.—18. All the earnings of the company, including all their receipts properly carried to the account of revenue, shall every year be applied as follows:—1st, In payment of all taxes, rates, and rents, and other preferable charges payable in respect of the company's landed property or works, and all arrears, if any, thereof. 2d, In payment of all management, working, and other current expenses of the company, and all arrears, if any, thereof. 3d, In payments to the reserved fund and the depreciation fund. 4th, In payment to the preferential shareholders, if any, of their dividends, according to their respective priority."

[1] Henry v. Great Northern Railway Co., 1857, 1 De Gex & Jones, 606; Webb v. Earle, 1875, L. R., 20 Eq. 556; Corry v. Londonderry & Inniskillen Railway Co., 1860, 29 Beavan, 263.

The question for us to decide is this,—The company say that the preference shareholders not having got a dividend during two years, there being no profits to divide, the dividend for those years falls altogether. The preference shareholders, on the other hand, maintain that those dividends not having been paid for want of funds fall to be paid out of the first profits earned by the company. The question is very simple, and it seems to me to be settled by authority, and settled in a way which to my mind is both plain and just. The difference between preference and ordinary shareholders is just this, that the one is entitled to be paid preferably to the other. Given profits, the rule is that the preference shareholders shall be paid first. Neither class are creditors of the company except in the sense that all shareholders are creditors for their share of the profits of the company in which they hold shares.

I cannot see that there would be any justice in a rule which would limit the right of the preference shareholders to receive 5½ per cent to years in which profits have been made, and give them no right to their dividend if no profits have been made during the year. It seems to me that they are clearly entitled when profits are made to their dividend of 5½ per cent, whether it is a past year's dividend or the dividend of the present year. The question was very fully considered in *Henry's* case. That case is a very high authority, the decision having been given in the Court of Chancery by Lord Chancellor Cranworth and two Lord Justices of high repute, viz., Lord Justices Knight Bruce and Turner. I should hesitate even if I had any doubt as to the justice of that decision in going against so high an authority; it is therefore satisfactory to find that one's own impression is in accordance with it.

Mr Younger called attention to that part of the articles of association which regulate the manner in which the profits of the company are to be disposed of. They are to be expended, according to the rules there set out,—"1st. In payment of all taxes, rates, and rents, and other preferable charges payable in respect of the company's landed property or works, and all arrears, if any, thereof." That rule contemplates the payment of debts, whether contracted in the year in which the profit was made or in any previous year, and the directors would have been bound to do that whether it was so provided in the articles or not. Now, the fourth rule is this,—"In payment to the preferential shareholders, if any, of their dividends, according to their respective priority." With regard to that rule, it is said that the words "all arrears" which occur in rule 1

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are omitted, and it is therefore contended that the directors are not entitled to pay arrears of these dividends. I think that it is far too strict, I may say too fanciful, a construction of the rule. If the rights of preference shareholders are such as I have stated them to be I cannot think that they can be cut off by any such construction of the articles of association.

As regards the question of interest, if there are profits earned by the company the preference shareholders are entitled to their dividends. If there are no profits no dividends can be paid, and therefore as between the company and those shareholders there is no default of payment on the part of the debtor. I cannot see how interest can be payable on a sum which ought not to have been paid at the time from which the interest is said to become due. Interest runs only from the date when the principal ought to have been paid.

LORD MURE concurred.

LORD SHAND.—I am also of the same opinion as your Lordship.

The words contained in the resolution under which these preference shares were established are these, that "the capital of the company be and is hereby increased by the sum of £30,000, to be issued in 6000 preference shares of £5 each, these shares to be entitled to a preferential dividend of £5, 10s. per centum per annum." The resolution provides that there is to be a preferential dividend for a fixed sum of £5, 10s. a-year, but, of course, if at the end of a year there are no profits the preference shareholder cannot receive his dividend. If, however, in future years profits are earned, then I think that in a question between him and the ordinary shareholder, according to the plain meaning of the language used, a person who has taken preference stock is entitled to payment of his arrears. It has been stipulated that he shall receive payment of his preferential dividend for each year, of course out of profits. It would not, I think, be a reasonable construction of the words of this resolution to hold that because there are no profits in any particular year not only shall there be no payment that year, but that the claim, as for that year, is entirely extinguished. There are no terms in the resolution limiting the preference shareholders' right to that effect. If the right were to be made conditional the resolution would require to be qualified by such words as these,—"If there be profits for the year which will yield that sum." But there are no such qualifying words, and accordingly I am of opinion—and supposing we had no authority on the subject I should have had no difficulty in holding—that that is not the true meaning of the words used. But, as your Lordship has pointed out, there is much authority in the law and practice of England in favour of the view which your Lordship has expressed, and in which I concur.

The only other question is, whether anything can be made of the specialty to which Mr Younger drew attention, contained in the articles of association of the company, under the head "application of earnings." Now, the provision in regard to preference shareholders is this, that in the fourth place the earnings shall be applied "in payment to the preferential shareholders, if any, of their dividends according to their respective priority." These words simply express the rule of law that has been long settled. But it is said that in two previous clauses, referring to the payment of taxes and expenses of management, arrears are mentioned and directed to be paid, while in this fourth clause arrears are not mentioned, and that therefore we should apply a different rule from that

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usually followed in regard to arrears of preferential dividend, and so are to infer the loss of a valuable right usually possessed by preference shareholders from the terms in which these previous clauses are expressed. I think it would be an extremely strong thing to limit the rights of preference shareholders by a mere inference to be drawn from the mention of arrears occurring in a previous article dealing with another matter. It would require clear language to justify the Court in holding that these preference dividends shall be payable out of profits in the event only of there being profits for the year so as to exclude any claim for arrears. To do so we should require such language as was prescribed by the Legislature in the Companies Clauses Act of 1863, sec. 14, to which Mr Davidson referred us, where there is a direct provision that "if there are not profits available for the payment of the full amount of preferential dividend or interest for the year no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company." In short, I think that in order to restrict the preference shareholders' right you must have something express, and not something drawn by doubtful implication from such words as are here founded on, which, at the best, seem to be merely an expression of what the common law requires, viz., that a company out of its first receipts, and before paying dividends, shall pay its debts and expenses of management, and all arrears of these.

With regard to the claim for interest on the arrears of preference dividends, it appears to me that it is an extravagant claim. If you have no profits you can have no dividend, and if you have no dividend declared you can have no interest running. The claim of the preferential shareholder has priority to that of the ordinary shareholder. But, of course, he is to be paid only out of profits earned and declared, and if he get his dividend as soon as there are such profits, he obtains the full measure of his rights. I am of opinion with your Lordship that the claim of interest must be refused.

LORD ADAM concurred.

THE COURT answered the first alternative of the first question in the affirmative, and the second alternative in the negative. They also answered the second question in the negative.

MORTON, NEILSON, & SMART, W.S.—BRUCE & KERR, W.S.—Agents.

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June 9, 1888.*
Bennett v. Wilson.

JAMES BENNETT, Pursuer (Respondent).—*H. Johnston.*
GEORGE WILSON, Defender (Appellant).—*D.-F. Mackintosh—Watt.*

Process—Appeal—Sheriff—Power of Sheriff to remit to Sheriff-substitute to pronounce decree—Debts Recovery (Scotland) Act, 1867, *secs.* 9-12.—It is incompetent for a Sheriff in an action raised under the Debts Recovery (Scotland) Act, 1867, to remit to the Sheriff-substitute to pronounce decree.

1st Division.
Sheriff of Aberdeen, Kincardine, and Banff-shires.
M.

JAMES BENNETT, Elgin, raised an action in the Sheriff Court at Elgin, under the Debts Recovery (Scotland) Act, 1867, against George Wilson, farmer, Marypark, concluding for payment of £26, 11s. 3d.

On 1st February 1888 the Sheriff-substitute (Grierson) sustained the defences to the extent of £26, and decerned against the defender for the balance of 11s. 3d.

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* Decided June 23, 1888.

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The pursuer appealed to the Sheriff (Guthrie Smith), who, on 9th May 1888, recalled the judgment of the Sheriff-substitute. In his interlocutor he found that the sum sued for was due and resting owing to the pursuer; "therefore repels the defences, and remits to the Sheriff-substitute to decern in terms of the summons, with expenses, and decerns."

The defender appealed to the Court of Session.

The pursuer objected to the competency of the appeal, on the ground that no judgment had been pronounced by the Sheriff finally disposing of the cause, and that the cause was therefore not appealable in terms of the Debts Recovery Act, 1867, secs. 9-12.

The defender maintained that the interlocutor practically disposed of the cause, as all that remained was for the Sheriff-substitute to give effect to the Sheriff's judgment.[1] If the objection were sustained his right of appeal was altogether cut off, as it was incompetent under sec. 11 of the Act to appeal to the Court of Session direct from the Sheriff-substitute.

The Court intimated that they desired to hear parties on the merits. The cause was then heard on the merits.

LORD PRESIDENT.—(After stating his opinion that the Sheriff's interlocutor ought to be recalled on the merits)—I think it right to add that there is another ground upon which the Sheriff's interlocutor might be recalled. I do not think that that interlocutor was competently pronounced in terms of the statute. I do not think that the Sheriff had any power to remit to the Sheriff-substitute to pronounce decree; he must do so himself. On that ground also, I should have been prepared to recall the interlocutor appealed against.

LORD SHAND and LORD ADAM concurred upon both points.

LORD MURE was absent.

THE COURT recalled the interlocutor of 9th May 1888, and remitted to the Sheriff to affirm the judgment of the Sheriff-substitute.

HENDERSON & CLARK, W.S.—ALEX. MORISON, S.S.C.—Agents.

No. 130.
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June 9, 1888.
Simpson v.
Brown.

GEORGE SIMPSON, Complainer (Respondent).—*Lyell.*
WILLIAM BROWN, Respondent (Reclaimer).—*C. S. Dickson.*

Bill—Diligence—Suspension of Charge—Caution—Bills of Exchange Act, 1882 (45 *and* 46 *Vict. c.* 61).—In a suspension brought by the acceptor of a bill of a charge given by the drawer, the complainer averred that the bill had been delivered by him as a blank bill to the drawer to be used for a different purpose from that for which it was used, but it appeared from letters signed by the complainer that he had admitted liability for the bill. *Held* that the complainer was not entitled to have the charge suspended without finding caution.

Observed that the Bills of Exchange Act, 1882, made no alteration on the law in regard to caution.

Bill-Chamber.
1ST DIVISION.
Lord Lee.
Bill-Chamber
Clerk.

ON 16th March 1888 George Simpson, residing at Trinity, near Edinburgh, was charged at the instance of William Brown, solicitor, Hamilton and Glasgow, to make payment, as acceptor, of a bill for £282 drawn by Messrs W. V. & J. R. Orr, of which Brown was the holder.

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[1] Malcolm v. M'Intyre, Oct. 19, 1877, 5 R. 22; Cathcart v. Sloss, Feb. 11, 1865, 3 Macph. 521, see Lord Deas' opinion, 525, 37 Scot. Jur. 261.

Simpson presented a note of suspension in which he averred that in the end of 1886 he had occasion to go to America, and that before leaving he executed a power of attorney in favour of Brown (his brother-in-law), to whom also he gave a number of bill stamps accepted in blank to be used for his (complainer's) business if required; that none of these stamps were required in the complainer's absence, and on his return the respondent obtained a discharge from him; that in the autumn of 1887 Mr Dundas Simpson, the complainer's father, had a claim of £282 made upon him by a bondholder over his properties in Airdrie, and that the respondent, who was son-in-law to Mr Dundas Simpson, pressed the complainer to relieve his father by paying the amount, but that the complainer refused to do so; that to stop a sale of the property the respondent had without the complainer's authority filled up one of the blank bills and delivered it to Messrs Orr the bondholder's agents, and Mr Brown at the same time gave them his own cheque as security for payment of the bill.

The respondent stated in answer that he had been employed by the complainer in November 1887 to obtain a loan to pay off a bond of £1700 over a property belonging to the complainer's father, with arrears of interest thereon amounting to £282—and that it was upon an arrangement with Messrs Orr—the agents for the bondholder—and after the circumstances had been explained to the complainer, that the latter had authorised the respondent to settle the payment of interest by the bill in question, in order to avoid a sale of the property. On 10th November 1887 (the date of the bill), the respondent had written to the complainer, who was then in Paris, intimating that he had given the bill "in payment of the interest." Between that time and the date when the bill became due a correspondence (which was produced) took place between the respondent and the complainer, in the course of which the complainer admitted that he was due the sum in the bill, although he was unable to meet it. *Inter alia,* on 9th January 1888 he wrote to the respondent,—"I have been trying for the last few days to realise, so as to cover the bill due to Orr, but it is almost impossible to do so"; and on the same day the respondent wrote to the complainer,—"It is more than ever necessary that you arrange with Mr Orr on the 13th at latest." On 10th January 1888 the complainer wrote to the respondent,—"I am disappointed again, and must therefore fall back on you to realise to clear off Orr's matter."

The complainer pleaded;—(1) The prayer of the note ought to be granted in respect the charger gave no value for the bill. (2) The said bill having been fraudulently and unwarrantably written as stated on the blank bill stamp, it forms no warrant for diligence against the complainer.

On 31st March 1888 the Lord Ordinary (Lee) passed the note without caution.*

The respondent reclaimed, and argued;—The note ought not to be passed without caution. The Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), had not made any change upon the existing law and practice in that respect. Sec. 100 of that Act prevented such a result. The Lord Ordinary was wrong in his view that value must be instructed. Value was always presumed.[1] If the case was to be put on the ground of bad faith, this was a case specially for caution.

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* "NOTE.—In the circumstances, so far as admitted by the respondent, and appearing from the correspondence produced by him, it appears to me that, as between the suspender and the respondent, the bill in question cannot be held to instruct value to have been received by the suspender from the respondent."

[1] Law v. Humphrey, July 20, 1876, 3 R. 1192.

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Argued for the complainer;—What he desired to prove was that the bill had been granted without authority. The cases in which notes had been passed without caution were no doubt very few,[1] but, under the Bills of Exchange Act, 1882, the proof which was allowed was now very much wider. Hence the Court would not be so ready to impose caution.

Lord President.—I think the Lord Ordinary has very properly passed the note, because there is a little complication as to the transactions between the parties, and the result may be to shew that the bill ought to be debited to the complainer in an accounting with the respondent, but it may be the opposite way.

But the question of caution is another matter. The correspondence makes a different impression on my mind from what it seems to have made upon that of the Lord Ordinary. When the blank stamp was filled up in a bill on which Simpson stood as acceptor, intimation that that had been done was made to Simpson by letter. Whether the letter was received or not by Simpson cannot affect the matter, as there was undoubtedly immediate intimation made by the respondent. There was no answer from Simpson upon the subject until the 9th January, two months later, but the letter shews very distinctly that Simpson considered that he was liable not only as acceptor, but that it was a bill for which he was liable as in a question between Brown and him. He writes in his letter of 9th January,—"I have been trying for the past few days to realise, so as to cover the bills due to Orr, but it is almost impossible to do so. It is most aggravating to be forced to sacrifice when there is ample security in the property to cover. . . ." If he were of opinion that Brown was bound to provide for the bill, and to take it out of the circle, he would have written in a different way. That is not the attitude which he takes up. I cannot therefore say that the complainer is entitled to have this inquiry without finding caution. His name stands upon the bill as acceptor, and the question of caution remaining just as it was before the passing of the recent Bills of Exchange Act, 1882, it is for the Court in the whole circumstances of the case to say whether there ought to be caution or not. I am therefore sorry that I cannot agree with the Lord Ordinary in his view that the note should be passed without caution.

Lord Shand.—I am of the same opinion. There is no doubt that section 100 of the Bills of Exchange Act has introduced a very important and valuable change in the law, for where formerly the mode of proof was restricted to the writ or oath of parties in cases where the parties, although truly acceptors, had granted bills for accommodation purposes, a proof at large is now competent. But the practice of the Court in regard to caution is saved. It is always a matter of discretion for the Court whether caution is to be made a condition of the note being passed or not.

I agree that this is a case in which the note ought not to be passed without caution. It is clear that the bill stamp accepted in blank was not originally given by Simpson to Brown to be used for the purpose to which he put it. But the writings strongly indicate that the suspender subsequently gave this authority. When Brown so used it, he at once intimated that he had done so to Simpson. Simpson says that the letter did not reach him for some time, but when it did reach him, although we have three letters produced from him to

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[1] Mackay's Practice, ii. 192; Ross v. Miller, Dec. 2, 1831, 10 S. 95.

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Brown, he never says that the bill was used without authority. On the contrary, his view was that he must realise his securities to meet the liability. That is quite inconsistent with the position which he takes up in this suspension, and I think that as matter of equity he must find caution as a condition of having the note passed.

LORD ADAM.—*Prima facie* it appears to me that the complainer adopted this bill. I have no hesitation in saying that the note ought not to be passed without caution.

LORD MURE was absent.

THE COURT accordingly recalled the Lord Ordinary's interlocutor, and remitted to his Lordship to pass the note on caution or consignation.

RICHARDSON & JOHNSTON, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

No. 131.

June 9, 1888.
Thomson v. Davidson's Trustees.

JANE THOMSON AND OTHERS, Petitioners.—*Kennedy.*
WILLIAM ANDERSON AND OTHERS (Davidson's Trustees), Respondents.—*W. Campbell.*

Trust—Charitable trust—Administration of trust—Discretion of trustees.—A truster directed his trustees to hold his estates, which were heritable, and apply the free yearly revenue thereof "for preserving the aged and infirm among the descendants of my father from want, or from the necessity of applying for public relief, and for obtaining for the young among the said descendants, both boys and girls, such a good, sound, plain, and useful education as will enable them to earn a livelihood for themselves, . . . with power . . . to maintain the young among the said descendants either in family with their parents or otherwise while at their education, . . . "; declaring that the trustees should not be entitled to spend more than £20 annually for the relief of any one beneficiary, "and that only while, in the judgment of my said trustees, he or she stands in need of it in supplement of his or her own exertions."

The truster directed the surplus revenue to be divided among certain of his relatives and their representatives *per stirpes.*

At a time when the trustees, assumed and acting in the trust, were among the persons interested in the surplus revenue being as large as possible, a descendant of the truster's father, who was a widow with six children under seventeen, applied for assistance from the trust. The revenue of the trust exceeded £500, less than £50 of which was expended on descendants of the truster's father, the remainder having been applied as surplus revenue. The trustees offered the applicant 12s. 6d. per week, with school fees and boots for the four youngest children, and to pay a debt she had incurred for rent, amounting to £6. The Court *held* that this allowance was in the circumstances inadequate, and *directed* the trustees to make an allowance of £10 per annum for each of the six children, reserving to the parties to apply to the Court to alter the allowance in the event of any change of circumstances.

2D DIVISION.
M.

WILLIAM DAVIDSON of Newhall died in December 1860 leaving a trust-disposition and settlement whereby he conveyed to trustees his estates of Newhall, in Orkney, and Bogbain, in Ross-shire. The purposes of the trust-disposition and settlement, after providing certain small legacies and annuities, were, in the fifth place, that the trustees should "hold the said estates and apply the free yearly revenue arising from the same, or such portion thereof as may be necessary, as after mentioned, for the benefit of the lawful descendants of my father, Alexander Davidson." He directed the trustees "to apply the said revenue for preserving the aged and infirm among the descendants of my said father from want, or from

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the necessity of applying for public relief, and for obtaining for the young among my said descendants, both boys and girls, such a good, sound, plain, and useful education as will enable them to earn a livelihood for themselves,—it being my desire that their religious education shall be carefully attended to, and that they shall be brought up in the principles of the Free Church of Scotland,—with power also to my said trustees to maintain the young among the said descendants, either in family with their parents or otherwise, while at their education, and also during such time as they or any of them may be apprenticed by my said trustees to business, which my said trustees are hereby empowered to do; and I hereby declare that my said trustees shall not be entitled to apply any sum beyond £20 sterling per annum for the benefit or relief of any one, either young or old, of said descendants, and that only while, in the judgment of my said trustees, he or she stands in need of it, in supplement of his or her own exertions." In the sixth place, in the event, which happened, of the free yearly revenue being more than sufficient for the foregoing purposes, the trustees were directed to accumulate the yearly surplus, investing the same until an opportunity should arise of purchasing land, which they were directed to do as soon as possible. In the seventh place, they were directed, after the expiry of the legal period during which the revenue could be accumulated, to divide the free yearly surplus into four equal shares or parts to be paid *per stirpes* to the testator's brother and three sisters and their families, declaring that in the event of their families dying out the trustees should divide the yearly revenue, or surplus revenue, among charitable and religious societies in such proportions as they might determine.

In the year 1887 the capital value of the trust-estate stood in the accounts of the trust at £15,380. With the exception of an annuity of £20, the income was available for the fifth and seventh purposes of the settlement.

The trustees were among the persons favoured under the seventh purpose, and had therefore an interest in the surplus revenue available under that purpose being as large as possible.

On 10th March 1888 a petition was presented by Jane Davidson or Thomson (a grand-daughter of the truster's father), widow of James Thomson, and her six children after named, setting forth that the petitioner Mrs Thomson was in weak health, and had six children—Jane, aged sixteen; Sarah, aged fourteen; James, aged eleven; Elizabeth, aged nine; Barbara, aged seven; and Martha, aged three; that she was unable to maintain, still less to educate, them, had been rendered destitute by her husband's death, and had been obliged to obtain relief from the parochial board; that Jane and Sarah had passed the 5th Standard, but were now withdrawn from school as she was unable to keep them there; that an application to the trustees of Mr Davidson for aid under the fifth purpose of his settlement to keep them there had been refused; that they were desirous to obtain a "good, sound, plain, and useful education," to enable them to earn their livelihood by fitting them to become teachers or to fill situations in the post-office or in commercial houses; that Jane was not in employment, but was assisting her mother at home, while Sarah was earning 6s. a-week in a confection-making factory.

The petitioners stated that the trustees, in answer to an application made to them, had, while refusing to make any allowance for Jane and Sarah, offered a sum of 7s. 6d. per week for the whole petitioners, and to pay the school fees of the younger children and allow them shoes; and that after certain correspondence they had increased this offer to 12s. 6d. per week, besides paying a sum of £6, being the petitioner's past due rent; that "the trustees have not exercised a sound and reasonable judgment in fixing the said allowance, but are administering the revenue so as to divert it from the fifth to the sixth and seventh purposes, in which they are personally interested, and have acted contrary to the spirit and directions of the truster in the said fifth purpose both in refusing reasonable and sufficient allowances and in excluding the two eldest children from the benefit of the said purpose. The free revenue, of which . . . more than £500 is surplus free and available under the fifth purpose, is amply sufficient to allow of £15 for each of the two eldest children, £12 for each of the next three younger children, and £5 for the youngest child. These allowances are reasonably necessary for the respective maintenance and education of the said children, and, if granted, the petitioner, their mother, does not ask any allowance to herself." The petitioners prayed the Court to fix the allowances to be made by the trustees to the petitioners at these sums, or to fix such other allowances as the Court might think reasonable, beginning the first term's payment of each allowance as at 1st December 1887, and so forth monthly thereafter until further orders of the Court.

The trustees denied the averment that they had applied as small an amount as possible to the objects of the fifth purpose, and stated that, on the contrary, they had endeavoured, to the best of their ability, to carry out the truster's intentions. They admitted the facts to be as stated by the petitioners, and maintained that the eldest two children, Jane and Sarah, had already had a good education, and did not require assistance, more especially as Sarah was earning 6s. a-week.

They stated that the allowance they had agreed to give—viz., 12s. 6d. per week, with school fees of the children attending school, and boots for them, together with payment of the petitioner's past due rent, was in their judgment reasonable and sufficient; that they were under the trust sole judges of the question whether an individual claiming assistance from the trust really needed it, and if so, what amount should be allowed in supplement of his own earnings; and that nothing had been stated to justify interference with their discretion. They submitted that the application was incompetent and irrelevant, and that if it were competent for the Court to review their decision, the allowance they offered was reasonable and sufficient.

On 19th May 1888, counsel were heard on the petition and answers, when the Court, without pronouncing any order, continued the cause that the respondents might put in a statement of the revenue and the application thereof.

A statement lodged by them shewed that for the year ending 30th June 1887, the total revenue divided was £557, 1s. 6d., of which sum £48, 9s. had been applied to the fifth purpose and £488, 12s. 6d. to the seventh purpose. For the preceding year the total revenue divided was £598, 17s. 7d., of which £43 was expended on the fifth purpose, and £535, 17s. 7d. on the seventh purpose.

Counsel were then heard on the petition and answers with the accounts.

Argued for the petitioners;—The Court could competently interfere with the discretion of the trustees, because, admittedly, they had a personal interest in there being as small a part as possible of the revenue applied to the fifth purpose. Further, even in an ordinary family trust, and where the trustees had no personal interest, the Court would interfere where the trustees were not exercising a sound discretion in the application of the revenue of the trust.[1] This was a perpetual trust, which, also,

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[1] Baird v. Baird's Trustees, Feb. 24, 1872, 10 Macph. 482, 44 Scot. Jur. 299.

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was a reason for the Court interfering with the discretion of the trustees which did not exist in the case of *Baird*. On the merits, the allowance offered was entirely inadequate.

Argued for the respondents;—The question was one for the discretion of the trustees, with which the Court would not interfere, or, at least, would be slow to interfere.[1] Some very exceptional ground must be stated for such interference, and the fact that the trustees had a personal interest was not such a ground unless they were shewn to be acting corruptly. *Baird's* case turned on the circumstance that the truster while directing an expensive establishment to be kept up for his heir had not fixed the allowance for it or provided any means of doing so. On the merits, the offer of the trustees was sufficient. The two eldest children had been already educated without the aid of the trust, and no allowance should be made for them.

LORD JUSTICE-CLERK.—These questions in regard to the administration of trust-funds are of some delicacy, because they involve to a certain extent a supervision of the operations of the trustees. I am not of opinion that it is desirable in the ordinary case to interfere with the discretion of trustees acting reasonably in the discharge of their discretion. That is, I say, a delicate matter, and, generally speaking, the trustees may be said to be the better judges of such questions.

But in this case I am satisfied that the trustees are not acting reasonably in the discharge of the powers committed to them. I do not say that they are actuated by their personal feelings, though they have an interest in the estate, but I do say that they have misjudged the case hardly and harshly, and I am prepared to give the remedy which is suggested in the application. There are six children still at a stage of life when education is required, and I think that an allowance of £60 per annum until further orders of the Court will be a reasonable sum to award. I think that less would be insufficient.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG and LORD CRAIGHILL were absent.

THIS interlocutor was pronounced:—"The Lords having considered the petition along with answers for the respondents, . . . and heard counsel for the parties, fix the rate of allowance to be made by the said trustees at £10 sterling per annum for each of the six children of the petitioner mentioned in the petition, to be paid to their said mother, and that monthly from and after the first day of December 1887, and decern: Reserving to the parties, or either of them, to apply to the Court at any future time to alter said allowances: Find the petitioners entitled to expenses, and remit the account thereof to the Auditor to tax and report."

J. D. MACAULAY, S.S.C.—SKENE, EDWARDS, & BILTON, W.S.—Agents.

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[1] Douglas v. Douglas' Trustees, July 6, 1872, 10 Macph. 943, 44 Scot. Jur. 522.

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JOHN BURNETT (Judicial Factor on the Trust created for behoof of the Licensed Episcopal Church in Brechin), Petitioner.—*Kennedy.*
REV. JAMES CRABB AND OTHERS (the Vestry of St Andrew's Episcopal Church, Brechin), Respondents.—*Fleming.*
REV. ROBERT WORKMAN ORR AND OTHERS (the Minister and Managers of the High Street United Presbyterian Church in Brechin), Respondents.—*Strachan.*

Trust—Administration—Nobile Officium—Cy près—Church—Episcopal Church.—In 1743 an Episcopalian church was erected in Brechin on ground the disposition to which was taken in name of trustees for behoof of the congregation, and bore that the price had "been truly paid out of the money belonging to the Episcopal Congregation of Brechin, and that the lands were purchased for making a convenient meeting-house or house of worship for the said congregation."

In 1746 and 1748 the Penal Statutes against the Scottish Episcopal Church were passed, which prohibited the exercise of that form of worship in Scotland, except in licensed churches and by clergymen of English or Irish orders. Few Episcopalian congregations complied with these conditions, but among the number so complying was the congregation at Brechin, which, in consequence (like the others in the same condition), became known as the "Licensed Episcopal Congregation" in Brechin.

In 1792 the penal laws against the Scottish Episcopal Church were relaxed by the Act of Relief, and the public ministrations and church government of that communion were resumed. About 1800 a congregation of the Scottish Episcopal Church was formed in Brechin, originally of Episcopalians who during the existence of the Penal Statutes had held aloof from the "Licensed Episcopal Congregation," but in course of time drawing to it many members of the latter congregation, which, in consequence, in 1820 ceased to have a permanent clergyman, and in 1830 ceased to have religious services at all. By that time the congregation had incurred a debt of £145.

In 1830 David Burnett and others, the trustees of the Licensed Episcopal congregation (the original trust constituted by the disposition of 1743 having been continued by successive assumptions), borrowed a sum of £145 from the congregation in Brechin of the Relief Synod in Scotland—a Presbyterian communion—and in consideration thereof wadsetted and disponed the chapel to the Relief congregation for the use and behoof of the said congregation, but redeemable by the granters, their successors in office, assignees, or other successors, on payment of £145 at Whitsunday 1887. The wadset further provided "that the said chapel shall be used solely as a chapel or place of worship for the said Relief congregation, and for no other purpose whatever, and if the said Relief congregation should at any time cease to be connected with the said Relief Synod of Scotland, or should cease to maintain religious worship regularly in said chapel by a preacher in communion with the said Relief Synod, then the said wadset right shall *ipso facto* cease and determine, and the said subjects revert to the said disponers and their foresaids, they being bound to pay the said principal sum of £145." The money thus obtained was employed in paying off the debts of the "Licensed Episcopal Congregation."

Thereafter the Licensed Episcopal congregation ceased to exist; some of its members continued to worship in the chapel and became members or adherents of the Relief congregation; others joined the Scottish Episcopal congregation.

In 1847 the Relief Synod became incorporated in the United Presbyterian Church, but the Relief congregation of Brechin, as a congregation of the United Presbyterian Church, continued to worship in the chapel until 1876, when they erected a new church.

In 1878 a judicial factor was appointed on the trust-estate of the Licensed Episcopal congregation on the petition of David Burnett, the sole surviving manager of the congregation and reverser under the wadset.

In 1879 the judicial factor obtained a reconveyance to the chapel from the

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United Presbyterian congregation, he having advanced the redemption money. He thereafter, under the authority of the Court, sold the building, and having repaid himself out of the price, in December 1887 presented a petition to the Court for an order settling the destination or administration of the balance of the price. He stated that David Burnett, on whose petition he had been appointed, was dead, that there were no other members of the Licensed Episcopal congregation, as it existed at the date of the wadset, alive, and that it was practically certain that that congregation would not be revived, nor a new Licensed Episcopal congregation formed in Brechin.

The Scottish Episcopal congregation in Brechin and the United Presbyterian congregation in Brechin each claimed the whole fund, the former on the ground that they were the only Episcopalians in Brechin, and truly represented the congregation which had erected the church; the latter on the ground that a majority of the Licensed Episcopal congregation had (as these respondents averred) joined the Relief congregation in 1830, when the wadset was granted, and had thus practically amalgamated the two congregations.

The Court, without allowing the United Presbyterian congregation a proof of their averments, *held* that the Scottish Episcopalian congregation were entitled to the funds in the hands of the factor, being of opinion that as the chapel was in 1743 built by and for the use of the Episcopalians in Brechin, the money arising from its sale in consequence of the failure of the trust ought in equity to be given to the only persons who represented the Episcopalians of Brechin.

1st Division.
B.

This was a petition by John Burnett, baker in Coupar-Angus, judicial factor on the trust created for behoof of the Licensed Episcopal congregation in Brechin, praying the Court for an order settling the destination or administration of the funds in his hands belonging to the trust, being the surplus of the price arising from the sale of the chapel, in the circumstances to be mentioned.

Answers were lodged by the Vestry of St Andrew's Episcopal Church, Brechin, and by the Minister and Managers of the High Street United Presbyterian Church, Brechin, each of whom claimed the entire fund.

The circumstances out of which the competition arose, as appearing from the statements in the petition and the admissions of the parties, were as follows:—

For some time after the Revolution of 1688, the Episcopalian incumbent of Brechin continued to officiate in the parish church. But early in the eighteenth century an Episcopalian congregation was formed, by whom the chapel in question was erected about 1743. The earliest deed relating to the chapel was a disposition dated 3d October 1749, and recorded 21st April 1755, by which Patrick Dickson, on the narrative that Nicolas Cowie and another had by disposition, dated 3d May 1739, sold and disponed to him, his heirs and assignees, heritably and irredeemably, All and haill that fore tenement of land called of old the Chaplainrie of St Ninian's Altar, situate within the Cathedral Church of Brechine, lying on the east side of the High Street of the said city, opposite to the Bishop's Close-head, acknowledged and declared that the price had been "truly paid out of the money belonging to the Episcopal congregation of Brechin, and that the lands were purchased for making a convenient meeting-house or house of worship for the said congregation"; and that the said disposition had been taken in his name as trustee for and to the use and behoof of the said congregation, and at the desire of the managers of its affairs, and that he had resold certain parts and portions of the said subjects in 1740 and 1742, and had applied the prices of the said portions towards payment of the charges of building and finishing the house of worship for the said congregation; and that he, Colin Alison, and Alexander Jack, and others after named, had advanced respectively certain sums therein specified; therefore the said Patrick Dickson disponed in favour of himself and the said Colin Alison, Alexander Jack, and others, the creditors aforesaid, and the longest liver of them, their heirs and assignees, not only as trustees for and to the use of the said congregation, but also for security to them for their said advances, the subjects above described (except the parts sold in 1740 and 1742): Provided that the said disponees should be managers of the affairs of the said congregation until reduced to less than five, in which case it should be lawful for the heads of families of the said congregation to appoint as many of their number as would make seven in all; that interest should run on the said advances from the date of a minister being called and first officiating as minister of the said congregation until payment; and that as soon as all the said creditors or their heirs or executors should have received payment of their said advances and interest, the disponees therein should be obliged, when desired, to denude and to convey the said subjects to such persons as might be appointed by a meeting of the heads of families, and to the longest liver of such persons, their heirs and assignees, as trustees for and to the use of the said congregation, with and under such provisions, conditions, and declarations as should be agreed on by the said heads of families as aforesaid.

The chapel was erected in pursuance of the Toleration Act, 10 Anne, cap. 7, by which persons of the Episcopal persuasion in Scotland were permitted to assemble for divine worship, provided, *inter alia*, that none should officiate or exercise the functions of a pastor unless he possessed and had registered a letter of orders from some Protestant bishop. But shortly after the erection of the chapel the Penal Acts of 1746 and 1748 (19 Geo. II. cap. 38, and 22 Geo. II. cap. 34), were passed, which required such pastors to qualify by taking the oaths to his Majesty, on pain of their meeting-house being shut up, inflicted certain penalties of fine, imprisonment, and loss of civil practice on all persons resorting to an unregistered meeting-house, and enacted that the letter of orders above required must be by some bishop of the Church of England or of Ireland. In consequence of these enactments the public ministration and rule of the Scottish Episcopal clergy almost entirely ceased, their services were conducted privately, and their former congregations dispersed. In some towns the local congregation, or the majority of its members, procured the services of an English or Irish Episcopal clergyman qualified under the Act, and continued to meet for divine worship publicly in their chapels as before the Acts. The same religious articles and doctrines were taught, and the same forms of worship and ritual were observed as in the Scottish Episcopal churches prior to 1746, but the service included prayer for the reigning sovereign. These were usually called "Licensed Episcopal" but sometimes "Qualified English" chapels. The chapel at Brechin was one of this number, and its congregation was thereafter known as the "Licensed Episcopal Congregation in Brechin."

By disposition dated 9th August 1790, and recorded 15th June 1804, the above-mentioned Alexander Jack, on the narrative of the disposition by Patrick Dickson of 1749, and that he was then the only surviving and acting trustee of the "Licensed Episcopal Congregation in Brechin" under that deed, that all the said advances had been repaid, and that the said congregation, on 18th March 1790, had chosen John Smith of the navy, George Stewart, and twelve other persons as managers or trustees for the said congregation, five to be a quorum, and required him to denude in their favour, conveyed the said subjects to the said managers and their successors in office, named by the said congregation for ever, to be held in trust under the control and direction for and upon account of the said

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congregation, whose orders and directions the trustees and their successors should be bound to obey.

In 1792 the penal laws against the Episcopalians in Scotland were relaxed by the Act of Relief (32 Geo. III. cap. 63), which permitted their ministers to qualify by taking the oaths of allegiance and subscribing a certain declaration. In consequence congregations were formed, reconstituted, and public ministrations and church government resumed, but in many cases, as in the case of the congregation in question, the "licensed" or "qualified" English congregations continued to maintain their independent existence. Between 1792 and 1800 a Scottish Episcopal congregation was formed in Brechin, consisting originally of such members of the Episcopal persuasion as had held aloof from pastors and chapels licensed under the Penal Acts. This congregation built a chapel in St Andrew Street, which became the Church of St Andrew in Brechin, in the Scottish Episcopal Church. Its vestry was one of the two respondents to this petition.

The licensed or English congregation thereafter suffered a gradual diminution of the number of its members, many of whom became members of the congregation of St Andrew's Church. But they continued to be considerable in number, and raised sufficient funds for minister's stipend and other congregational purposes until the death of their pastor in 1820. After that they were unable to raise a sufficient stipend to secure a permanent English pastor, though religious services were maintained until about June 1830. By that date they had incurred debts to the amount of about £145. Negotiations consequently took place between them and the Relief congregation in Brechin, which resulted in the following deeds.

By disposition dated 12th November 1829, John Smith, George Stewart, and three others, being the only surviving trustees and disponees under the disposition of 1790, on the narrative of that deed, and that other managers had been named by the Licensed Episcopal congregation, and that they, the said John Smith and others, had been called on to divest themselves of the said subjects, disponed the said subjects to John Burnett, David Burnett, and ten other persons, the then managers of the said congregation, and to the survivor of them or their assignees and to their successors in the management of the said congregation who might be assumed as trustees, and to the assignees of any persons so to be assumed, five to be a quorum, but in trust for the use and behoof of the said congregation, and under the conditions specified in the said disposition of 1790. John Burnett, David Burnett, and the other persons named were infeft in the subjects as trustees foresaid, conform to instrument of sasine dated 16th and recorded in the Register of Sasines for the city of Brechin 17th November 1829.

By contract of wadset and disposition in security, dated 17th and registered in the Burgh Court Books of Brechin 19th of June 1830, the said trustees, David Burnett and others, specially authorised by said Episcopal congregation, in consideration of the sum of £145 sterling instantly advanced to them as managers foresaid out of the money belonging to the congregation in Brechin of the Relief Synod of Scotland (a Presbyterian communion) by James Ramsay, treasurer of the latter congregation, wadsetted and disponed to William Ferrier, the said James Ramsay, and others, the then managers of the said Relief congregation, and to their successors in office, the said chapel, in trust for the use and behoof of the said Relief congregation, but redeemable by the said granters or their successors in office, assignees or other successors, in right of the premises from the said wadsetters, by payment of £145 at Whitsunday 1887; but

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providing that "the said chapel shall be used solely as a chapel or place of worship for the said Relief congregation, and for no other purpose whatever, and that if the said Relief congregation shall at any time cease to be connected with the said Relief Synod of Scotland, or shall cease to maintain religious worship regularly in said chapel by a preacher in connection with the said Relief Synod, then the said wadset right shall *ipso facto* cease and determine, and the said subjects revert to the disponers and their foresaids, they being bound to pay the said principal sum of £145."

The wadset price was applied by the managers, John Burnett, David Burnett, and others, in payment of the debts of the Licensed Episcopal congregation. The Relief congregation entered into possession of the chapel. Thereafter the Licensed Episcopal congregation ceased to meet for religious services or other purposes as a separate body. Some of its members (the large majority as at June 1830, including the managers, according to the averment of the petitioner, which was not admitted by the respondents the vestry of St Andrew's Episcopal Church) continued to attend the chapel, and joined in the worship and services of the Relief congregation, and became ordinary members or adherents of that congregation.

The Relief congregation possessed the subjects as a chapel until the Relief Synod in May 1847 became incorporated in the United Presbyterian Church. After the incorporation, the congregation was known as the High Street United Presbyterian congregation, and continued to possess the subjects as before, until 1876, when they erected a new church, and ceased to maintain religious worship in the chapel. They were the other respondents to the petition.

The petitioner was appointed judicial factor on 9th January 1878, on the application of David Burnett, the sole surviving manager of the Licensed Episcopal congregation and reverser under the wadset.

The petition, which was dated December 1887, stated that the petitioner on his appointment had applied to the managers of the United Presbyterian congregation for a reconveyance of the chapel, on the ground that the wadset right had terminated through failure to comply with the condition; that on his advancing the redemption price they had reconveyed the subjects to him as judicial factor; that he had made up a title, and under the authority of the Court sold the subjects; and that after reimbursing himself of his advance and expenses there remained a sum of £176, 14s. 2d., which was the fund in question.

He further stated that David Burnett, on whose petition he had been appointed, was dead, that he believed there was no surviving member of the Licensed Episcopal congregation as it existed in 1830, and that it was practically certain that that congregation would not be revived, or a new Licensed Episcopal congregation formed. "The Licensed Episcopal congregation having ceased to exist, the means by which the objects of the trust were formerly carried out have failed, and there is in the meantime no trust beneficiary entitled to the said sum or the income thereof. The object of the trust appears to be the promotion and maintenance of religious services according to the Episcopalian form of worship, for the benefit of Episcopalians in Brechin and its vicinity. It is believed to be impracticable to trace the individual sources of the funds invested in the purchase of the said subjects, referred to in the disposition of 1749 by Patrick Dickson and others. No continuous or complete record of the membership of the Licensed Episcopal congregation exists, so far as known to your petitioner. In consequence of the dissolution of the congregation, it has become impossible to carry out the trust in the manner and by the means originally contemplated. In these circum-

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stances the petitioner is desirous to obtain the authority of the Court to apply the said funds to some useful and beneficial purpose, or to be directed how the said funds should be administered, or to have the said funds divided, in order that he may be relieved of his office.

"The Episcopal Congregation of St Andrew's, Brechin, appear to answer most nearly to the congregation for whose benefit the said trust was originally intended," and the petitioner suggested that the funds should be paid over to them, but added,—"It has also occurred to the petitioner that the High Street United Presbyterian congregation, as representing the Relief congregation, which after 1830 comprised the majority of the members who had till then constituted the said Licensed Episcopal congregation, may be held to have an equitable right to share in the benefits of the said funds."

The petitioner therefore prayed the Court "to settle a scheme for the application of the said funds, and to grant warrant to the petitioner to pay over the said funds, under deduction of expenses, to such person or persons as your Lordships may appoint, to hold and administer the same under such scheme; or to make such provisions for the management and application of the said funds, or to give such directions to the petitioner with regard to the future administration of the funds, as your Lordships may judge and determine to be suitable; or to appoint the said funds to be paid over to or among such persons as may be found entitled thereto; and in the event of your Lordships granting warrant to pay over the said balance of the funds to persons appointed to hold the same as aforesaid, then to recall the appointment of the petitioner as judicial factor on the said trust," and to discharge him.

The United Presbyterian congregation maintained that the fund should be paid over to them on the following grounds, as stated in their answers: —"It is stated by the petitioner that the Episcopal Congregation of St Andrew's in Brechin appears to answer most nearly to the congregation for whose benefit the trust was originally intended, but the respondents venture to doubt the soundness of this view. The congregation for whose benefit the trust was originally constituted was the Licensed Episcopal congregation in Brechin, and in 1830 that congregation became united with the then Relief congregation in Brechin, and thereafter ceased to meet for religious services, or other purposes, as a separate body. The chapel belonging to the congregation was conveyed in wadset to the Relief congregation, and a large majority of the members, including the managers, became members of the latter congregation, which became incorporated in the United Presbyterian Church in 1847, and is now represented by the respondents. The descendants of those members of the Licensed Episcopal congregation who joined the Relief Church, as aforesaid, in 1830 still belong, to a large extent, to the United Presbyterian congregation. So far, therefore, from the St Andrew's Episcopal congregation appearing most nearly to represent the Licensed Episcopal congregation, that congregation is not only represented by, but forms a constituent part of, the congregation now represented by the respondents.

"It is also stated in the petition that the Episcopal Congregation of St Andrew's was formed between 1792 and 1800, and that the Licensed Episcopal congregation continued to maintain an independent existence down to 1830. Not only was there no attempt or proposal made during this period to unite the two churches, but, on the Licensed Episcopal congregation becoming unable to raise a stipend for their pastor, they deliberately proposed to amalgamate with the Relief Church, rather than unite with the St Andrew's congregation. The latter is a Scottish Episcopal congregation, while the Licensed congregation was connected with the English Episcopal Church. There never was apparently any sympathy between the two congregations, and the opinion now expressed by the petitioner with reference to their identity was certainly not shared in by the Licensed Episcopal congregation when it united with the Relief congregation, and cannot certainly be reconciled with that proceeding.

"Another ground on which it humbly appears to the respondents that they have an equitable claim to the fund in question is, that it is the balance of the price of the church which was wadsetted to their predecessors in 1830. It continued in their possession until 1879, when it was reconveyed to the petitioner, by whom it was sold under the authority of the Court. During the time the subjects were held by the respondents or their predecessors a considerable amount was expended in extending or enlarging and improving them, and their value was thereby considerably enhanced, and the price ultimately realised by the petitioner proportionately increased. The balance now held by the petitioner is thus, to a large extent at least, the residue of the expenditure made by the respondents and their predecessors." *

The St Andrew's Scottish Episcopal Congregation put their case in their answers as follows:—"In 1739, when the first disposition was taken, the only Episcopal congregation in Brechin was the Scottish Episcopal congregation, and consequently the acknowledgment of trust by Patrick Dickson bears that the price had been paid out of moneys belonging to the Episcopal congregation of Brechin, and that the disposition had been taken in his name as trustee for that congregation. By that Scottish Episcopal congregation a chapel on the land thus bought was built and completed about 1743, and in that chapel they worshipped until the Nonjuring Acts of 1746 and 1748 were passed. Thereafter, and until the passing of the Relief Act in 1792, the congregation could not worship publicly; but certain of its members who submitted to Government, and procured the services of an English or Irish pastor, continued to use the chapel as a licensed or English Episcopal congregation. After 1792, however, the Scottish Episcopal congregation was free to meet as a congregation, and those members who had held themselves aloof from licensed chapels or pastors, along with many of the other members who in the meantime had been worshipping with the licensed congregation, built a new chapel, which was known as the church of St Andrew, and again worshipped publicly as a congregation of the Scottish Episcopal Church.

"The Licensed Episcopal congregation suffered from the gradual withdrawal of its members to the Scottish Episcopal congregation, until they finally got into debt, as stated in the petition, when the Licensed Episcopal congregation thus ceased to exist, and those of its members who adhered to the Episcopal faith joined the Scottish Episcopal Church. It is believed that some of the members may have joined the Relief Church, but it is not admitted that these formed a majority even of the few members who worshipped in the Licensed Episcopal chapel to the end.

"The respondents would therefore humbly submit that the original congregation who bought the land in 1739, and built the chapel thereon in 1743, still exist in the congregation of St Andrew's Church, and that to them should be paid over the fund held by the petitioner."

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* At the hearing these respondents stated that the sums thus expended by the Relief congregation amounted to £209 in 1830 and 1832, and that they themselves had also spent £74 for the same purpose in 1847.

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The arguments sufficiently appear from the statements of the respondents.[1]

At advising on 9th March 1888,—

Lord President.—This case was heard by Lord Mure, Lord Adam, and myself, and we have thought it right to put it out for judgment, notwithstanding Lord Mure's continued indisposition, but his Lordship has read the opinion I am about to deliver, and expresses his entire concurrence in it.

The fund in the hands of the judicial factor consists of the net proceeds of the sale of a building in Brechin, erected about the year 1743 as a chapel for the use of an Episcopal congregation, which apparently had been formed some years previously.

By disposition, dated 3d May 1739, Nicolas Cowie and another conveyed the ground afterwards occupied in part by the chapel to Patrick Dickson. On 3d October 1749 Patrick Dickson executed a deed in which he declared that the price which he had paid to Cowie and another for the subject in 1739 was truly paid out of money "belonging to the Episcopal congregation of Brechin for making a convenient meeting-house or house of worship for the said congregation"; that he was trustee for the congregation, and that at the request of the managers he had sold parts of the subjects in 1740 and 1742, and had applied the prices of said subjects, along with other moneys advanced by himself and others, in building the meeting-house.

The chapel was so erected in pursuance of the Toleration Act of the 10th of Queen Anne and subject to its conditions, that the minister to officiate in the chapel should be ordained by some Protestant bishop, should not be the established minister of any church or parish, should take and subscribe the oaths of allegiance and abjuration, and should, during divine service, pray for the Queen and the Royal Family.

Such was the position of the Brechin Episcopal congregation and its minister at the time of the erection of the chapel. But a very serious change soon occurred. For in the Rebellion of 1745 the Scottish Episcopal clergy had so generally manifested their sympathy with the cause of the exiled royal family, both by words and deeds, that in the years 1746 and 1748 two Acts were passed well known as the Penal Acts against Episcopalians in Scotland. These Acts not only required every chapel to be registered by a certain date, and that the ministers should qualify themselves by taking the oaths of allegiance and abjuration, and pray for the King or Queen by name, but also prohibited any minister from officiating who had not been ordained by some bishop of the church of England or of Ireland. In short, as Professor Grub states in his careful and accurate historical work,—"The obvious intention of the Legislature was to suppress the Scottish Episcopal Church and the native clergy altogether, and to grant toleration to those clergymen only who derived their orders from the English and Irish churches." The same author adds that "so far as appears no more than five Scottish clergymen attempted to avail themselves of the provisions of the statute by qualifying in terms of law."

It may therefore very safely be inferred that from the date of these Penal Statutes till their repeal in 1792 the minister of the Episcopal chapel in Brechin must have held his letters of orders, not from any bishop of the Scottish Episcopal communion, but from an English or Irish bishop. It was their position under the Penal Statutes that gave the Brechin congregation and all other lawful Episcopal congregations in Scotland during the period now referred to the distinctive description of "licensed."

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[1] Magistrates of Edinburgh v. Clephane, Feb. 15, 1864, 2 Macph. (H. L.) 7, 36 Scot. Jur. 325, 4 Macq. 603; Attorney-General v. Bunce, April 22, 1868, L. R., 6 Eq. 563.

The trust created by the disposition of 3d May 1739 and 3d October 1749 was kept up by the assumption of new trustees in 1790 and 1829, and was in 1830 vested in David Burnett and ten other persons, managers of the congregation. These trustees borrowed a sum of £145 from the managers of the Relief congregation of Brechin, and granted a wadset therefor on 17th June 1830, in which, however, it is provided "that the said chapel shall be used solely as a chapel or place of worship for the said Relief congregation, and for no other purpose whatever, and if the said Relief congregation shall at any time cease to be connected with the said Relief Synod of Scotland, or shall cease to maintain religious worship regularly in said chapel by a preacher in communion with the said Relief Synod, then the said wadset right shall *ipso facto* cease and determine, and the said subjects revert to the said disponers and their foresaids, they being bound to pay the said principal sum of £145." The money thus obtained was employed in paying off the debts of the Licensed Episcopal congregation.

The immediate effect of this wadset was that the Licensed Episcopal congregation as a united body ceased to exist. Some of them joined the Relief congregation, who in virtue of the wadset were in possession of the chapel, and others joined another congregation of Episcopalians in Brechin, which had been formed soon after the passing of the Act of 1792, which is, as I understand, at the present day in connection with the Scottish Episcopal Church, and is the only existing Episcopal congregation in Brechin.

The chapel remained in the possession and use of the Relief congregation from 1830 till 1847, when the Relief Synod formed a union with the Associate Synod, and the united body became what is now known as the United Presbyterian Church. This event put an end to all right on the part of the wadsetters of 1830 to continue their occupation of the chapel, in terms of the provision above cited from the contract of wadset. Nevertheless, the congregation formerly Relief, but now United Presbyterian, continued to occupy the chapel as a place of worship till the year 1876, when they built a new chapel for themselves, and ceased to occupy this chapel.

In 1875 the now deceased David Burnett, who was then the sole survivor of trustees of the chapel, and also sole survivor of the reversers under the wadset of 1830, applied to the Court for the appointment of a judicial factor on the trust-estate, when the present petitioner was appointed. The factor now informs the Court that in 1879 he advanced the redemption money, £145, out of his own funds, redeemed the subjects, and, as reverser under the wadset, obtained a conveyance of the chapel in his favour. Thereafter, under authority of the Court, he sold the chapel for £500, and the surplus, after deducting the redemption money and the expenses of the factory, amounting to £176, 14s. 2d., falls to be disposed of under the present application.

Two parties claim the fund, not as matter of legal right, but because they each consider that they have the best claim in equity to the remaining balance of the property of this lapsed trust.

The first party are the present minister and congregation of St Andrew's

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Episcopal Church, being, as I understand, the only Episcopal congregation in that burgh. The second party are the High Street United Presbyterian Congregation of Brechin, from whom, as in right of the wadset of 1830, the chapel was redeemed by the factor. After full consideration, I am of opinion that the former is entitled to prevail.

It has been contended that the chapel, having been licensed under the Statutes of 1746 and 1748, had no connection with the Scottish Episcopal communion, to which the St Andrew's congregation belongs, because the minister of the licensed chapel must have been ordained by an English or Irish bishop. But the chapel was erected and in occupation as a place of worship before the passing of these statutes, and there is no reason to suppose that while it existed under the authority of the Toleration Act of Queen Anne its minister was not a Scottish Episcopalian under the superintendence of a bishop of that denomination. While the Penal Statutes remained in force, the congregation were of course reduced to the necessity of either employing a minister in English or Irish orders, or of abandoning the right and privilege of public worship altogether. But it has not been alleged that after the Penal Acts were repealed in 1792, and down to the year 1830, the minister of the chapel was not a Scottish Episcopalian, or in connection with the Scottish Episcopal Church. It is only between 1746 and 1792 that the building is, so far as we see, spoken of as a "licensed chapel or house of worship."

When the congregation was broken up under the provisions of the contract of wadset of 1830, we are told that some of the members continued to worship in the chapel with the Relief congregation, who thereafter occupied it, while others joined the Episcopal congregation of St Andrew's. We have no means of judging of the proportions of those who adopted the one course and the other. Nor is this of much consequence, as the total number must have been trifling, and there is great probability in the suggestion that the falling-off of the congregation between 1792 and 1830 must have been owing to the building of another and more commodious Episcopal Chapel in Brechin in connection with the Scottish Episcopal Church.

The United Presbyterian congregation base their claim on the allegation that a large number of the Episcopal congregation in 1830 joined the Relief Church, and their descendants are now members of the United Presbyterian congregation. This averment is obviously incapable of proof, and would not be very material even if proved. For the wadset, which is the only title of possession which the United Presbyterian congregation ever had to the chapel, made their possession for the twenty-nine years between 1847 and 1876 illegal, as constituting a breach of contract, the provision of that contract already quoted plainly importing that while the wadset endured the chapel might be used for a congregation of the Relief Synod, but for no other class of religionists, and on the redemption of the wadset, or its forfeiture for failure to comply with this condition, the chapel should return to the trustees for the Episcopal congregation, a body always thereafter kept up, and in the end represented in 1875 by the gentleman on whose application the present factor was appointed.

The United Presbyterian congregation further allege that while in possession of the chapel the Relief congregation spent £209 on maintenance of the chapel in 1830 and 1832, and the United Presbyterian congregation £74 for the same purpose in 1847. It is very doubtful, to say the least, whether such a claim could be maintained by a wadsetter in possession for a long period of years as a condition of giving effect to the reverser's power of redemption. But it is at all events too late to maintain such a claim after possession has been given up and the redemption money paid and received, and the whole right of the wadsetter extinguished.

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The short ground of judgment seems to be that the chapel was built in the year 1743 by and for the use of the Episcopalians in Brechin, and that the moneys arising from the sale of the chapel in consequence of its disuse and the failure of the trust on which it was held ought to be given to the only parties who now represent the Episcopalians of Brechin.

LORD ADAM.—Having, as well as Lord Mure, had an opportunity of considering your Lordship's judgment, I entirely concur.

LORD KINNEAR, not having been present at the hearing, gave no opinion.

THE COURT remitted the judicial factor's accounts to Mr Cotton, C.A., for audit and report, and thereafter, on 12th June, on considering Mr Cotton's report, pronounced this interlocutor:—" . . . Find the petitioner entitled to the expenses of the present proceedings and incident thereto out of the trust-funds, as the same shall be taxed by the Auditor, to whom remit for that purpose, and authorise the petitioner to take credit therefor: Farther, after taxation and adjustment of the law-agents' accounts above mentioned, and deduction of the last-mentioned expenses, authorise the petitioner to make payment of the free balance of the trust-funds that shall then remain in his hands to the respondents the Rev. James Crabb and others, the Vestry of St Andrew's Episcopal Church, Brechin: *Quoad ultra* continue the petition."

GORDON, PRINGLE, DALLAS, & Co., W.S.—WM. OFFICER, S.S.C.—Agents.

THE REV. JOHN MAXIMILIAN DOLPHIN AND OTHERS (Mr and Mrs Dolphin's Marriage-Contract Trustees), First Parties.—
Cheyne—G. R. Gillespie.
THE RIGHT HONOURABLE WILLIAM EDWARD BAXTER, Second Party.—
H. Johnston—Macfarlane.

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Dolphin's Trustees v. Baxter.

Marriage-contract—Construction—Implication.—In an antenuptial marriage-contract the father of the wife bound himself to pay an annuity to the trustees under the contract, to be paid by them to the spouses jointly during the subsistence of the marriage, and to the wife during her life in the event of her surviving her husband. In case of her predecease leaving children of the marriage, the trustees were directed to apply the annuity in such a manner as they should think fit for behoof of the husband and children of the marriage during the survivance of the children, the annuity being restricted to half its amount in the event of the husband surviving the children. There was no obligation to pay any annuity to the children in the event (which happened) of the wife surviving her husband and dying leaving children of the marriage. The deed farther bore,—"And in regard to the foresaid interest, annuity, capital sums of the provisions . . . in favour of . . . and interest, dividends, and annual produce thereof, it is hereby provided that if there shall be more than one child of the said intended marriage it shall be lawful" to the husband, "at any time of his life . . . to divide and apportion . . . among the children or their issue, as after mentioned, the provisions respectively above written in their favour; . . . and in case of his death without making such division or settlement of the said respective provisions the said" wife, "if she

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shall survive him, shall, previous to the respective terms before mentioned, have the same power while she continues a widow, and failing any such division or settlement, the said respective provisions shall belong to and be divided among the children and the survivors" equally. The only "annuity" mentioned in the deed was the annuity provided by the father of the wife.

In a special case presented, on the death of the widow, in which her father maintained that his obligation to pay the annuity had ceased on that event, and the marriage-contract trustees, that it was to be inferred, from the clause above quoted, that the obligation still continued, *held* that to extend such an obligation by implication from other clauses in the deed, the inference must be very clear, and that as the terms of the clause founded on by the trustees were not sufficient to warrant the inference they contended for, the obligation to pay the annuity had ceased.

2D DIVISION. I.

CAPTAIN HERBERT DOLPHIN, of the Royal Navy, and Miss Jessie Scott Baxter, daughter of Mr W. E. Baxter, of Kincaldrum, were married on 11th June 1879. They had previously entered into an antenuptial marriage-contract, to which the Rev. John Dolphin, Captain Dolphin's father, and Mr Baxter were also parties. By this contract Captain Dolphin and his father on their part made certain provisions in favour of the spouses and the children of the marriage. Miss Baxter then conveyed her whole estates to trustees for certain purposes set forth, and then followed this obligation by Mr Baxter:—"And farther, the said William Edward Baxter hereby binds and obliges himself, his heirs and successors whomsoever, without the necessity of discussing them in their order, to pay to the said" trustees "an annuity of £300 sterling, and that at Martinmas and Whitsunday yearly, by equal portions, beginning the first term's payment thereof at the first of these terms which shall happen after the solemnisation of the said intended marriage, for the half year succeeding, and the next term's payment thereof at the first of these terms thereafter for the half year succeeding, and so forth half-yearly, termly and continually thereafter: With a fifth part more of each of the said termly payments of liquidate penalty in case of failure, and the interest of each of the said termly payments at the rate of £5 per centum per annum, from and after the term of payment thereof during not payment: And farther, to make payment to the said trustees at the rate of £300 per annum for the time that shall have to run from the date of the solemnisation of the said intended marriage to the first term of Whitsunday or Martinmas that shall happen thereafter, which annuity of £300 the said trustees shall periodically, as it is received from the said William Edward Baxter, pay to the said Herbert Dolphin and Jessie Scott Baxter jointly during the subsistence of the said intended marriage, and to the said Jessie Scott Baxter during her life, in case of her surviving her said intended husband, and in case of her predecease, leaving a child or children of the said intended marriage, or issue of such of said child or children who may die, the said trustees shall pay or apply the said annuity during the survivance of such child or children, or issue foresaid, for behoof of the said Herbert Dolphin and the said child or children or issue foresaid: With power to the said trustees either to pay the same to the said Herbert Dolphin, or otherwise to pay and apply the same for his and their behoof in such way and manner as the said trustees in their absolute discretion shall think proper: But on the failure of a child or children of the said intended marriage, or issue of such child or children, whether before or after the death of the said Jessie Scott Baxter, the said William Edward Baxter shall only be bound to pay to the said trustees for behoof of the said Herbert Dolphin, if then alive, a restricted annuity of £150."

The marriage was dissolved by the death of Captain Dolphin on 17th

October 1883. Mrs Dolphin died on 12th December 1886, survived by one child of the marriage, Violet Mary Dolphin.

After the death of Mrs Dolphin, the question arose whether Mr Baxter was bound to continue the payment of the annuity in the event which had happened, of Mrs Dolphin's survivance of her husband and her death leaving issue of the marriage. Mr Baxter stated that he was willing to make what he considered a suitable provision for his granddaughter, but he contended that his obligation to pay the annuity under the marriage-contract had ceased on his daughter's death.

A special case was accordingly presented, to which the trustees were the first parties and Mr Baxter was the second party.

The question put was,—"Is the party of the second part bound to continue payment of the said annuity during the survivance of the said Violet Mary Dolphin?"

The first parties admitted that the terms of the clause above quoted did not expressly impose an obligation on the second party to continue payment of the annuity in the event which had happened, but they contended that from other parts of the marriage-contract such an extension of the obligation on the second party was to be implied; and in particular they founded on the following clause:—"And in regard to the foresaid interest, annuity, capital sums of the provisions hereinbefore made payable by the said Herbert Dolphin, the Reverend John Dolphin, and Jessie Scott Baxter respectively, in favour of the children of the said intended marriage, and interest, dividends, and annual produce thereof, it is hereby provided and declared that if there shall be more than one child of the said intended marriage it shall be lawful to and in the power of the said Herbert Dolphin, at any time of his life, and even on deathbed, to divide and apportion, as he shall think proper, among the said children or their issue, as after mentioned, the provisions respectively above written in their favour, or any of them, or to settle the same upon them by way of liferent, or upon such conditions or trusts as he shall think proper; and in case of his death without making such division or settlement of the said respective provisions, the said Jessie Scott Baxter, if she shall survive him, shall, previous to the respective terms before mentioned, have the same power while she continues his widow, and failing any such division or settlement, the said respective provisions shall belong to and be divided among the said children and the survivors and survivor of them, equally, share and share alike."

The second party admitted that the only "annuity" mentioned in the marriage-contract was the annuity in question which he had undertaken to pay; and the first parties contended, therefore, that the clause last above quoted necessarily contemplated that this annuity should continue to be payable after Mrs Dolphin's death whether she survived her husband or predeceased him.

The second party, on the other hand, maintained that the insertion of the word "annuity" in the clause founded on by the first parties was a blunder on the part of the draftsman of the deed, and in support of this contention he founded on the fact that the enumeration "foresaid interest, annuity, and capital sums" occurred frequently in other parts of the deed, but, as regarded the word "annuity," always in a context that was intelligible with reference to the express terms of the obligation undertaken by him, whereas the clause in question, if it referred to his annuity, was contradictory of the clause of obligation, as it gave a power of apportionment to Captain Dolphin, while the clause of obligation gave the power of apportionment to the trustees. Apart from that specialty the second party maintained further that an obligation, which

No. 133. his undertaking was, was to be construed according to its terms, and was not to be extended by implication from other parts of the marriage-contract not expressly dealing with it.

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At advising,—

LORD JUSTICE-CLERK.—This is rather a perplexing question which your Lordships have here to decide. It arises on the construction of a marriage-contract, the parties to which were Captain Dolphin and Miss Baxter (the intended spouses), the father of the bridegroom, and the father of the bride being also parties to the contract. The question relates entirely to an obligation undertaken by Mr Baxter, Miss Baxter's father, who was the fourth party to the contract.

The first part of the deed relates to the settlements made by Captain Dolphin, the husband, and his father upon the spouses and the children of the marriage. Then comes a provision on the part of Miss Baxter by which she in general and very usual terms, by means of a conveyance to trustees, settles on herself and her intended husband and their issue all that she then had or should succeed to. Lastly, Mr Baxter, her father, provides in the terms mentioned in the marriage-contract an annuity of £300 first to the spouses as long as the marriage continues, in the second place to his daughter if she survived her husband, and thirdly, to the husband and the children of the marriage, under certain conditions in the event of the wife predeceasing the husband and leaving issue. Now, the event which has happened, and to which alone this question refers, is that the husband predeceased the wife after, I think, the marriage had endured for four years. The wife died a few years after, leaving one child. The question which arises is whether the annuity of £300 a-year terminated by the death of the wife, or whether the child has a continuing interest in it.

Of course the words of obligation are necessarily what your Lordships have to consider, and I now address myself to these words. Mr Baxter binds himself to make payment to the trustees, who are mentioned and appointed in the marriage-contract, of an annuity of £300 sterling, and that at Martinmas and Whitsunday yearly, by equal portions, and so on; and this annuity, as it is received, is to be paid over periodically by the trustees to the said Herbert Dolphin and Jessie Scott Baxter jointly during the subsistence of the said intended marriage, and to the said Jessie Scott Baxter during her life in the case of her surviving her said intended husband. Now this is the event which has occurred. She survived her intended husband, and Mr Baxter's annuity was paid to her during her life, but I can find nothing of an obligatory character in regard to the farther contingency which has happened, viz., the death of the wife after having survived her husband, leaving issue of the marriage surviving her. There are no words that I can find in any part of the deed professing to be words of obligation in regard to this annuity other than those I have read. If that be so, then I think that the obligation on Mr Baxter has been implemented by the payment of the annuity to the surviving wife during her life, for where you have recourse to inference from other clauses of the deed to control or enlarge the provisions of such an obligation that inference must be very clear.

The husband's survivance is not followed by the same result as the survivance of the wife, but I do not think that the provision in regard to the husband has any bearing on the present question.

It has, however, to be observed that throughout the deed this annuity is mentioned as being by way of a provision for the children. There are clauses in the deed in which the word occurs in rather a perplexing manner. But I do not think any of these clauses affect the real question, and without going into the long details of the deed I shall just mention one provision which throws some light on the question. There is a power of apportionment of the provisions in the marriage-contract, which runs thus,—"In regard to the foresaid interest, annuity, capital sums of the provisions hereinbefore made payable by the said Herbert Dolphin, the Reverend John Dolphin, and Jessie Scott Baxter respectively, in favour of the children of the said intended marriage." There you have the interest, annuity, and capital sums, but there is no mention of Mr Baxter in that clause, and his name is omitted just where you would have expected to find it had the annuity provided by him been really one of the things intended to be dealt with by the clause.

If I may venture a conjecture, it is that the whole difficulty of interpreting this deed arises from the fact, which I think I detect, that alterations have been made on revisal, which have somewhat disarranged the scheme which was in the mind of the first framer of it.

I therefore simply take the words in the obligation as they stand, and am of opinion that the annuity ceased on the death of the wife, and that therefore the child has no interest in it.

LORD RUTHERFURD CLARK and LORD KINNEAR concurred.

THE COURT answered the question in the negative.

MACKENZIE & KERMACK, W.S.—HENDERSON & CLARK, W.S.—Agents.

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Murray v. County of Middle Ward of Lanark Road Trustees.

THOMAS MURRAY, Pursuer.—*Rhind—A. S. D. Thomson.*
COUNTY OF MIDDLE WARD OF LANARK ROAD TRUSTEES, Defenders.—*Darling—Dykes.*

Process—Jury trial—New trial—Surprise.—In an action against road trustees for damages for the death of a child about three years of age, which had crept under a fence on the public road and had been drowned in a burn, through the alleged fault of road trustees in not duly fencing the road, the only defence on record was that the road was sufficiently fenced, and that the child had been negligently allowed by the pursuer, her father, to wander about unattended at the place in question. The pursuer's evidence shewed that there had been other accidents to children at that place, and that he had felt apprehension with regard to it, but he did not prove that he had given any notice of the danger to the defenders. The jury found for the defenders "on the ground of contributory negligence on the part of the pursuer, who, while living in fear of the burn, made no complaint to any authority as to the danger." The pursuer moved for a rule for a new trial on the ground that the contributory negligence which the jury had found proved had not been averred, and that he had therefore been taken by surprise. The Court *refused* a rule.

2D DIVISION.
Lord Kinnear.
I.

THOMAS MURRAY, miner, Airdrie, raised an action against the County of the Middle Ward of Lanark Road Trustees to recover damages for the death of his daughter, a child of two and a-half years of age, who was drowned through the fault, as he alleged, of the defenders.

The child was drowned in a burn which ran parallel to the public road, near the pursuer's house.

The pursuer averred that the paling by which the road was fenced from the burn was about 3 feet 9 inches high, that the lowest spar was

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17 inches above the level of the road, and that the child, when playing, fell into the burn through the space between the road and the lowest rail of the fence; further, that the fence was insufficient in respect that the lowest spar was so high as to permit a child such as his to pass easily under the same, and the road was therefore dangerous for children; that the place was a populous one, where it was specially necessary to have an adequate and sufficient fence. He further stated that within a very recent period seven or eight children had fallen through the fence into the burn, and that this was well known to the defenders.

The defenders denied fault. They averred "that on the said day the pursuer's child was negligently allowed by its parents to wander on to the said road without being under the charge of any person, and that the said child crept through beneath the lowest bar of the fence, ... and so fell into the burn. The space between the lowest bar and the road is nine inches."

The defenders pleaded, *inter alia;*—The parents of the said child being guilty of gross negligence as libelled, the defenders should be assoilzied.

The action was tried before Lord Kinnear and a jury under this issue, viz.,—"Whether the said Annie Murray was drowned through the fault of the defenders in failing sufficiently to fence the said road, to the loss, injury, and damage of the pursuer?"

At the trial the pursuer proved that other children had fallen into the burn, and that he and his neighbours had been apprehensive of danger.

The jury found for the defenders. Their verdict was in these terms: —"The jury find for the defenders on the plea of contributory negligence on the part of the pursuer, who, while living in fear of the burn, made no complaint to any authority as to the danger. The jury recommend that the part of the road in question should be made safe for very young children."

The pursuer moved for a rule on the defenders to shew cause why there should not be a new trial.

Argued for the pursuer;—The jury had been of opinion that the defenders were in fault, but had decided in their favour on the ground of contributory negligence on the part of the pursuer in not complaining to the road trustees of the danger. That was not within the record, and the jury were not entitled to consider it.[1] The pursuer had been taken by surprise, and was entitled to a new trial on that ground.[2] There was really no contributory negligence. The pursuer had no duty to give the defenders warning. The recent case of *Greer*[3] was applicable to the circumstances, and was decisive in the pursuer's favour.

LORD JUSTICE-CLERK.—I think we ought not to grant the rule for which the pursuer moves. The question for the jury was whether the event complained of was caused by the defenders' fault,—their fault, that is, in not putting a sufficient fence at the place in question.

I think the pursuer was bound to know all the circumstances connected with this accident, and it is not for him to complain of surprise if, he having proved the facts he did prove, the defenders' counsel founded on these facts in addressing the jury. It was not necessary to set forth these facts in detail, if they were sufficiently set forth to raise the issue, as I think they were. What the jury have added to their verdict is not a new issue.

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[1] Findlay v. Limerigg Coal Co., May 17, 1861, 23 D. 874, 33 Scot. Jur. 444.
[2] Crawford v. Lusk's Trustees, Oct. 28, 1884, 12 R. 25.
[3] Greer v. Stirlingshire Road Trustees, July 7, 1882, 9 R. 1069.

I think then there is no ground for the complaint that the pursuer suffered in his case from surprise. If not, then there was nothing else but the facts, of which the jury were the best judges, and their verdict on them for the defenders is decisive of the action.

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Lord Rutherfurd Clark.—I concur. The issue for the jury was whether the child of the pursuer was drowned through the defenders' fault—that is, their exclusive fault. The jury have negatived that issue. Therefore they thought either that the defenders were not in fault, or that they were not exclusively in fault. They were entitled to take either view according as the evidence should be. Now, the evidence stood thus. The burn had been fenced by the defenders. The pursuer thought it was not sufficiently fenced. But for a considerable time it had to his knowledge been fenced as it was at the time of the accident. The jury considered that if the pursuer thought the fence not sufficient it was his duty, not to wait till an accident happened, but to give notice to the defenders that in his opinion their fence was insufficient, in order that the defect might be remedied.

Taking that view of the evidence, they were entitled to say that the fault was not the exclusive fault of the defenders, and their verdict should therefore stand.

Lord Kinnear.—I am of the same opinion. I think this was a good verdict, supported by the evidence. It was proved that the fence was sufficient for all the ordinary purposes for which the road ought to be fenced. But the lowest rail was of such a height that a child of two years of age, if left unattended on the road, might creep below it, and having done so might go across the grass and fall into the burn. This had happened occasionally, though this child was the first that had been drowned in that way. The pursuer led proof that the parents of children and those living near the spot apprehended danger, and had done so for some time, and he proved that other children had fallen into the burn. That being so, he was not taken by surprise by the evidence on which the jury went in returning their verdict, for the defenders' counsel pressed upon the jury that this being all proved, the duty of the pursuer, if he wished the fence to be made so that a young child, if left unattended, could not creep below the rail and then fall into the burn, was to give the defenders some notice that in his opinion the fence should be altered in a particular way so as to make it impossible for a child of two to creep through. It was fair to put that to the jury. They took that view. I concur in one observation of Mr Thomson. I think it was not a case of contributory negligence. I should have been prepared to agree if it had been found that the fault all lay with the pursuer himself. But that was not what the jury found. I do not think the verdict ought to be too narrowly criticised. The jury have found against the pursuer, because he should have given notice to the defenders of his objection to the fence. I think that was a good ground for finding for the defenders.

Lord Trayner.—After what has just been said by Lord Kinnear, who presided at the trial, I think there can be no doubt of the propriety of the verdict. There seemed, during the speech of Mr Thomson, to be a serious question which might arise, and upon which we might technically be obliged to find that he was entitled to a new trial,—that was, that the jury had returned a verdict on the ground of contributory negligence, which was not averred. If that were clear, I am disposed at present to think that a new trial would require to

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Murray v. County of Middle Ward of Lanark Road Trustees.

be granted. But I do not so read the record. The issue was whether the defenders were in fault, such fault as led to the death of the child of the pursuer. The defenders' answer was a denial that they were, and an averment of contributory negligence by the pursuer himself. I think the statement made in answer to condescendence 3 is a relevant averment of contributory negligence. It is,—"The defenders aver that on the said day the pursuer's child was negligently allowed by its parents to wander on to the said road without being under the charge of any person, and that the said child crept through beneath the lowest bar of the fence after described, which is situated between the road and the burn, and so fell into the burn." At the trial the jury "found for the defenders on the plea of contributory negligence." There, I think, the verdict proper ceases. What follows in the rest of the verdict is an observation by the jury as regards the duty of the pursuer and of the defenders respectively. They say,—"We choose to add a recommendation to our verdict; we think the defenders should be in future more careful." But the verdict itself is a pure verdict for the defenders on the ground of the pursuer's contributory negligence.

THE COURT refused a rule.

WILLIAM OFFICER, S.S.C.—BRUCE & KERR, W.S.—Agents.

No. 135.

June 12, 1888.*
Raeburn's Trustees.

JAMES SHEPHERD AND OTHERS (Raeburn's Trustees), Petitioners.—*H. Johnston.*
THE ACCOUNTANT IN BANKRUPTCY, Compearer.—*Blair.*

Bankruptcy—Bankruptcy (*Scotland*) *Act*, 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 166—*Private trust.*—*Question*, whether private trusts can be brought under the superintendence of the Accountant in Bankruptcy, in terms of the 166th section of the Bankruptcy (Scotland) Act, 1856.

1ST DIVISION.
Lord Trayner.
M.

ROBERT REID RAEBURN died on 7th February 1888, leaving a deed of settlement providing for the management and disposal of his means and estate, and appointing Mr James Shepherd and two others trustees for the purpose of carrying out the provisions of the settlement.

On 7th March following the trustees presented a petition to the Junior Lord Ordinary (Trayner), founding upon the 164th, 165th, and 166th sections † of the Bankruptcy (Scotland) Act, 1856, and praying that an

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* Decided March 20, 1888.

† Section 164,—"It shall be competent to one or more creditors of parties deceased to the amount of £100, or to persons having an interest in the succession of such parties, in the event of the deceased having left no settlement appointing trustees or other parties having power to manage his estate or part thereof, or in the event of such parties not accepting or acting, to apply by summary petition to either Division of the Court for the appointment of a judicial factor, and, after such intimation of the petition to the creditors of the deceased, and other persons interested, as may be considered necessary, and after hearing parties, the Court may appoint such factor, subject to such conditions as to caution, and such other conditions as the Court may provide by Act of Sederunt; and such factor shall manage the estate, recover debts due to it, realise the effects by public or private sale, as may be most expedient, dispose of the heritable estate by public sale or private bargain, according to such directions as the Court, on report of the Accountant, may give, and shall apply the free proceeds, after defraying all expenses in payment of the claims of creditors according to their several rights and preferences, conformably to a state of funds and scheme of division to be prepared by him, and considered and approved of

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order should be granted "on the Accountant in Bankruptcy to superintend the administration of the estate of the said Robert Reid Raeburn, in order that the estate may be managed, the debts due to it recovered, the moveable effects realised by public or private sale, as may be most expedient, the heritable estate disposed of by public sale or private bargain according to such directions as the Court on the report of the Accountant may give; and that the free proceeds, after defraying all expenses, may be applied in payment of the claims of creditors, according to their several rights and preferences, conformably to a state of funds and scheme of division to be prepared by the said trustees, and considered and approved of by the Court on a report by the Accountant, and that the trustees may thereafter account for the residue, if any, after payment of debts and expenses to the said Rebecca Scott Raeburn, her heirs, executors, and assignees, all in terms of the provisions contained in said recited sections of the said Act," &c.

It was stated that the amount of the debts due by the deceased exceeded the estimated value of the assets, which consisted chiefly of house property. The parties interested in the estate were all of full age.

The Lord Ordinary (Trayner) reported the case, in view principally of the opinions which had been expressed by the Court in the case of *Tweedie*, Jan. 22, 1858, 20 D. 438, and of the fact that in practice the provisions of the 166th section had not been brought into operation.

The Court directed intimation to be made to the Accountant in Bankruptcy.

When the case was called on 20th March following, appearance was made for the Accountant in Bankruptcy, and a letter was read in which he stated that he had been informed by the Lord Advocate that his Lordship did not consider he should oppose the granting of the petition, provided the Court were satisfied that the statute applied, and that the trust was one which should be brought under its provisions.

The petitioner accordingly moved the Court for an order in terms of the prayer of the petition upon the Accountant in Bankruptcy, to supervise the administration of the trust.

The LORD PRESIDENT asked whether there was any machinery or regulations regarding the procedure which would necessarily have to be taken.

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by the Court, on a report by the Accountant; and thereafter the factor shall account for the residue, if any, after payment of debts and expenses, to the parties having a right to the deceased succession: Provided that the Accountant shall annually examine and audit the proceedings, intromissions, and accounts of such factor, which shall be duly transmitted for that purpose, and report to the Court thereon, from time to time, as he may deem expedient, and shall generally exercise the like powers and discharge the same duties with regard to him as he is empowered and required to exercise and discharge with regard to a trustee under a sequestration, but subject always to the control of the Lord Ordinary or the Court."

Section 165 provided,—"The Court shall have full power to regulate by Act of Sederunt the caution to be found by such factor, the mode in which he shall proceed in realising and dividing the funds, and otherwise in the discharge of his duties, and any other matter which they may deem necessary."

Section 166,—"If a party deceased has left a settlement, appointing trustees, or other parties having power to manage his estate as aforesaid, it shall nevertheless be competent for the trustees under the settlement, with or without concurrence of the creditors of the deceased and of the persons interested in his succession, to apply in like manner to the Court, and obtain from them an order on the Accountant to superintend the administration of the estate, in which case he shall exercise the like powers and discharge the like duties, under the control of the Lord Ordinary or the Court, which have been provided for in the preceding sections."

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It was submitted for the petitioners that the 166th section provided that the Accountant should exercise under that section like powers and discharge like duties as he did under the 164th and 165th sections, and so the Act of Sederunt, which was passed in virtue of the powers conferred upon the Court by the 165th section, would apply. Therefore, until a special Act of Sederunt was passed applicable to the case of trusts, the Accountant would simply regulate procedure by that Act of Sederunt, so far as applicable to the case of trustees. On examining the Act of Sederunt it would be seen that its provisions, other than those for judicial factors finding caution, were all applicable to the case of trustees, provided the words "judicial factor" were read as "the trustees," and "the date of the judicial factor's appointment" were read as "the date of the order of the Court placing the trust under the supervision of the Accountant."

LORD PRESIDENT.—I cannot help thinking that whoever framed the 166th section of the Bankruptcy Act, 1856, hardly foresaw, what nevertheless was the obvious result of it, that if it was to be carried into operation anything like generally, the administration of private trusts would be all carried out at the public expense. I do not think that was the intention of Parliament, and after what occurred in the case of *Tweedie* (20 D. 438) so far back as the year 1858, since which time no attempt has ever been made to bring this section into operation, it would be very rash on our part to grant the prayer of the petition. If we are to entertain the matter at all, I think we must appoint the cause to be heard before the whole Court.

LORD ADAM.—If there is a distinct provision in an Act of Parliament that trustees should have the benefit of a certain course of procedure, and that private trusts should be managed at the public expense, I do not see that considerations of administration, machinery, and expense can prevent the Court from giving effect to the statutory provisions. But after the case of *Tweedie,* I think we have no course open to us but to consult the whole Court.

LORD KINNEAR concurred.

LORD MURE and LORD SHAND were absent.

The case was accordingly continued till the Summer session, in order that, if the trustees desired to press it, it might be sent to the whole Court, but no further procedure took place.

MILL & BONAR, W.S.—THE CROWN AGENT—Agents.

No. 136.

June 14, 1888.
Lockhart v. Brown.

N. & N. LOCKHART, Pursuers (Respondents).—*Jameson—G. W. Burnet.*
JOHN BROWN, Defender (Reclaimer).—*H. Johnston—G. R. Gillespie.*

Partnership—Joint adventure—Sale.—W B, a retail dealer in nets and other fishing apparatus, wrote to a manufacturer giving him an order for a quantity of nets, and stating,—"This order is only for one of our six boats, but I wish to get this lot and let our men see them, and then I can order for the rest."

On W B's bankruptcy it appeared that he and his brother J B were joint owners of several fishing-boats, and the manufacturer raised an action against J B for the price of the nets, alleging that before the date of the order he and W B had entered into a joint adventure for the purchase and fitting out of fishing-boats, and that the order had been given by W B on behalf of the joint adventure, and that the goods had been sold and delivered for its behoof. J B denied this. It was proved that the pursuer had supplied to W B unrigged nets, with suitable rigging for them, and that W B had supplied to the joint adventure at retail prices rigged nets (which were much more valuable than unrigged nets), but it was not proved that the unrigged nets furnished by the pursuer were among those supplied by W B as rigged nets to the joint adventure. *Held* (*rev.* judgment of Lord M'Laren) (1) that the joint adventurers were not parties to the contract with the pursuer; and (2) that the goods furnished by the pursuer were not *in rem versum* of the joint adventure, and defender assoilzied.

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MESSRS N. & N. LOCKHART, flax-spinners and net-manufacturers in Kirkcaldy, sued John Brown, Freefield Ironworks, Lerwick, for payment of £162, 10s. 3d., with interest, being the price of certain nets and ropes supplied by them in the course of the year 1883 on the order of William Brown, the defender's brother,* on behalf, as the pursuers alleged, of a joint adventure in certain fishing-boats. William Brown had since become bankrupt.

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The pursuers stated that both joint adventurers were bound to contribute to the stock in trade of the adventure, the defender having to provide the boats, and William the nets, gearing, and stores. They admitted that the order for the goods came from William, but alleged that when they received it they were aware that he was acting in partnership with some one else, whom they ascertained after William's bankruptcy to be the defender.

The defender stated that his business was that of blacksmith and iron-merchant, and that his brother was a grocer and general merchant, and also carried on in separate premises a retail business as ship-chandler in nets, ropes, buoys, &c., in which he (the defender) had no interest; that he and his brother each supplied half the funds for their joint adventure in five or six fishing-boats, partly in fittings and supplies from their respective businesses, and partly in cash; and that each of them charged against the joint adventure the retail prices of his business; that the nets in question were supplied to William after orders had been solicited from him by the pursuers, and in connection with his retail business, and on his order, and for his account only; that they were not in point of fact supplied to the boats belonging to the joint adventure, and that if any of them were they were rigged and prepared for sea when so supplied, and their value thus increased nearly 50 per cent beyond what it was when they were in the raw state; that at the time in question William was getting nets from four other well-known makers, who were named.

The pursuers pleaded, *inter alia*;—(1) The said goods having been ordered and sold and delivered on account of the said partnership or joint adventure, the defender is liable in payment of their price.

The defender pleaded;—The pursuers' statements being unfounded in fact, the defender is entitled to be assoilzied.

It appeared from the proof that each of the two brothers had an equal share in the profits of the joint adventure, and that it was part of the agreement that each should supply goods at retail prices for it. It was proved that the nets furnished by the pursuers were unrigged nets, with the

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* The first order from William Brown to Messrs Lockhart was as follows:—"Gentlemen,—Some time ago you sent me your price-list of nets, and requesting an order, which I can now send you, and which I hope you will send on as soon as possible. This order is only for one of our six boats, but I wish to get this lot and let our men see them, and then I can order for the rest. As I have had nets which has not pleased our men from other places, and which came to be a serious loss to both our men and ourselves, but as I come to learn you have sent some to our town already, which have given satisfaction, so I trust it may be a mutual benefit, so will you please send as undernoted as soon as possible, and oblige.—Yours, &c., WILLIAM BROWN."

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materials for rigging them, and that these were disposed of after being rigged up along with the other goods in William Brown's shop. The nets furnished by him to the joint adventure were rigged nets. William Brown deponed,—"The price of unrigged nets varies, but I should say 30s. would be a very fair price. Rigged nets range about 63s. or 64s.—that is, for a cotton net." The nets furnished by William Brown to the joint adventure were charged at retail prices, and each brother kept a pass-book with a note of everything he put into the adventure charged at the retail price. It was not proved that all of the pursuers' nets were supplied to the joint adventure, and it appeared that he bought nets from several other makers besides the pursuers.

The Lord Ordinary (M'Laren), on 10th January 1888, pronounced this interlocutor:—"Finds that the sum sued for is the price of goods supplied to account of a joint trade in which the defender was a partner, and that the price is resting owing and unpaid: Therefore decerns against the defender in terms of the conclusions of the action," &c.*

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* "Opinion.—This is an action at the instance of a firm of net manufacturers carrying on business in Kirkcaldy, against one of the joint owners of certain fishing-boats trading at Lerwick, for the price of nets supplied to the joint adventure.

"The defender John Brown and his brother William Brown were the chief owners of the fishing-boats, the only other owners being the fishermen who worked the boats and who according to custom received each a small share in the boat which he assisted in working, in order that he might have an interest in the safety of the boat and an inducement to maintain it in good repair.

"It is in evidence that the defender kept the accounts of the joint trade, but that his brother William Brown took the chief part in the ordering of nets and fishing gear for the boats and provisions for the men. William Brown kept a shop at Lerwick from which he supplied the boats with provisions, and the defence is that the nets were supplied by William Brown in his capacity of tradesman; that he ordered nets from makers on his credit as a tradesman, passed them into his stock, and from that stock supplied such quantities of nets and other gear as might be necessary for the purposes of the joint trade. Hence, it is argued, there is no contract relation between John Brown and the manufacturers who supplied the material which eventually went into the fishing concern.

"I am of opinion that this defence is more ingenious than sound.

"It does not appear to me that the case raises any substantial question depending on the differences between joint trade and partnership. The chief difference of course is that in a proper partnership the acting partner has a universal power to bind his co-traders for goods ordered on account of the firm, and therefore it is not necessary that a manufacturer or wholesale merchant suing for the price of his goods should prove that the goods were in fact applied to the purposes of the partnership trade. In an action against a defender who is not sued as a partner, but as a joint trader, it is, if not in every case strictly necessary, yet in all cases very material to the cause of action, to inquire whether the goods supplied were of the description covered by the agreement for joint trade, and whether the goods were in fact applied to the purposes of the joint trade. In the present case the evidence satisfies me that both questions must be answered in the affirmative, and it does not satisfy me that there is any substance or reality in the defence that the nets were purchased by William Brown in his capacity of private trader, and supplied to the joint adventure upon a separate and independent contract of sale.

"The chief witnesses to facts were the defender and his brother. Their evidence, which is perhaps more copious than necessary for the purposes of the case, deals largely with the history of the joint trade, and the manner in which it was carried on. A considerable part of this evidence relates to matters which are not in dispute, and which do not call for observation from me.

"But when these witnesses come to speak of the particular transaction, their

The defender reclaimed, and argued;—On the facts it was proved (1) that William had no authority to order goods for the joint adventure; (2) that the nets came to him in a raw state, and were afterwards prepared by him for sea; and (3) that the adventure was charged a full retail price over and above what was charged by the pursuers. Further, the pursuers had never inquired whether William had any partners associated with him, and did not in fact know that he had any until after William's sequestration. The case turned upon the question, what was the true contract between the parties? and it was clear from the facts that there were two separate transactions—(1) the purchase from the pursuers by William, and (2) the purchase from William by the joint adventure. The facts were very different from those in the previous case of *Moodie*.[1]

Argued for the pursuers;—On the facts the reality of the case was that the goods were ordered by William for the joint adventure in which he

evidence is evidently coloured by the argumentative view of it, which they have perhaps persuaded themselves is well founded; and it is my distinct impression that their statements on this subject cannot be accepted without large reserves.

"1. It is evident that William Brown had authority to order nets and fishing gear for the joint trade.

"2. In his first letter to the pursuers William Brown stated that he was in want of nets for 'our six boats,' and gave what he professed to be a trial order. I understand that there were then only five boats belonging to the joint adventure, but there had been another which was disposed of. No other meaning has been suggested as applicable to the expression 'our six boats,' and I read this as an order for nets on account of the joint trade.

"3. Other orders were given at short intervals extending over a period of six months, and in the absence of any distinguishing direction I consider that the pursuers were entitled to treat these as orders for the account of the owners of the six boats.

"4. The defender has failed to prove that the nets supplied by the pursuers were in fact applied to other purposes than that of the joint fishing trade.

"5. The defender has shewn that his brother did to some extent supply nets in the course of his business as a general dealer, but it is not likely that William Brown would order nets of the value sued for on the chance of disposing of them, and without reference to a specific order.

"6. The defender kept the accounts of the joint trade, and I think that there was a certain duty cast on him to see that the obligations of the fishing adventure were duly met. In a question with creditors of the adventure, he was not justified in shutting his eyes to their claims, and treating the obligations of himself and the other owners as matters which only affected the accounting between himself and his brother.

"7. The nets of the fishing adventure were stored in a store belonging to the defender, and were insured in the joint names of himself and his brother. When the store and its contents were destroyed by fire the defender recovered £1200 from the insurance company for the value of goods stored (chiefly nets), and divided this money among the joint adventures, apparently without making any inquiry as to whether the makers of the stored property had been paid.

"This action on the part of the defender may no doubt be represented as being consistent with his view that the nets were supplied by his brother, and that he had no individual responsibility to the makers. But it is also consistent with the supposition that the two joint traders, one of whom was a man of means and the other impecunious, had arranged to divide the money, which ought to have been applied in meeting their trade obligations, and to relegate the payment of the debts of the undertaking to the chapter of accidents.

"There are other points in the evidence on which comment might be made; but I think I have said enough to indicate the grounds of my opinion, which is, that the defender is responsible in law and in equity for the debt sued on."

[1] Lockharts v. Moodie & Co., June 8, 1877, 4 R. 859.

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was engaged along with the defender. There were two joint adventures—the first between the brothers, who between them created the subject of the second—in which they took part along with the fishermen. Admitting that the joint concern was not avowed,—which was indeed the ordinary case,—there was, in the language of Mr Bell,[1] "a credit raised on the combined responsibility" of the two partners. Further, and in any view, the nets were *in rem versum* of the adventure, and that was a sufficient ground of liability.

Lord President.—In this case there was undoubtedly a joint adventure between the two brothers, John Brown and William Brown, for fitting out and using fishing-boats on the fishing-grounds near Lerwick. William Brown, one of the joint adventurers, who is now bankrupt, was a general merchant, and among other things dealt to a considerable extent in nets and other fishing-apparatus. The other partner, John Brown, the present defender, was an ironmonger, and it was very naturally arranged between them that they should supply for the use of the joint adventure the goods in which they respectively dealt. That is the import of the evidence of the two brothers, and I do not see any reason to doubt its accuracy. There is no imputation against their honesty upon any general grounds, and there is nothing at all improbable in the account which they give of the conditions upon which the joint adventure was entered upon.

Now, William Brown, in pursuance of his undertaking and arrangement to furnish nets, ropes, and other things that were required for the boats, put himself in communication with the Messrs Lockhart, the pursuers. Having received from them in November 1882 a letter containing their price-list, he wrote a letter, ordering a certain quantity of nets, in which he thus expresses himself,—"Some time ago you sent me your price-list of nets, and requesting an order, which I can now send you, and which I hope you will send on as soon as possible. This order is only for one of our six boats, but I wish to get this lot and let our men see them, and then I can order for the rest. As I have had nets which has not pleased our men from other places, and which came to be a serious loss to both our men and ourselves," he expresses the hope that these gentlemen will do better. There are some other letters following very much in the same style in which William Brown speaks of requiring nets for "our boats." It was not disclosed in any of these letters to the pursuers what the joint adventure between the two brothers was, nor, indeed, that there was any joint adventure whatever. All that was disclosed, so far as I can see, in these letters, was that someone else was interested in the particular set of boats besides William Brown. That, I think, is the utmost that can be made out of them. The goods in question were furnished between 28th March and 9th August 1883. The account which was rendered by the pursuers to William Brown, in terms of the order they had received from him, amounted to £187, 5s. 3d., with a certain discount off, and that is substantially and in fact the account for which the defender is now sued.

The ground of action, as I understand it, is that William Brown having ordered these nets, they were supplied to him not for his own use, but for the use of the joint adventure, and that the joint adventure got the benefit of the transaction. I think it is upon that question that the whole case depends—viz., whether the joint adventure got the benefit of the contract between the pursuers and William Brown. I think that the pursuers have not only failed to prove that, but that the contrary has been established. It appears to me that upon the evidence, both parole and documentary, it is quite clearly made out that William Brown purchased from the pursuers the nets mentioned in the order, at certain wholesale prices. He received delivery of the nets, and before he sold them again he performed certain operations upon them and added certain materials to them which converted them really into different goods from those that he had himself bought from the pursuers. They were simply nets as they came from the pursuers, but they were afterwards furnished and made up ready for use as sold to other persons; and therefore supposing that all the nets that were bought by William Brown from the pursuers were really put into the joint adventure, they were put into the joint adventure, not in the same specific form in which they were bought from the pursuers, but there were certain alterations made on them which converted them really into other goods from those that formed the subject of the contract between William Brown and the pursuers.

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[1] Bell's Comms. (6th edn.) ii. 539.

Then, again, the price which was charged for the nets as between William and the joint adventure was totally different,—being a very much higher price than that which was stipulated for in the contract between William Brown and the pursuers.

Now, in these circumstances, it appears to me to be perfectly impossible to say that the joint adventure got the benefit of the contract which was entered into between William Brown and the pursuers. They neither got the goods that formed the subject of the contract, nor did they get them at the contract price, but at a totally different and retail price instead of at the wholesale price. The question whether the whole of the nets that were bought from the pursuers by William Brown really came into the custody of the joint adventurers and their fishermen is perhaps not of very much consequence, but it has certainly not been established, and is not very probable, that the whole of the nets represented in the account sued for reached the hands of the joint adventurers. William Brown was a man dealing in nets to a considerable extent, and not merely in nets, but in all sorts of apparatus of that kind. He was buying from several wholesale dealers besides the pursuers, and he was selling these to various parties besides the joint adventurers. But the ground of judgment which appears to me unassailable is that this contract never was taken up by the joint adventurers at all. The joint adventurers never got the benefit of it, nor did they get delivery of the goods that were the subject of the contract, nor at the price stipulated for in the contract.

It appears to me, therefore, that the legal view of this case is that the only contract that the pursuers had was with William Brown as an individual. They were not aware of the joint adventure, and they must have trusted to William Brown alone in their contract. If it could be shewn that the goods were *in rem versum* of the joint adventure in the proper sense of that term, the mere circumstance that they had originally trusted to the credit of William Brown alone would not disentitle them to recover in this action. But unfortunately, in my view, they have entirely failed to establish that the joint adventure got any benefit from this contract in any sense or form whatever.

It appears to me that the case which is nearest to this, and indeed quite parallel to it, is the case of *Whyte* v. *M'Intyre*, 3 D. 334. In that case two persons acquired a piece of urban building ground as a joint adventure. One of them was a builder, and he undertook at a certain price to erect certain buildings upon the ground at a lump contract price. In executing his contract he employed other tradesmen under special contracts, and among others a bricklayer, who was to build certain portions of the tenements which he was erecting, in so far as they were to be made of brick. The builder became bankrupt, and the bricklayer who had performed his contract to the builder sued the other solvent joint adventurer, Whyte, just as the Lockharts are suing John Brown here, and the answer made was that he, the bricklayer, had contracted with the builder only, and that although he was one of the two joint adventurers it was not in that capacity he contracted, but alone. No doubt in one sense of the word the joint adventure got the benefit of the bricklayer's materials and work, because the brick building was erected upon the ground, but then the Court held that the labour and materials of the bricklayer were not *in rem versum* of the joint adventurers, but were really *in rem versum* of the builder. Lord Mackenzie expressed his view of the matter thus,—"The furnishings by the pursuer were not *in rem versum* of the copartnery, but *in rem versum* of Reid, enabling him to fulfil his contract with Whyte, or with the joint adventure, and giving him right to the stipulated price for it. If a company contract with a builder to erect a house for them, on their lands, the workmen or tradesmen employed by the builder cannot demand payment from the company on the ground of *in rem versum.* The works or furnishings are *in rem* of the contractor, not the company, who are bound to receive them from him and to pay him for them." And Lord Fullerton says,—"The pursuer's claim, if it has any foundation at all, must rest on the other ground; that where a joint adventure exists, although not known to the public, a third party dealing with an individual partner, and on the credit of that individual alone, may have the benefit of a joint liability against the *socii,* if the dealing, though nominally with the individual partner, is truly and substantially one with the joint adventure itself, out of which the joint adventure is to take the benefit through the medium of the act of the partners."

Now, in like manner here, the contract between the pursuers and William Brown is a distinct contract for enabling the latter to perform his undertaking to the joint adventure. He proposed to furnish the joint adventure with the nets that they required, and to enable him to do so he ordered these nets from the pursuers. The cases are, I think, exactly parallel, and they both stand upon the same footing in point of law, that where an original contract is made upon the credit of an individual partner who gives an order to a tradesman who has no knowledge of the existence of a joint adventure, and the goods are supplied, he, the tradesman, cannot recover from the joint adventure unless he can shew that the joint adventure has received the benefit of the contract which he has made, and the goods which he has delivered under the contract. I am sorry to say, therefore, that I am driven to differ from the Lord Ordinary and to hold that the defender is entitled to be assoilzied.

LORD MURE.—It appears to me that the evidence of the two brothers in this case is very distinct as to the nature of the joint adventure which they had entered into, and as to what the position of each of them was to be. William Brown was fixed upon to be the manager of the concern; and they were each to furnish a part of what was necessary to carry on the adventure. The defender John Brown was to contribute the boats, and other things which were necessary for the fitting up of the boats. William Brown was to contribute the nets that were necessary for carrying on the fishing.

Now, I see no reason to doubt the truth of this statement of the two brothers, and I am unable from the letter that was so strongly founded upon by Mr Burnet, or from any other documentary evidence, to draw the inference that the statement of the brothers is not to be relied upon. In that letter William no doubt orders nets for "our boats," but the rest of the letter is otherwise worded, for he says "some time ago you sent me your price-list and requesting an order which I can now send you, and which I hope you will send on as soon as possible. This order is only for one of our six boats, but I wish to get this lot, and let our men see them, and then I can order for the rest." Then he states certain reasons for ordering nets from the pursuers, as those he had had from other manufacturers were not good.

Now, the nets were furnished upon that request, and sent to William Brown as an individual. When he gets them they are not fit for use, and he puts them into order by fitting them up with gearing for the use of the boats, and upon that being done he in terms of his contract furnishes them to the joint adventure, and to the fishermen whom they employed, for the use of the boats. William Brown was also a dealer in nets, and he therefore retailed these nets with their fittings to the joint adventure, at a profit just as he did to others. It appears from the evidence that he purchased nets from other people as well as from the Messrs Lockhart, and supplied them to the joint adventure as well as to other people. That is all perfectly consistent with what the two brothers say, and that being so, the case falls distinctly within the rule referred to by your Lordship as given effect to in the case of *Whyte* v. *M'Intyre*, where it was thus laid down by Lord Fullerton in dealing with the large class of cases of this description,—"But there is another class of cases to which that principle will clearly not apply. Such are the cases referred to by some of your Lordships in which a party to a joint adventure has agreed to put into the common stock a certain quantity of goods, or a certain sum of money, and in order to fulfil this agreement to his partners has a separate dealing with a third party in his own name and on his own credit, from whom he gets the goods or money. In such cases the individual partner is neither ostensibly nor really acting for the joint concern, as may be at once seen by considering that the joint adventure has no interest whatever in the terms of that dealing. In such cases I think there is no principle for holding the *socii* jointly liable, as the dealing of the individual is not joint in point of law." And upon these grounds I concur with your Lordship in holding that we must give effect to that decision.

Lord Shand.—I think the first matter to be ascertained in cases of this class is, what was the contract between the parties who entered into the joint adventure, because when the Court is in possession of the facts as to the nature of the contract it will not be difficult, generally speaking, to answer the question whether there is liability or not,—assuming always that the parties have acted in terms of the contract. The actings of parties will, of course, shew whether they have varied the terms of the contract or acted in accordance with it.

And so, I think, the first question to be ascertained here is, what was the contract between the two brothers, William and John Brown, in regard to the joint adventure which they had in five, and it may be six, of these fishing-boats. Now, the evidence is all one way on this subject. There is no written agreement about it, and it was according to the exigency of the pursuers' case necessary that there should be proof of the terms of the contract by the evidence of the two brothers themselves. Accordingly the pursuers put these two persons, John Brown and William Brown, into the witness-box. William, in a single passage of his evidence, puts the contract in this way,—"The understanding my brother and I had as to supplies for the boats was that I should provide whatever I had in my shops. I was to charge the current prices I was charging other people. In addition to that I was to have the supplying of the men with provisions, charging in that case also the current rates." Then his brother is examined on the same subject, and says,—"The understanding was that he (William) should provide whatever he had in his stores or shops, as a general merchant, that the boats required, and that I should provide whatever blacksmith work and other things I might have requisite for the boats out of my business; and we were each to charge the regular trade prices of the place, the retail prices. I thought my brother would be able to do something in the way of paying for the hulls of the boats, but after the first one I had to pay for all the rest." It appears to me, as the result of that evidence, that the arrangement and agreement between these two brothers was that each of them was to put material into the joint adventure, and thus to contribute part of the subject of the joint adventure. John apparently had hopes that his brother William would aid him in putting in part of the original cost of the hulls of the boats. William failed to do this, and John was obliged to put in the hulls of the boats himself—all except the first—and he also put in such ironmongery and other things as he could supply at retail prices. William, on the other hand, supplied a great many other things to the boats, such as nets, ropes, and other things that the boats required, also at retail prices. It appears to me, as the result of that agreement, that whatever each gave out of his own shop was to form part of the subject of the joint adventure, that these furnishings were to be the joint adventurers' respective contributions, and in the accounting between the two in the joint adventure each became a creditor of the joint adventure for their respective furnishings. It appears that this arrangement excluded the idea that one brother was entitled to pledge the credit of the other for anything that he purchased. Each was to give his contribution. If the one brother thought fit to make a purchase he was entitled to do so, and place the article in his own store, and then to supply it to the joint adventure. He himself, and not the person from whom he bought it, was to supply the article to the joint adventure, so unless there is something in the actings of the parties that runs counter to that agreement it does not appear to me that there can be any liability upon the defender. So far from there being anything of this kind in the actings of the parties, I think everything squares with it. We find that the accounts of the brothers were settled upon that footing. Each kept pass-books containing a note of everything that he put into the concern, and for these each became a creditor of the joint adventure. William became a creditor of John, and John a creditor of William for these things, and it may be also of the fishermen for goods supplied to them by each from his shop or store. When the accounts came to be settled, the amount of the account of each creditor was carried into the general account, and the balance due to each was settled year after year on the footing of the agreement as I have explained it. Further, we find that the nets which were supplied by William to the concern were not necessarily or exclusively the nets the price of which is here sued for, but were just nets taken out of his general store. It is, I think, proved that a large number of the nets that came from the Messrs Lockhart were so supplied to the joint adventure; but I am not by any means satisfied that all of them were. There is evidence to shew that a considerable profit was made upon those nets that were fitted or rigged up, and indeed after they came into William's hands they practically became different goods. As has been pointed out, there was a great deal of work done by William, and indeed so much was this the case that the nets really became new goods before they left his hands and went either into the stock of the joint adventure or into the hands of other purchasers. I do not think it would have made any difference if the whole of the nets had gone into the boats belonging to the joint adventure and had been even charged for at the wholesale prices, because the agreement was that anything William contributed in this way was to be put in as his contribution, for which he was to become a creditor of the adventure. Upon the whole, and having in view the matters to which I have referred, I think the case is clear.

Mr Burnet made a point upon the terms of the letter or order of 16th February 1883, in which William Brown uses the expression "one of our six boats," and speaks of ordering for the rest afterwards. I do not doubt that a merchant getting that order might perhaps not unnaturally think that he was to have other people answerable to him for the joint adventure over and above the writer. But I am not satisfied that William Brown meant this when he wrote of "one of our six boats" and of ordering for the rest afterwards. The language is very loose. But, surely, if there was any doubt, and the risk being with the manufacturers, it was for them to inquire on whose credit the goods were ordered. They knew nothing of the joint adventure, or that the goods were ordered or intended for a joint adventure, beyond the expression "our boats" used in the letter, and so they could not have had the liability of any particular person except him who gave the order in their minds. If they were not satisfied with the credit of William Brown by himself, they should have declined to supply the goods on his credit alone. But, even supposing that William Brown had ordered the goods not for himself but as for his copartner, I still think he could not have fixed liability upon the joint adventure, for he had no power to do so, and it was not consistent with the agreement of the brothers that he should do so. This letter forms a piece of evidence on the question of liability, but it is nothing more.

That being so, I am unable to agree with the Lord Ordinary in what I rather think is the fundamental finding of his judgment, that William Brown had authority to order nets and fishing-gear for the joint trade. If that means that William Brown had authority to order nets, and to pledge the credit of the joint adventure, then I think the proof does not shew that. On the contrary, I think the proof shews he had no such authority. He had authority to supply nets out of his own stock in trade for the purposes of the business of the joint adventure, but I do not think his authority went beyond that.

In the case of *Lockhart* v. *Moodie & Co.*, 4 R. 859, I put the question in my opinion in this way,—"The question is whether Mackenzie was acting for himself alone, with the view of afterwards selling the yarn as his own property to the joint adventure, or was really acting for the joint concern in making the purchase." And upon the evidence I came to the conclusion that in making the purchase he acted for the concern. It was the first and single transaction for the joint account, and the two persons who were acting together got the benefit of it, and gave a joint acceptance for the price. And I put the same question here, whether William Brown was

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acting for himself with the view of afterwards selling to the joint adventure, or was really acting for the joint adventure in making the purchase. I answer that clearly to the effect that he was not acting for the joint adventure, but for himself, and that the nets so purchased went into his own stock; and he having bought the nets and made them part of his own stock sold them to the joint adventure, of which he thereafter became a creditor for the amount of their value. So I am of opinion that the liability alleged against John Brown has not been established.

Lord Adam.—I do not think it was doubtful on the evidence in this case that the terms of the joint adventure were that the one brother John should supply the boats and iron work necessary for the boats, and that the other brother William should supply the nets and gearing necessary for the crew, the one being a dealer in iron and the other a general dealer, supplying nets, and such like goods. One of the terms of the joint adventure was that the one brother should supply commodities in which he dealt at retail prices, and that the other brother should do the same, just as he did to other people. The evidence of the two brothers is clear upon that subject, and it is the only parole evidence in the case; and it appears to me that the account books of the joint adventure and of the two brothers which have been produced are in entire conformity with the parole evidence, and prove to my mind beyond doubt that these were the terms of the joint adventure as between the two brothers.

Now that being so, it appears to me that the books and accounts prove beyond question that such of these nets as were purchased or supplied by the pursuers—not all of them—but so many of them as passed into the possession of the joint adventurers—passed into their possession under a contract of sale between William and the concern, in terms of the contract of joint adventure, and on no other terms. I think the books shew that clearly, because the nets are charged not at the price at which they would have been charged if they had been bought by William, not for himself, but for the joint adventure, in which case they would have been charged at the wholesale price. They are charged just at the retail price, in other words, they are just sold by William to the joint adventure. And that being so, it humbly appears to me that upon the facts of the case, so far as we have got them, the pursuers can have no claim whatever for the price of the nets which they sold to William, and which William in his turn sold to the joint adventure.

The only other part of the case which remains relates to the terms of William's letter ordering the nets, and which is said to imply that he, William, was acting on behalf of other people besides himself. That may possibly be maintained on one reading of the letter, but the answer is this, that the terms of the joint adventure being what I think they were, William had no power whatever to bind his brother in any such terms. It would make no difference in my mind although the letter had borne that it was written on behalf of the joint adventure, because William had no power to bind his brother for any nets which he had bought for himself.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defender from the conclusions of the summons.

Watt & Anderson, S.S.C.—Mackenzie & Kermack, W.S.—Agents.

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JOSEPH LAWSON, Pursuer (Respondent).—*C. S. Dickson—Wilson.*
GRANGEMOUTH DOCKYARD COMPANY, Defenders (Reclaimers).—
Balfour—Ure.

Ship—Salvage or towage services—Measure of award.—In approaching a port which had a very narrow entrance, a steam-vessel ran for about one-sixth of her length upon a bank composed of loose stones and mud, at that time under water, it being high tide. In answer to signals of distress a tug which was passing outside with a sailing-vessel in tow cast the vessel off, and at some risk, and with the loss of her hawser and other damage, requiring her detention for two days in port, drew the steam-ship off the bank.

In an action by the tug-owners against the owners of the steam-ship for payment of £500 as salvage, the Lord Ordinary (Fraser), although of opinion that the steam-ship had not been in a position of serious danger, awarded £50. On a reclaiming note by the defenders the Court *adhered*, holding that whether the services rendered were proper salvage services or not, they were at least towage services of an extraordinary kind, and that the award was not excessive.

Shipping Law—Salvage—Expenses of action—Merchant Shipping Acts, 1854 (*Act* 17 *and* 18 *Vict. cap.* 104), *sec.* 460, *and* 1862 (*Act* 25 *and* 26 *Vict. cap.* 63), *sec.* 49.—By the 460th section of the Merchant Shipping Act, 1854, it is provided that in disputes with reference to salvage claims, "if the claimants in such dispute do not recover . . . . a greater sum than two hundred pounds, they shall not, unless the Court certifies that the case is a fit one to be tried in a superior Court, recover any . . . expenses incurred by them in the prosecution of their claim."

In a salvage case, in which the Lord Ordinary gave decree for £50 and certified that the case was one fit to be tried in a superior Court, the Court *held* that the certificate had been properly given.

Observed that the Inner-House will be slow to interfere with the exercise by the Lord Ordinary of his discretion in regard to the granting of such a certificate, and that the circumstances of the case were such as justified the Lord Ordinary in granting it.

1ST DIVISION.
Lord Fraser.
M.

ON 20th October 1887 the s.s. "Tabasqueno" was returning to Grangemouth from her trial trip, when she ran upon the bank or breakwater on the west side of the entrance to the river Carron, and remained fast. The steam-tug "Tweed," which was passing, was hailed to assist her, but failed to tow her off, and signals were then made to another tug steamer, which turned out to be the "Cruiser," and was engaged in towing a vessel past the entrance of the harbour down the Forth. The "Cruiser" cast off the sailing vessel, and after about half-an-hour's work in concert with the "Tweed" managed to draw the "Tabasqueno" off the bank.

This was an action for payment of £500 of salvage brought by Joseph Lawson, the owner of the "Cruiser," against the Grangemouth Dockyard Company, the owners of the "Tabasqueno."

The pursuer pleaded;—(1) The defenders' vessel having been stranded and in imminent danger of being wrecked, and the pursuer's tug having saved her, the pursuer is entitled to salvage. (2) The sum sued for in name of salvage and compensation being reasonable and moderate, the pursuer is entitled to decree therefor, with interest and expenses, as concluded for.

The defenders made a tender of £20, and pleaded, *inter alia;*—(2) The pursuer is not entitled to compensation as for salvage, the services rendered by the said steam-tug "Cruiser" being towage and not salvage services.

It appeared from the proof that the bank or breakwater on which the "Tabasqueno" ran was composed of loose stones resting on a bank of mud; that the depth of the stones was from six to eight feet; that the bank was covered with water, it being full tide, and about 5 P.M., when the accident took place; that the "Tabasqueno" was going at a high

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rate of speed, and ran at least one-sixth of her whole length of 160 feet on to the bank; that the breach in the bank was about nine feet wide, and its depth about six feet; that the tug "Tweed" was first hailed to the assistance of the stranded steamer, but failed to draw her off; that signals were thereafter made from the "Tweed," but apparently at the instigation of those on board of the "Tabasqueno," to another tug steamer, the "Cruiser," which was seen going down the Forth with a brig in tow, and that upon her noticing the signals she cast off the brig and came to the help of the steamer; that the "Cruiser" was a powerful tug with double engines, which eminently fitted her for the work in question,—and after putting her hawser on board the "Tabasqueno" and getting up extra steam so as to produce a heavy strain, and through the combined efforts of both tugs the steamer was, after about half-an-hour's work, dragged off the bank; that the "Cruiser's" hawser subsequently got entangled in her paddle-wheel and was rendered useless,—it having been previously worth about £25,—and that she thereafter took the ground on the other side of the channel, and was in consequence obliged to go into port for examination,—thus losing two days' work besides the £3 which she would have earned from towing the brig which she had been obliged to throw off; that the "Tabasqueno," which was valued at about £8000, did not suffer beyond having the paint scraped off where she had run along the bank; that vessels frequently got upon the breakwater on going in and out of the port, and sometimes remained fast over a tide,—and that a customary charge for assisting them off was from £2, 10s. to £3; and that the claim made by the "Tweed" for her services on this occasion had been settled by arbitration for £15.

There was a conflict of evidence, as appears from the Lord Ordinary's note and from the opinions of the Court, as to whether the "Tabasqueno" was in danger or not when lying on the bank.

The Lord Ordinary (Fraser), on 1st February 1888, gave decree for £50.*

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* "OPINION.—The question in this case is, what amount of compensation shall be awarded to the pursuer for services rendered to the defenders? It is, perhaps, unnecessary to determine whether the service that was rendered comes under the head of towage or of salvage service. The practical point is, what compensation shall be awarded, for it is admitted that some compensation is due, and £20 has been tendered by the defenders.

"The defenders' vessel, called the 'Tabasqueno,' was upon her trial trip, and had 390 tons of coals on board at the time when she approached the port of Grangemouth, which has a very narrow entrance between two breakwaters. The 'Tabasqueno,' almost immediately after entering into the channel between the two breakwaters, ran into the north breakwater and there stuck. The cause of her doing so is not very clearly brought out by the evidence, but it is surmised that she took a sudden sheer by touching the ground and thereby deviated from the proper channel and went into the breakwater. The case for the pursuer is, that she was going at her full power of ten knots an hour, while the defenders aver that she was only going at half speed. The evidence upon this point is conflicting, and the Lord Ordinary adopts the latter view, because no person having any knowledge of the port or of seamanship would have gone into the channel at the rate of ten knots an hour. The point is only of importance with reference to the position of the 'Tabasqueno' when she struck upon the bank. This bank is 20 feet high, composed of loose stones and mud, but at the time of this occurrence it was all covered with water and no part of it was visible. The pursuer endeavoured to prove that the 'Tabasqueno' mounted over this bank, and passed over the top of it to the extent of 40 to 50 feet; while the evidence for the defenders is to the effect that the vessel struck the bank diagonally and stuck in the mud, and did not mount over it. When the

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The defenders reclaimed, and argued;—(1) The Lord Ordinary had erred in not applying his mind to the question whether the services rendered by the "Cruiser" were towage or salvage. If they were the latter the £50 award was not too large, if the former, it was clearly excessive. To constitute salvage services the vessel salved must be in probable danger of shipwreck or serious injury. If the assisting vessel merely performs a service which she holds herself out to do, then the service is a towage service. That was the case here. Further, even upon the Lord Ordinary's view of the evidence the service was a towage service. (2) The policy of the law had been to discourage the bringing of salvage

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tide had receded, the place where the vessel had struck was examined by a number of witnesses, and the exact position where she lay was ascertained by the hollow in the mud which her impact had made. This shewed that she had not mounted on the top of the embankment or breakwater. The point is material, because the claim for salvage services here is made high because of the alleged danger in which it is said the 'Tabasqueno' stood. If she had mounted over the breakwater, then upon the retiral of the tide the stem of the vessel would have sunk down, it is said, and the vessel itself would have capsized. On the other hand, if it be held that she had remained fixed in the mud and had not gone over the embankment, she would have floated next day with the tide. Upon considering the conflicting evidence that we have got, the Lord Ordinary is of opinion that the latter is the proper conclusion to be drawn from the proof. The wind was light, and there was no danger to be apprehended from rough weather. The scene of the occurrence was in the channel of an inland river, and there are here therefore wanting several of the elements which induce Courts to give large compensation for such services.

"But, at the same time, the Lord Ordinary thinks that the tender which has been here made is not sufficient for the service rendered. The pursuer's vessel, the 'Cruiser,' was at the time of the occurrence in the middle of the Forth towing a brig away to Leith. Signals of distress were made to the 'Cruiser' from Grangemouth harbour, and that vessel, though under contract to tow the brig, at once responded to the signal, threw off the hawser from the brig, and proceeded to Grangemouth harbour. There it was found that a small tug called the 'Tweed' was vainly endeavouring to set free the 'Tabasqueno.' The 'Cruiser' at once proceeded to work, and by skilful operation got the 'Tabasqueno' out of her position. This was not done without some risk to the 'Cruiser,' for the hawser of the 'Cruiser,' after the 'Tabasqueno' was freed, got entangled in one of her wheels, and it was with some difficulty and some risk that the hawser was removed from that entanglement. The 'Cruiser' herself took the ground on the opposite bank before this was done.

"Now, looking to the ready response which the 'Cruiser' made to the signal of distress; to the prompt and efficient assistance which she rendered; to the fact that by throwing off the brig which she was towing a claim of damage might have been stated against the 'Cruiser' by the owner of the brig had anything happened to her; to the loss of the towage wages which the 'Cruiser' would have earned had she conveyed the brig to Leith; and to the injury that is proved to have happened to the 'Cruiser's' hawser, the Lord Ordinary thinks that the pursuer is entitled to a sum of £50 as compensation for the services that the 'Cruiser' rendered. It is no answer to the claim to say that tugs at Grangemouth remove vessels from the embankments that have got embedded there for a fee of £2 or £3. There was no such tug available at the time of this occurrence, and the rate at which tugs will work whose business it is to relieve embedded vessels in this channel is no criterion for the reward that ought to be given to vessels such as the 'Cruiser'—a stranger in the water, and who did the service so efficiently and promptly.

"In regard to expenses, and with reference to the 460th section of the Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), the Lord Ordinary is of opinion that this is a case fit to be tried in the Supreme Court, and has certified accordingly."

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claims of small amount into the Supreme Court.[1] By the 460th section of the Merchant Shipping Act, 1854, it was provided that two Justices might try such claims, and by the 49th section of the Merchant Shipping Act Amendment Act, 1862, power was given to the Sheriff or Sheriff-substitute to exercise that jurisdiction. There was also a provision that where the damages awarded were under £200 to entitle the pursuer to expenses the Court must certify that the case was one fit to be tried in a superior Court. This case was of so simple a nature that the Lord Ordinary ought not to have certified it as he had done, and accordingly the pursuer ought not to have any expenses. It was not even a question of taxing them down to the Sheriff Court scale. In the case of the "*Minnehaha*"[2] there were a number of legal questions involved, and it was not in point.

The pursuer's argument upon the merits sufficiently appears from the opinions of the Judges.[3] He asked that the Lord Ordinary's interlocutor should be adhered to. On the question of expenses he argued;—This was a case which was properly brought in the Court of Session.[2] It was certainly not a case to bring before two Justices, the tribunal proposed in the Act of 1854, and the only alteration made by the Act of 1862 was to substitute the Sheriff or Sheriff-substitute for the Justices. The kind of case suited for trial before each tribunal was left unchanged.

LORD PRESIDENT.—As this case was presented to us by the counsel who opened it for the reclaimer, I was very much disposed to think that the Lord Ordinary had made a mistake in awarding so large a sum as £50. But after a consideration of the evidence, I am of opinion that the award is not excessive, and in the circumstances I think the owners of the tug are well entitled to the sum which has been found due to them.

A question has been raised whether the services rendered are to be considered salvage or towage services. Of course the answer to that question must depend upon whether the vessel which received the assistance was in danger, and was rescued from it by the services which were performed. There is a great deal of conflicting evidence upon this point—and I think the point is a very narrow one—but, upon the whole, I think it is not satisfactorily proved that the vessel was in danger. Those who first came to her assistance seem to have thought she was in danger, because they invoked the services of the tug. They put up signals of danger or distress, and upon that invitation the tug went to her assistance. But assuming that she was not in danger, although she was thought to be so, what was the nature of the services rendered? The benefit which the vessel derived was that she was dragged off the breakwater or mud bank on which she had stuck, and was brought back into the channel of the Carron. I think that was a service of very considerable difficulty, and involving risk to the tug, to her crew, and to all her appliances.

This is very clearly brought out in the evidence of the master and engineer of the tug. The master says,—"When we got to the steamer they called to us to put a hawser on her port bow, as she had not a hawser on board. We put our hawser on her port bow, and they pulled it on board. We then towed for about ten minutes, trying to get her off. The 'Tweed' was towing on the steamer's starboard quarter, and we on the port bow. The result was that the ebb tide carried us down on the 'Tweed.' I slacked the hawser, and ordered those on board the 'Tabasqueno' to give me a small warp over the stern, so as to get my boat into position again. They did so, and I took the warp to our starboard sponson. I then stopped our starboard engine and went easy ahead with our port one, the effect of which was to bring my boat up the river again against the tide and into position, the large hawser still being slack. I got to the south-eastwards of the 'Tabasqueno,' further up the river, and then I ordered the engineer to cut the small warp and set both our engines going. I told everybody to stand clear in case of accident, and then I put the engines full speed ahead. The result of that was to give a tremendous jerk, and with the jerk the steamer listed a little to port, and then came off into deep water. That was a very risky thing to do, because the sudden bringing off of the boat might have sent the hawser in and injured some of the men, or broken the steamer's shaft. It involved a very severe strain on the boat and engines." The engineer again, after repeating what the master had said about the preparatory proceedings, depones,—"When we got into position again, a little further up the river than the 'Tabasqueno,' our captain ordered all hands to stand clear of the hawser, and I cut the small tow-line. We then put both engines full speed ahead, and with a sudden jerk upon the hawser—which very nearly threw me overboard—the steamer came off. After she came off, the captain ordered them to let go the hawser, which they did. We tried to get our boat into position to go up mid-channel, but the tow-rope got into the starboard wheel, and spragged the starboard engine. We had only the port engine to work with, and the tide drove us down to the mud on the south breakwater. We lay there for a little while, got the tow-rope clear of the wheel, and had to back the tug over the mud into mid-channel. I think she must have holed herself, because I noticed she made a little water every night after that when we were lying. We got a diver at Aberdeen about a fortnight afterwards, and a small hole was found in her bottom about 4 inches from the keel. The jerk in taking off the steamer was dangerous to both the tug and her crew, because if the hawser had given way, it might have come in, and perhaps have killed someone on board. We had also more steam upon the boilers at the time, and the sudden jerk might have caused an explosion. The strain was tremendous." This kind of jerk is not a thing that tugs are in the habit of resorting to in ordinary cases. We have the evidence of Liston, a Firth of Forth pilot, on this matter,—"It is very seldom that tugs give a jerk. The jerk in this case was a source of danger, because of the risk of carrying anything away."

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[1] Merchant Shipping Act, 1854, sec. 460; Merchant Shipping Act Amendment Act, 1862, sec. 49.

[2] The "Minnehaha," 1861, 1 Lushington's Reps. 335.

[3] *Authority cited.*—S.s. "Vulcan" v. s.s. "Berlin," July 6, 1882, 9 R. 1057.

The rest of the evidence supports what is said by the master and the engineer, and that being so it appears to me to be proved that the services of the tug were of a very different kind from ordinary towage services. If they were towage services, they were of a very special kind—and as I have said they are proved to have been attended with very considerable risk to the tug, and to her crew, and appliances. For such services it appears to me that ordinary towage service rates are quite inadequate. I do not think that the Lord Ordinary has awarded too much, or that the rate allowed by him is more than proper remuneration.

As to the expenses of the action, that is a point on which I attach great importance to the view of the Lord Ordinary. I do not say that he is final in the matter of granting a certificate, but still I think a great deal of deference is due to his opinion. In this case I see no reason for differing from his Lordship. No doubt there are no questions of law involved in the case, but there are very

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June 14, 1888.
Lawson v. Grangemouth Dockyard Co.

difficult questions of fact. For instance, there is the question whether the services are salvage or towage services. Although this is a case which might have been tried before the Sheriff, it is certainly not a case which could have been tried before two Justices under the Act of 1854. The Act of 1862 does not alter the kind of case in which the Court may be called upon to issue a certificate, and I see no reason for interfering with the Lord Ordinary's discretion in the matter.

LORD MURE concurred.

LORD SHAND.—If it were necessary in order to sustain the Lord Ordinary's judgment as to the amount to be awarded to the pursuer to deal with the question of the nature of the services rendered, I am not prepared to say that I should not have held the services in this case to be salvage services. There is a great deal which would incline me to that result. In the first place, those who asked the assistance thought the services were salvage services. In the second place, the tug was asked to give her assistance by parties who thought there was risk and danger, and I do not think she would have left the vessel she was towing unless she had been so called. In the third place, the vessel was fast in the bank for one-sixth of her length,—no doubt it was a bank of mud,—but there were also tons of stones forming the embankment, and there was, I am disposed to think, a risk of the vessel heeling over and of the stones going through her side; and these considerations all rather tend to the inference that the case was one of salvage,—though the payment to be made might not in the circumstances be large.

But taking the case as one of special service short of salvage, I think the sum which the Lord Ordinary has awarded is moderate and reasonable.

The tug was herself in some danger from having to take the vessel off by jerks. Her hawser, which was valued at £24, was rendered useless. She lost her hire. She lost two days' work in the harbour. These were, I think, material incidents in the giving of the service she did which cannot, I think, be taken to be mere ordinary towage service. I think an award of £50 is therefore quite a moderate amount.

The question of expenses is one of a delicate and difficult nature. A case has been cited to us where the Privy Council was of opinion that a certificate that the case was fit to be tried in a superior Court had been rightly given, and having regard to the specialties of this case and the legal considerations involved I am not prepared to say that it was not a fit case for a superior Court. Upon the whole matter I agree with the Lord Ordinary.

LORD ADAM.—If it were necessary to express an opinion whether the services rendered were salvage services or not, I think I should be inclined to say that they were not. The "Tabasqueno" was not in danger; it might have been different if there had been a change of weather. But, at the same time, I think it is not a case of ordinary towage services. The risk which the tug ran is material, for she went on shore or touched the ground and was disabled for work for two days. In that view, I think the sum which has been awarded is not too large.

With reference to the question of expenses, I might possibly have come to a different conclusion from the Lord Ordinary. But I might have been wrong.

THE COURT adhered.

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 138.

June 16, 1888.
Farquharson v. Sutherlands.

WILLIAM FARQUHARSON AND ANOTHER, Appellants.—*Low.*
ALEXANDER SUTHERLAND AND ANOTHER, Respondents.—
Sir Charles Pearson.

Bankruptcy—Election of Trustee—Appeal—Competency—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 71.—At a meeting of creditors for the election of a trustee in a sequestration, creditors to the value of £15,000 voted for A and creditors to the value of £1600 voted for B. Objections were taken by creditors to certain votes for A.

The Sheriff-substitute sustained an objection to the vote of X, a creditor for £16, who had proposed A, and, on the ground that A had been proposed by a creditor who was not entitled to vote, declared B to have been duly elected.

An appeal by A to the Court of Session was objected to on the ground that by sec. 71 of the Bankruptcy Act the Sheriff's judgment was final.

Held that the appeal was competent, and that the interlocutor must be recalled, on the ground that the Sheriff had exceeded his jurisdiction—the Lord President holding that the Sheriff had exceeded his jurisdiction in failing to ascertain the number of valid votes for each candidate—Lord Shand holding that the Sheriff's jurisdiction was limited to disposing of objections stated to him—Lord Adam concurring on both grounds.

1st DIVISION.
Sheriff of Caithness, Orkney, and Shetland.
M.

ON 24th March 1888 the estates of Eric Sinclair Mackay, fishcurer, Wick, were sequestrated by the Sheriff-substitute of Caithness (Harper), and a meeting appointed to take place at Wick on 6th April following for the election of a trustee and commissioners.

The minute of meeting of creditors held upon 6th April bore, *inter alia*, that John Campbell, a creditor, proposed William Farquharson, whom failing, George Sinclair, to be trustee, and that Alexander Sutherland, whom failing, Symon Flett Sutherland, was proposed by another of the creditors; that there voted for Farquharson three creditors whose claims amounted in value to £15,856, 18s. 9½d., and for Alexander Sutherland a number of creditors with claims amounting to £1641, 0s. 5d.

Among objections to the votes tendered in support of Farquharson was this objection to the vote of John Campbell, a creditor for £16, 8s. 2½d.,—"The oath does not bear to have been taken in presence of a Magistrate or Justice of the Peace, as the name of the Justice of the Peace is omitted, and his vote is therefore null."

On 16th April following the Sheriff-substitute (Harper), pronounced this interlocutor:—"The Sheriff-substitute . . . for the reasons stated in the subjoined note, hereby declares the said Alexander Sutherland and the said Symon Flett Sutherland to have been duly elected trustee and trustee in succession on the sequestrated estates of the said Eric Sinclair Mackay, in terms of the Bankruptcy Statutes. . . ."*

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* "NOTE.—The Sheriff-substitute sustains the objection to the oath of John Campbell, viz., that it does not bear to have been taken before a Magistrate or Justice of the Peace.† The words of the Act of 1856 are very explicit (section 22), that the oath must be taken before a Judge Ordinary, Magistrate, or Justice of the Peace; but in the present case, although the oath bears to be signed by a Justice of the Peace, it is not said, and it does not appear, that it was taken before him.

"This seems to be enough for the case without dealing with any of the other

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† The affidavit bore,—"At Wick, the 6th day of April 1888 years,—In presence of one of Her Majesty's Justices of the Peace for the county of Caithness,—Compeared John Campbell, merchant, 74 Kinnaird Street, Pulteneytown, who being solemnly sworn and interrogated, depones,— . . . . All which is truth, as the deponent shall answer to God.

"JOHN CAMPBELL.
"CHARLES BRUCE, J.P."

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Farquharson appealed to the First Division of the Court of Session.

The Sutherlands objected to the appeal as incompetent, and argued;—The appeal was wholly incompetent, and was excluded under the 71st section of the Bankruptcy Act, 1856.[1] The sections in the Small-Debt Act, 1837, excluding review (secs. 30 and 31), were in point. [The LORD PRESIDENT referred to the case of *Graham* v. *Mackay*, Feb. 25, 1845, 7 D. 515, 6 Bell's Apps. 214.] On the merits, it was admitted that under section 70 of the Bankruptcy Act, 1856, the Court were entitled to look at the Sheriff-substitute's grounds of judgment as stated in his note—and that it could not be excluded. The Sheriff-substitute was right in sustaining the objection to Campbell's affidavit. The Court would always very narrowly scrutinise such a document, because it inferred the pains of perjury.[2]

Argued for Farquharson;—In pronouncing the interlocutor appealed against the Sheriff had exceeded his jurisdiction in giving effect to an objection which he had himself been the first to state, and which was in itself bad,[3] viz., that no one could be elected a trustee who had not been formally nominated by a creditor. If he had not committed this error he would have proceeded under the 101st section to elect the person who had "the majority in value of those present and entitled to vote." It was also to be observed that he had not considered the other objections which were lodged on both sides; that made his deliverance only the worse. It was not review of the interlocutor which was sought,[4] for in what he had done the Sheriff had not been acting in the exercise of his statutory jurisdiction. The case of *Foulis* was a very narrow one; it was review that was sought there, and the Lord President had in his opinion in that case specially saved a case like the present.

LORD PRESIDENT.—In considering the question of the competency of this appeal, I think we are entitled to look at the whole proceedings in the case; but at the same time it appears to me that there is enough in the face of the Sheriff-substitute's interlocutor to lead me to the conclusion that it cannot stand. It declares certain persons to have been duly elected trustee and trustee in succession, "for the reasons stated in the subjoined note." These reasons are so stated in conformity with the provision of the statute, and accordingly we are entitled to look at the note to see what the grounds of judgment were. We find that the Sheriff-substitute having expressed an opinion that Mr John Campbell's affidavit was bad, goes on as follows:—"This seems to be enough for the case without dealing with any of the other objections, because the appointment of Mr Farquharson, whom failing, George Sinclair, as trustee, was proposed by the said John Campbell, who, if he was not entitled to vote, was not entitled to propose."

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objections, because the appointment of Mr Farquharson, whom failing, George Sinclair, as trustee, was proposed by the said John Campbell, who, if he was not entitled to vote, was not entitled to propose. It follows, therefore, that the other persons proposed for the trusteeship, viz., Alexander Sutherland, S.S.C., whom failing, Symon Flett Sutherland, there being no objections to the votes of their supporters, and the meeting having declared itself satisfied with the sufficiency of the cautioners offered, fall to be declared elected."

[1] Foulis v. Downie, Oct. 27, 1871, 10 Macph. 20, 44 Scot. Jur. 22; Buchan v. Bowes, June 13, 1863, 1 Macph. 922; Rankine v. Douglas, July 19, 1871, 9 Macph. 1053.

[2] Hall v. Colquhoun, June 22, 1870, 8 Macph. 891.

[3] Bowes v. Buchan, 1 Macph. 922 (Lord Kinloch's opinion, p. 923).

[4] Dick v. North of Scotland Railway Co., Oct. 8, 1860, 33 Scot. Jur. 2, 3 Irvine, 616.

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The Sheriff-substitute's opinion obviously is that no one can be elected trustee who has not been formally nominated by a creditor, and in that opinion I think he is entirely wrong. No one has attempted to maintain that he is right. It is for him to decide who has the majority in value of the votes of the creditors, and thereupon to declare him elected; but instead of ascertaining that, he has declined to do so, and has said that because this person, against whom he has decided, was not nominated, therefore he cannot be declared elected. In doing so, he has gone outside of the statute. It was the Sheriff's duty simply to examine the votes and objections, and to determine, after a scrutiny, who had the majority of votes. He has declined to exercise that function, and he has thereby exceeded his jurisdiction, because that is just as much an excess of jurisdiction as if he had gone beyond his territorial limits. He has refused to exercise the statutory jurisdiction which is imposed upon him.

I think we must recall the Sheriff-substitute's interlocutor, and remit to him to proceed.

LORD SHAND.—I reach the same conclusion as your Lordship, but upon a separate ground. I think the Sheriff-substitute in the course he took has gone out of the statute. If the Sheriff in dealing with a question of this kind keeps within the provisions of the statute, this Court has no jurisdiction to review his judgment, which is final. But in the present case it is different.

The 69th section of the Bankruptcy Act, 1856, carefully provides that,—"If there be competition, or objections to the candidate or candidates, such objections to the votes or candidates shall be stated at the meeting, and the Sheriff may either forthwith decide thereon, or make avizandum, and he shall, if necessary, make a short note of the objections and of the answers, on which he shall . . . hear parties *viva voce*, and declare the person or persons trustee or trustees in succession whom he shall find to have been duly elected." There is thus a statutory provision for a note of objections, and prescribing the course which the Sheriff is to take in regard to the objections stated. If we proceed to section 70, which provides for the case when the Sheriff is not present at the meeting of creditors, we find that "if there be competition or objection the parties shall . . . lodge in the hands of the Sheriff-clerk short notes of objections, and the Sheriff shall forthwith hear parties thereon *viva voce*, and give his decision, and state the grounds thereof in a note, which note, as well as such short notes, shall form part of the process." These provisions in the two sections of the statute prescribing that objections shall be given in and noted in writing, and thereafter dealt with by the Sheriff, seem to have been made with the view of fixing the parties down to the objections stated only, and of preserving a record which will shew how these objections were disposed of. If the Sheriff has dealt only with objections stated by the parties, then he is within the statute, if not, then he is without it.

In this case the Sheriff-substitute, in the first place, sustained an objection made by the Messrs Sutherland to one of the votes in favour of William Farquharson, viz., that of John Campbell who proposed him, but he has not gone on to consider the objections which were stated to the validity of the other votes given on behalf of Farquharson—votes which, if good, would secure his election to the office of trustee. The objection which has been sustained was confined to one particular debt. The Sheriff-substitute, in place of taking up the objections stated to the votes of the other creditors, has sustained an objection not

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stated to any of them, and has held their votes to be bad. If an objection had been stated by the Messrs Sutherland to the effect that all these votes were bad and ineffectual because they were tendered on behalf of a person who had not been duly proposed by a person entitled to vote, that would have been very different. His decision would have been bad in law, but would have been final. But there was no such objection stated—and none of that class. The Sheriff-substitute has gone beyond the objections. He has sustained an objection which was not stated.

It appears to me that the statute authorises the Sheriff to deal only with objections which are stated, and that, in taking up and sustaining an objection not stated in this case, he has gone beyond the statute. I am not prepared to say that he has refused to exercise his jurisdiction, although he has decided most erroneously that he was not called upon to inquire into the objections which were stated, and thereupon to sustain or disallow the votes. I do not think he has gone outside of the statute, except in so far as he has dealt with and given effect to an objection which was not put forward by the parties themselves.

LORD ADAM.—I also think the Sheriff-substitute has gone outwith the statute. I agree that we may look at all the proceedings in the case. The only objection which was laid before us to the votes which were given in support of the appellant was an objection to Campbell's. That was the only objection which was sustained, and we are entitled to assume in these proceedings that all the other votes were unexceptionable and good in themselves. If the Sheriff-substitute had done his duty, and had examined the other votes which were objected to as invalid, of course we cannot say what the result would have been. After considering these votes he should have proceeded under the 101st section to ascertain who had the majority in value of the good votes, and to have declared him trustee, this being a mere matter of arithmetic. But he went outside of the statute and declared that a person who had not a majority of the good votes was elected trustee. It is said that there is another ground upon which we may proceed, viz., that the Sheriff-substitute started an objection at his own instance and has given effect to it. I agree upon this point also, as the objection could only be dealt with if stated by the parties.

LORD MURE was absent.

THE COURT sustained the appeal, recalled the deliverance of the Sheriff-substitute, and remitted to him to proceed.

ALEXANDER MORISON, S.S.C.—JAMES PURVES, S.S.C.—Agents.

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June 19, 1888.
Marshall's Trustee v. Macneill & Co.

JOHN GOURLAY (Marshall's Trustee), Pursuer (Reclaimer).—
Sir Charles Pearson—Younger.
DUNCAN MACNEILL & COMPANY, Defenders (Respondents).—
D.-F. Mackintosh—Murray.

Personal or real—Ground-annual—Obligation to build within a certain period—Liability of singular successor.—A, a vassal under a feu-contract, conveyed part of his feu by contract of ground-annual to B, with and under the burdens and conditions contained in the feu-contract, and further under an obligation to erect certain buildings on the ground within one year from the term of entry, in order to secure payment of the ground-annual and of the share of the feu-duty, &c. which had been allocated upon the ground disponed, and to maintain the buildings in good order and repair in all time. B bound himself and "his heirs, executors, and representatives whomsoever, and his assignees," to perform these

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conditions, and they were declared to be real burdens upon the subjects disponed, and appointed to be recorded in the Register of Sasines. B subsequently disponed the subjects to C, and six years after the date of the contract of ground-annual C disponed them to D, the disposition being in each case "with and under the real liens and burdens, conditions, provisions, and others specified and contained in said contract of ground-annual."

The trustee upon A's sequestrated estate having raised an action against D, to have it found that he was bound to implement the obligations in the feu-contract, and the obligation in the contract of ground-annual, as to the erection and subsequent maintenance of buildings, *held* (1) that as the pursuer was not a party to the feu-contract he had no title to sue upon it; and (2) that in so far as the contract of ground-annual was concerned it imposed no personal obligation to erect buildings which was enforceable against a singular successor in the lands, and defender therefore assoilzied.

Question, whether the obligation to erect buildings contained in the contract of ground-annual could be made effectual as a real burden.

Right in security—Ex facie absolute disposition—Back-bond—Reconveyance.—After an action had been raised against a person infeft in certain subjects on an *ex facie* absolute disposition, concluding for implement of certain obligations alleged to be contained in his title, he recorded a back-bond and executed a reconveyance of the subjects to his debtor and obtained decree in absence ordaining him to register it.

Question, whether the recording of the back-bond and the registration of the reconveyance operated a divestiture of the feudal title as in a question with the pursuer.

Opinion (*per* Lord Kinnear), that it did. On a reclaiming note opinions *reserved*.

1st Division.
Lord Kinnear.
B.

JAMES and THOMAS MARSHALL of the Ibrox Flour Mills, Glasgow, were in right (1) of certain subjects, being a portion of ground consisting of 3927 square yards or thereby, originally feued by Hinshelwood's trustees to William Simm, under feu-contract, dated in 1876; and (2) of certain other subjects, being a portion of ground consisting of 887 square yards or thereby, feued to them by the Commissioners of Police of Govan under feu-contract, dated in 1879. The feu-contracts contained no obligation on the vassals to erect buildings.

By contract of ground-annual, dated 5th and 13th May, and recorded 21st June 1879, entered into between the Marshalls, of the first part, and John Inglis Bruce and James Walker Bruce, drysalters in Glasgow, trading under the firm of Bruce Brothers & Company, of the second part, the first party sold and disponed to the second party the two sets of subjects above mentioned. The deed contained the following provisions:—"But the subjects first above disponed are so disponed always with and under, in so far as applicable and still subsisting, the real liens and burdens, servitudes, reservations, conditions, restrictions, prohibitions, declarations, obligations, and others specified and contained in the foresaid feu-contract between the said . . . trustees of the said deceased John Hinshelwood, and the said William Simm, dated and recorded as aforesaid: Declaring that the proportion of the original feu-duty of £305, 18s. 3d. effeiring to the subjects first hereby disponed is £147, 5s. 10d., which with the sum of £14, 14s. 7d. of augmentation, in terms of the said feu-contract, amounting together to the sum of £162, 0s. 5d., is the amount hereby allocated on the said subjects first hereby disponed of said original feu-duty; which proportion of feu-duty, &c., . . . the second party and their foresaids shall be bound, as they hereby bind themselves and their foresaids, to pay, and so free and relieve the first party and the remaining subjects belonging to them in all time coming, from and after the term of entry after mentioned; and the subjects second above disponed are so disponed always with and under the burden of the

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feu-duty, and whole other burdens, conditions, provisions, declarations, and others specified and contained in a feu-contract entered into between" the Clerk to the Police Commissioners of Govan "and the first party, dated . . . all in the year 1879; and further, the subjects above disponed are so disponed always with and under the further real liens and burdens, conditions, provisions, and others after specified, viz.:—(First) With and under the real lien and burden of the payment by the second party and their successors to the said James Marshall and Thomas Alexander Marshall, and their heirs and assignees whomsoever, of a yearly ground-rent or ground-annual of £106, 5s. 6d. sterling . . . to be paid to and uplifted and taken by them and their foresaids furth of and from the portions of ground above disponed, and houses and buildings erected and to be erected thereon, or furth of any part or portion thereof, and readiest rents, maills, and duties of the same . . . (Second) Over and above the obligations already existing as to the erection of buildings on said ground hereby disponed, the second party and their foresaids shall be bound and obliged, as they hereby bind and oblige themselves and them, within one year from and after the term of entry after mentioned, to erect and build on the said ground hereby disponed buildings which shall be of a substantial description, and built of stone or brick and lime, and covered with slates, sufficient to yield a yearly rent equal to at least double the amount of the said ground-annual hereby created, and the foresaid proportions of feu-duty, augmentations, and others, and to maintain and uphold the said buildings in such good order and repair as will make them yield the said rent in all time thereafter . . . which yearly ground-rent or ground-annual of £106, 5s. 6d., duplication thereof, interest and consequents, and whole conditions, declarations, obligations, and others before written, are hereby created real liens and burdens in favour of the first party and their foresaids, upon and affecting the said portions of ground before disponed, and houses and buildings erected and to be erected thereon, and are hereby appointed to be recorded in the Register of Sasines as part of these presents, or inserted in any notarial instrument to follow hereon, and to be inserted or validly referred to in all future conveyances or investitures of the said portions of ground, or any part thereof, otherwise the same shall, in the option of the first party and their foresaids, be void and null, and the said subjects and others, and whole buildings thereon, shall revert and belong to the first party and their foresaids . . . For which causes, and on the other part, the said John Inglis Bruce and James Walker Bruce hereby bind and oblige themselves, their heirs, executors, and representatives whomsoever, and the stock and effects of their said firm, and their assignees, all jointly and severally, and without the necessity of discussing them in their order, to pay to the said James Marshall and Thomas Alexander Marshall, their heirs and assignees whomsoever, the foresaid yearly ground-rent or ground-annual of £106, 5s. 6d. sterling, and duplication thereof, and these at the terms and with interest and penalty all as before written, and also to fulfil and perform all the other obligations incumbent on them and their foresaids under these presents . . ."

By disposition, dated in August 1882, the Messrs Bruce conveyed to John Inglis Bruce, one of themselves, the subjects in question under the burdens, conditions, and others contained in the contract of ground-annual and feu-contracts above mentioned. In September following John Inglis Bruce conveyed the same subjects to the firm of Duncan Macneill & Company and the individual partners thereof,—"always with and under the real liens and burdens, conditions, provisions, and others specified and contained in said contract of ground-annual, dated and recorded as aforesaid."

The estates of James and Thomas Marshall were sequestrated on 14th February 1887, and Mr John Gourlay, C.A., Glasgow, was appointed trustee.

The trustee, on 25th May 1887, brought an action against Duncan Macneill & Company to have them ordained to implement obligations lying on the vassals under the two feu-contracts, and to implement an obligation in the contract of ground-annual to erect upon the two lots of ground above described buildings of the nature, class, and value specified and sufficient to yield double the amount of the ground-annual and other payments therein set forth,—being a yearly sum of £536, 11s. 10d.,—and to maintain and uphold the buildings in such good order and repair as would make them yield the rent in all time thereafter. There was an alternative conclusion for damages.

The pursuer stated that the year within which the second party to the contract of ground-annual was taken bound to erect the buildings stipulated for expired on 15th May 1880, and that the whole structural value of the buildings which had been erected did not amount to more than £75 a-year. He further averred:—"The said two portions of ground are at present in the possession of the said defenders. By the titles condescended on, the said stipulations as to building were made conditions of the right to the subjects, and the defenders are under an effectual personal obligation to implement those stipulations. The defenders have been called upon to complete the obligations to erect buildings contained in said contract of ground-annual and two feu-contracts, but they refuse or at least delay to do so, and the present action has thus been rendered necessary."

The defenders denied that implement had not been made of the obligations contained in the contract of ground-annual,—and further founded on the fact that the feu-contracts contained no obligation to erect buildings. They further explained that the disposition under which they held, although *ex facie* absolute, was merely in security, being qualified by a back-letter granted by them in favour of Mr John Inglis Bruce, dated 11th September 1882, and recorded 1st June 1887; and that they had further on 27th July 1887 executed a disposition and reconveyance of the subjects in Bruce's favour, and obtained a decree in absence against him on 21st September 1887 ordaining him to accept and record it.

The pursuer pleaded;—(1) The defenders being bound conjunctly and severally to implement and fulfil, in so far as has not already been done, the obligations to erect and maintain buildings imposed upon the second party, and their assignees and disponees, under said contract of ground-annual, and upon the respective second parties, and their assignees and disponees, to said two feu-contracts, in so far as relating to the subjects conveyed by said contract of ground-annual, and the said obligations being conditions of their right to the ground, and being binding on the defenders, decree should be pronounced in terms of the first conclusion of the summons, with expenses.

The defenders pleaded, *inter alia*;—(1) The statements of the pursuer are irrelevant, and insufficient in law to support the conclusions of the summons. (2) No title to sue, in respect that the pursuer has no title to enforce the conditions contained in the feu-contracts. (3) The defenders are not personally bound by any of the stipulations in the contract of ground-annual.

The Lord Ordinary (Kinnear), on 29th October 1887, assoilzied the defenders from the conclusions of the summons.*

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* "OPINION.—The pursuer avers that, as trustee on the sequestrated estate of Messrs James and Thomas Marshall, he is in right of a ground-annual pay-

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The pursuer reclaimed, and argued;—(1) The first answer that the defenders made was that the obligation to build did not transmit against singular successors like the defenders. It was not now contended that the pursuer had a title to enforce the conditions of the feu-contract—but it was different in regard to the ground-annual. The obligation to build therein contained was of the nature of a personal obligation, which transmitted against singular successors. The case of *Gardyne*,[1] which had been referred to on the other side, was said to be in point, but that was a case in which it was sought to enforce an obligation to pay money, and, besides, it

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able out of the lands described in the summons, and of certain obligations to build imposed by the contract of ground-annual upon the owners of the ground; and in the exercise of these rights he brings this action against the defenders, as the present owners of the ground, to have them compelled to perform the various obligations to build contained in the contract of ground-annual, and in certain feu-contracts under which the defenders are said to hold.

"The pursuer is no party to the feu-contracts, and has plainly no title to sue upon them, either as trustee in the sequestration or in any other character, and the only question therefore is, whether he is entitled to enforce the obligations of the contract of ground-annual against the defenders.

"But the defenders are not parties to that contract. They are the disponees of one of the parties who was proprietor of the ground when the contract was executed, and it is well settled law, since the judgment of the House of Lords in *Gardyne* v. *The Royal Bank*,[1] that the personal obligations contained in a contract of ground-annual do not transmit against singular successors in the land. It is said that although they do not necessarily transmit with the land, they are yet transmissible, like other obligations, by express stipulation; and that the defenders must be held to have undertaken the obligations in question, because they have accepted a conveyance 'with and under the real liens and burdens, conditions, provisions, and others contained in the said contract of ground-annual.' But these words do not import a personal obligation in favour of the creditor in the ground-annual; and it is admitted that there is nothing else in the deed that can be construed into such an obligation. It is unnecessary to inquire whether the condition as to building could be made effectual as a real burden, because a real burden does not carry with it any personal obligations. Again, it is said that the obligation to build is a condition of the tenure. But if it be, the pursuer, who is not the superior, and has no title of any kind to the land, has no concern with the conditions of the tenure.

"The principles on which the question must be determined are very clearly explained in the judgments of the Lord President and Lord Deas in the *Marquis of Tweeddale* v. *Lord Haddington* (7 Rettie, 625), and their application to the present case does not appear to me to be doubtful.

"Assuming, therefore, that the defenders were to be treated as proprietors for the purposes of the present case, they could not, in my opinion, be compelled to perform the obligation to build undertaken by their author. But the other ground on which they claim to be assoilzied appears to me to be equally well founded. Although their title is *ex facie* absolute, they are in reality mere heritable creditors, the disposition in their favour being qualified by a back-letter which they have recorded in the Register of Sasines. It may be that the registration of the back-letter does not operate a complete divestiture of the feudal title. But it is at least a publication of the true nature of their right; and since the record was closed they have executed a reconveyance and obtained a decree in absence against their debtor ordaining him to accept and record it. They have thus taken the step which the majority of the Judges in *Gardyne* v. *The Royal Bank* thought would be necessary and sufficient to extinguish the title, the registration of the back-bond being sufficient in the opinion of the minority."

[1] Gardyne v. Royal Bank of Scotland, March 8, 1851, 13 D. 912, rev. H. L. May 13, 1853, 1 Macq. 358.

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involved a *de futuro* liability. The obligation here was of a different nature; it was an obligation *ad factum præstandum*, and could only be performed by one who had a right to be upon the land. Further, it could not have been assumed here by a singular successor, as had been held to be an important feature in some previous cases,[1] that the obligation had been performed. It was quite plain to everyone that it had not. The case of *Coutts*[2] was in point. It dealt with a personal obligation which was held to be binding on the defender, who was a singular successor in the lands. Another condition which had been commented upon as awanting in some of the previous cases was satisfied here—for there was an express clause in the conveyance under which the defenders held transmitting the obligation. *Clark's* case[3] was also in point. There the obligation, which was held to be good against a singular successor of the original vassal, was a matter of contract rather than a real burden, and it made no difference that it was a case of superior and vassal. (2) Assuming the reclaimer was in the right so far, did it make any difference that the defenders were merely security-holders? It was to be observed that the back-letter had not been recorded until after the raising of the summons, and so *ex facie* the defenders were owners of the subjects, and the action was rightly directed against them.[4] Besides, the reconveyance, which was the important fact in the consideration of this point, was not made until after the closing of the record. The existence of the back-bond, even though it was recorded, made therefore no difference in the position of the defenders,[5] and could not relieve them of liability. The reconveyance was opposed to the maxim *pendente lite nihil innovandum.* Besides, it was without consideration, and that being so, it could not be taken into account in a question like the present.[6]

Argued for the respondents;—(1) The case depended upon the construction of the contract of ground-annual. The obligation upon the Bruces, "their heirs, executors, and representatives whomsoever, and their assignees," referred to assignees before infeftment, and did not include singular successors. There being no express contract transmitting the obligation against a singular successor, the liability, if enforceable, must depend upon the doctrine of privity of estate. There was that privity between superior and vassal, but not between seller and purchaser.[6] The case was ruled by that of *Gardyne.*[7] It was sought to distinguish that case on the ground that the obligation there was a pecuniary one, while here it was said to be an obligation *ad factum præstandum*, and not of a continuous nature. But if there was a distinction the present case seemed to be the less favourable, because the more important part of it,—viz., the building as opposed to the maintenance—fell to be performed at once. Besides, the obligation to build had been

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[1] Magistrates of Edinburgh v. Begg, Dec. 20, 1883, 11 R. 352.

[2] Tailors of Aberdeen v. Coutts, Dec. 20, 1834, 13 S. 226, H. L. 1 Rob. Apps. 296.

[3] Clark v. City of Glasgow Life Assurance Co., June 20, 1850, 12 D. 1047, rev. H. L. 1 Macq. 668; *cf.* also Marquis of Tweeddale's Trustees v. Earl of Haddington, Feb. 25, 1880, 7 R. 620.

[4] *Cf.* Liquidators of City of Glasgow Bank v. Nicholson's Trustees, March 3, 1882, 9 R. 689; Stewart v. Brown, Nov. 22, 1882, 10 R. 192.

[5] Scottish Heritable Security Co. v. Allan, Campbell, & Co., Jan. 14, 1876, 3 R. 333 (Lord President, p. 340).

[6] Gardyne v. Royal Bank, 13 D. 912 (Lords Cockburn, Robertson, and Mackenzie).

[7] Gardyne v. Royal Bank, March 8, 1851, 13 D. 912, rev. H. L. May 13, 1853, 1 Macq. 358.

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undertaken in 1879; it was prestable in 1880, and ought to have been performed two years before the defenders had to do with the property. Such an obligation was not a condition of the tenure. *Gardyne's* case had established that, and the cases of *Coutts* and *Lord Tweeddale* were not opposed to it. In *Coutts'* case the Judges held that it was of no consequence whether the personal conclusions were well-founded or not, as there was no insolvency on the part of the estate, and the obligations were pecuniary. If *Coutts'* case decided that an obligation of the kind could be enforced against singular successors by a personal action, it had been overruled by *Gardyne's* case. As to *Lord Tweeddale's* case, the obligations there were continuous and recurring, having a tract of future time, and the case had been always considered, and had been decided, as a case of superior and vassal, so that there was no semblance of authority which could interfere with that of *Gardyne's* case, and nothing to shew that an obligation *ad factum præstandum* differed from an ordinary pecuniary obligation. (2) But assuming that the first ground of defence failed, the obligation, if good against singular successors generally, could not affect the defenders, who were mere security-holders. The obligation did not come into force during their possession, and did not specially affect it. It was therefore in the same category as arrears of feu-duty, which could not be recovered after the person liable had parted with the subjects. Perhaps *Gardyne's* case was an authority to the effect that the mere registration of the back-letter would not have operated a release. But there had also been a reconveyance. The Lord Ordinary's judgment had no doubt been pronounced before the recording of the reconveyance, but this was one of the cases in which *quod fieri debet infectum valet.* Besides, if the recording took place before judgment was pronounced by the Inner-House, that was sufficient. It was said that *pendente lite nihil innovandum,* but that did not operate to make intransmissible what was otherwise transmissible. No demand made could alter the character of the obligation.

At advising,—

Lord President.—The reclaimer brings this action in the character of trustee upon the sequestrated estate of two persons named Marshall, and that is his sole title to sue. The Marshalls were in right of two feu-contracts—one of which was granted by Hinshelwood's trustees in 1876, and the other by the Commissioners of Police of Govan in 1879. The Marshalls, being the vassals, entered into a contract with two persons named Bruce, by which they conveyed to them the subjects contained in the two feu-contracts. These gentlemen in turn conveyed them to one of themselves, and he again conveyed them to the defenders. The defenders accordingly are singular successors of the Marshalls in the properties which were originally feued out as I have explained.

One purpose of the action is to enforce certain obligations contained in the original feu-contracts against the defenders as singular successors in the feus. I agree in the opinion of the Lord Ordinary that the pursuer not being a party to the feu-contracts in question, cannot sue as in right of the superior, and so far accordingly has no right to insist in the conclusions of the summons.

But the pursuer also seeks to enforce a certain obligation contained in the contract of ground-annual by which the Bruces acquired the property from the Marshalls; and the question is whether he can enforce the obligation in question against the defenders personally as singular successors in the subjects.

The obligation particularly in question is an obligation to build which is contained in the contract of ground-annual, and is there made a real burden upon the land. But there is no personal obligation to build to be found in the deed; the obligation is merely constituted a real burden. The only personal obligation to be found there is to pay the ground-annual, which is undertaken by the disponees, and "their heirs and assignees whomsoever," by which last expression I understand is meant assignees before infeftment, for according to my reading of the deed it is impossible to understand it in any other sense. I suppose it will not be contended that that personal obligation will transmit against singular successors. Indeed it has been authoritatively decided the other way. The question here is whether an obligation to build can be enforced as if it were a personal obligation. I should think there can be only one answer to that question, and I have heard no argument to convince me that the Lord Ordinary's view is unsound. An obligation to build is one of a peculiar kind, and if the question were to arise whether such an obligation can be made a real burden, I think it would require a good deal of consideration. The obligation in the contract of ground-annual was to erect certain buildings within a year from the date of entry, and I do not think there is any case in which it has been decided that such an obligation can be the subject of a real burden. But it is not necessary to enter upon that question here, because it is not proposed in this action to attach the land. The action is directed against the defenders personally. It is not a case between superior and vassal, nor is there any question either of tenure or of condition of title. It is a question between a seller and purchaser under a contract by which a seller has conveyed to a purchaser. I entirely agree with the Lord Ordinary, and I have never been able to see what objections could be stated to the views to which he has given effect in his interlocutor.

Lord Shand.—I am entirely of the same opinion, and think that the interlocutor of the Lord Ordinary should be adhered to.

The action in the first and second conclusions seeks a decree, as your Lordship has already pointed out, at the instance of the pursuer, as in right of a ground-annual, to compel payment of feu-duties which are due to the superior; but the pursuer's counsel in opening the case explained that he did not maintain the pursuer's right to enforce any such liability. He did not present any argument in support of these conclusions, and for the reason explained by your Lordship, I am not surprised that the view of the pursuer that he had a right to compel payment of the feu-duties has been abandoned.

Farther, I understand it was not maintained that the pursuer could enforce any demand for payment of the ground-annuals themselves, or that there was any personal obligation existing upon the defenders to pay these ground-annuals. The defenders were no parties to the original contract of ground-annual, but have only been in right of the property for a time under a conveyance in their favour by the disponees under the contract of ground-annual.

But then it is said, nevertheless, that although there is no liability to pay the ground-annuals stipulated, there is a personal liability to fulfil an obligation to build, because that is a condition of the tenures. It strikes me at the outset of this question that it would be a very remarkable result that a person in possession of the ground on a title of property, though under no obligation to pay the ground-annuals themselves, should nevertheless be bound to fulfil an obligation the object of which is to secure payment of the ground-annuals. I should feel very great difficulty in sustaining such a claim, and could certainly

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not do so unless it were made absolutely clear that such an obligation had been undertaken. But it seems to me on the contrary to be very clear that the question which is now presented for decision has been already expressly decided by the case of *Gardyne*, which has been the ruling case in regard to obligations for payment of ground-annuals since the decision was pronounced.

The argument for the pursuer seems to me to fail, for this reason, that the pursuer's relation to the lands is not such as to give him any right to enforce the erection of buildings on the ground, excepting against the original disponees under the contract of ground-annual and their heirs and representatives. The right to the lands in the person of the trustee on this sequestrated estate, as representing the bankrupts who had parted with the property, is of quite a limited nature. He is a mere security-holder. The bankrupts, no doubt, by the contract of ground-annual, created certain real burdens, and I shall assume that the obligation to build now in question has been made an effectual real burden on the lands. But the right to a real burden only gives the creditor right to use diligence against the land itself, and not a right to sue as upon a personal obligation of the proprietor arising out of his right of ownership. Now I think the result of *Gardyne's* case is really this, that a security-holder in such a position as the pursuer (or his predecessors, the bankrupts) has no such right in the lands as can enable him either to create or enforce what are called conditions of the tenure. When the Marshalls conveyed the lands to the Messrs Bruce what was left in the Marshalls (besides the personal obligation of the disponees) was simply a security right, and a security right of the nature of a real burden, which came to depend entirely on the infeftment which was taken on the disponees' title. I need not say that any person holding such a security, even though in right of a real burden, is in a totally different position from a superior with a continuing relation towards his vassal. Superior and vassal, changing as their several properties change hands, yet continue in direct relations towards each other; and conditions that are in their titles may be enforced by the superior or by the vassal in consequence of their respective proprietary rights in the lands and the continuing relation between them. Such a case as this, where the pursuer, the holder of the ground-annual, has really parted with his direct proprietary right to the lands and become a security-holder only, is in quite a different category from the case of *Tweeddale*, which has been much referred to, for that case was treated as a case of superior and vassal, or at least of superior and subvassal. Again, this case differs also from the cases in which questions have arisen between conterminous feuars deriving their rights from a common superior. There the Court has held as to certain conditions inserted in all the titles for the common advantage that one feuar or vassal may in certain circumstances enforce obligations contained in particular deeds to which he is not directly a party. The right there, I think, arises because the parties have each a direct proprietary right in lands, and also a direct interest, it may be, under a feuing-plan, or special arrangements for feuing, which have been embodied as conditions in different feu-contracts. But the right and interest of the parties is very different from that of one having a title as a security-holder only. The case of *Coutts* v. *The Tailors of Aberdeen*, it seems to me, in so far as it was decided on the ground of existing personal obligations, was regarded in the same light as a case of superior and vassal, or of conterminous vassals. The Tailors of Aberdeen had given off one of a number of different plots of ground, all under the same conditions for the common advantage of all the disponees as well as the disponers, and the rights maintained were those of the proprietors of part of the ground, who, though they had not the title of superiors as in feu-holdings, had still the same interest as a superior in such circumstances, and a right of property in part of the lands said to be affected with conditions for the common benefit. The same principle was held to apply as in the case of superior and vassal. In all these cases you have a direct proprietary interest in the property in the person seeking to enforce the obligation.

That the view I have stated is borne out by the case of *Gardyne*, may, I think, be shewn by reading two passages only from the decision. What the Lord Chancellor says is this,—"When Gardyne sold to Duff" (now Gardyne was the original seller and Duff the original purchaser), "what he acquired was a personal right against Duff and against Duff's representatives in all time for payment of the ground-annual; and further, a right against the land into whosesoever hands it might come. But he acquired no personal right against purchasers from Duff. It was not competent to Duff to give him any such right." That seems to me clearly to support the view that even Duff, who was the disponee, was not in a position to give to the holder of the ground-annual the right to enforce the personal obligation against a purchaser from him taking the property under a disposition granted by him. The matter is made still more clear in a subsequent passage in these terms,—"It is hardly necessary to remark that there is here no personal obligation whatever arising from the mere tenure of land independently of contract. In the case of superior and vassal, the vassal for the time being is personally liable for the feu-duties, just as in the case of landlord and tenant the tenant for the time being is personally bound to pay the rent; that is a liability resulting from principles of tenure. In both these cases the personal liability arises by reason of what in this country is called privity of estate. But that doctrine has no application to a case like the present, where there is no such relation subsisting." And so, as I read these passages, the judgment in the case of *Gardyne* was rested upon this, that a person disponing lands, and simply retaining right to a ground-annual out of the estate, which ground-annual he makes a real burden on the lands, has no such title to the lands as will enable him to enforce a personal obligation such as we have here, and cannot enforce even the personal obligation for payment of the ground-annual. It would, as I have also observed, be a most extraordinary result, that although he cannot enforce payment of the ground-annual he would still have a title to compel the proprietor taking the estate from his disponee to put up buildings to cover the ground-annual. The argument appears to me to be entirely excluded by the grounds of judgment in the case of *Gardyne*.

It was maintained by the reclaimer that if he could not make his right effectual under the original disposition by the Marshalls to the Bruces against any proprietor for the time, he can do so under the deed which Bruce granted to Messrs Macneill & Company. But the Lord Chancellor says in *Gardyne's* case that it was not competent to Duff, the disponee, to give the holder of the ground-annual the right claimed against a disponee from him, and, if this was not competent to Duff, so here it was not competent to Bruce to give the pursuer such a right as against his disponees, the defenders. I have read the disposition in the defenders' favour with care, and I do not find any terms in it which on a legitimate construction can be held as imposing or attempting to impose upon the defenders, the disponees, a personal obligation to erect buildings to secure payment of the ground-annuals. If any clause of the deed could be so read, the case of *Gardyne*

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is, I think, a clear authority for saying it would be ineffectual. The present pursuer, or the bankrupts whom he represents, was no party to the deed by the Bruces in favour of the defenders, and he can take no benefit from it. It is *res inter alios* so far as he is concerned, and confers no title by which he can enforce any obligation arising on that transaction and which does not arise under the original contract of ground-annual. And so I agree with your Lordship in holding that the case fails. If the argument were sound it must, as it appears to me, go the length of this, that the present pursuer is entitled to enforce payment of the feu-duties. The obligation to pay these is an inherent condition of the tenure, but the pursuer has no right or title to enforce it.

There was a second question discussed, as to whether there can be liability for an obligation to erect buildings against the defenders in any view now that they have reconveyed the lands to the original disponees. Even if this were held to be an inherent condition of the tenure enforceable by the pursuer as in right of the ground-annual, it rather appears to me that the obligation must go with the proprietorship for the time, and cease when the right of proprietorship is transferred to another. Upon that point, however, I give no final opinion, and I have only noticed it because it was the subject of much argument; and upon the whole I agree with your Lordship in thinking that we should adhere to the judgment of the Lord Ordinary.

Lord Adam.—I am also quite satisfied with the Lord Ordinary's judgment, and with the reasons assigned by his Lordship in support of it, and I would only wish to add with reference to the last paragraph of his Lordship's note relating to the effect of the disposition by Macneill & Company to the Bruces executed *pendente processu*, that I think it raises a very difficult question, upon which I would desire to reserve my opinion. I rest my opinion on the first paragraph of the Lord Ordinary's opinion and on that alone, and I give no opinion on the second paragraph.

Lord President.—We have all abstained, I think, from saying anything about the last paragraph of the Lord Ordinary's note. The first paragraph is what we have adopted as the grounds of our judgment.

Lord Mure was absent.

The Court adhered.

J. & J. Ross, W.S.—Pearson, Robertson, & Finlay, W.S.—Agents.

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Watt v. Neilson & Co.

Euphemia Watt and Others, Pursuers (Appellants).—*Shaw*—*G. W. Burnet.*

Walter Neilson & Company, Defenders (Respondents).—*Murray*—*Fleming.*

Reparation—Master and Servant—Defective machinery.—A workman was fatally injured while engaged along with others in raising a heavy barrel, which was suspended by a moveable block and tackle from an iron bar laid across a hatchway in the roof of the apartment in which he was working. The iron bar was laid upon two wooden stools, the block and tackle being attached to it by a hook, and the accident took place through the slipping of the bar. The deceased had assisted to adjust the block and tackle on the day of the accident, and on various previous occasions on which the same operation had been conducted with safety during the preceding four years. In an action by his widow

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and family against the employer, *held* that, in the circumstances, neither defect in the machinery nor neglect to provide proper appliances had been proved, and defender assoilzied accordingly.

Euphemia Kiddie or Watt, widow of Robert Watt, storekeeper, Glasgow, and her two children, Robert and William Watt, raised an action against Walter Neilson & Company, ironfounders there, to recover damages for the death of Robert Watt, who died on 1st May 1887 from the consequences of an accident which befell him in the defenders' works on 10th March 1887. The pursuers concluded for £500 as damages at common law, and alternatively for £180 as damages due under the Employers Liability Act, 1880.

The action was raised in the following circumstances:—The deceased had been for more than ten years in the employment of the defenders as a storekeeper. The work of japanning metal was carried on on the first floor of their works. In the course of it the tanks in which the japanning material was kept for the use of the workers had to be refilled at intervals of about six to nine months. These tanks stood about four feet above the level of the floor, and in order to fill them barrels of japan had to be raised to the edges of them. At one time this had been done by rolling the barrels up planks to the top of the tanks, but for about four years before the accident, and at the date of it, the following method was adopted. An opening or hatchway about 3½ feet long by 2½ feet broad was made above the tanks through the roof of the room, which was about nine feet above the floor, and in the room above an iron bar was laid across the opening. From this bar depended a chain, adjusted to the bar by a hook. By means of a block and tackle connected with this chain the barrels were raised to the required height. The bar was not laid directly on the joists of the floor above, but, in order to give a greater length of chain, was laid upon blocks of wood or on stools on the floor. At the date of the accident stools were used, and they were placed on their sides on the floor with the legs towards the opening, in order to make them more steady. That was done by two workmen named Nish and Wilson, Watt remaining below to see whether the adjustment of the bar and tackle appeared to be correct from that position, and whether the other arrangements were in order. The barrels were then raised one by one, and while the third of them was being raised, and the men were pushing somewhat to one side in order to get it emptied into the tank, the iron bar slipped off the stools and fell through the opening. The barrel and tackle fell with it, and the bar struck the head of Watt, causing him the injuries of which he died.

The pursuers averred that the plant used for hoisting the barrel was defective.

They pleaded;—(1) The said deceased Robert Watt having been fatally injured through the defective state of the said iron bar and blocks belonging to the defenders, the defenders are liable to the pursuers in reparation for his injuries and death to the extent of the sum sued for in the first conclusion. (2) The pursuers having suffered loss and damage from the injuries and death of the deceased Robert Watt, to the extent of £180, through the fault and negligence of the defenders in allowing their works, machinery, or plant to be in a defective condition, are entitled under the Employers Liability Act, 1880, to decree therefor.

The defenders denied that the plant was defective.

The defenders pleaded, *inter alia;*—(1) The deceased not having met his death through the fault or negligence of the defenders, or of anyone for whom they are responsible, the defenders are entitled to be assoilzied.

At the proof the above facts were proved.

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The pursuers examined two consulting engineers, who were of opinion that it was dangerous to leave the iron bar unfixed; and further that as it was necessary in emptying the barrel to press it somewhat to one side, a longer chain ought to have been used; and, therefore, that it ought to have been fixed, not to the floor above but to some higher point. These witnesses admitted that the arrangement, though primitive, was quite sufficient to hoist the barrels in point of strength of materials. One of them admitted that for lifting light weights and for temporary purposes such a system was occasionally used. They thought that in the operation as carried out in the defenders' works jerking of the barrel would be a very likely thing to occur.

The Sheriff-substitute (Cowan) found that the accident was caused by the "fault of the deceased's fellow-workmen, Robert Nish and Thomas Wilson, in not properly placing the supporting bar and bearing stools so that the same should not give way," and found "in law that the defenders are liable under the Employers Liability Act to the pursuer Mrs Euphemia Kiddie or Watt, the widow of the deceased."

On appeal the Sheriff (Moncreiff) pronounced this interlocutor:—"Sustains the appeal, and recalls the interlocutor appealed against, . . . Finds that the deceased Robert Watt on 10th March 1887, while in the employment of the defenders, and while engaged in hoisting a barrel in their service, sustained an injury on the head, from which he died on the 1st of May following: Finds that it is not proved that the said injury was caused through the fault of the defenders, or of anyone for whom they are responsible: Finds in law that they are not liable either under the said Act or at common law." *

The pursuers appealed, and argued;—The defenders were liable both at common law and under subsec. 1 of sec. 1 of the Employers Liability Act,† for the use of defective plant. The evidence shewed the plant used

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* "NOTE.— . . . . . (After stating that in his opinion the pursuers had stated no case under the Act)—In my opinion the only serious question in the case is whether the accident occurred owing to a defect in the plant or machinery for which the defenders are responsible. On this matter I agree with the Sheriff-substitute. The method of raising the barrels was certainly primitive, but then the operation in question, viz., raising a barrel to the height of four feet, was comparatively simple, and did not require much engineering skill. The apparatus was rigged up in the full sight of all the persons engaged, the iron bar itself being only a few feet above the heads of those below. They had all therefore the best means of seeing and judging for themselves whether the operation was a dangerous one or not, and the risk was an ordinary one.

"It does not clearly appear what was the precise cause of the accident. No doubt, if the iron bar had been fixed it would not have happened; but barrels had been raised for three or four years in this way with perfect safety, and, therefore, it would appear that the accident was caused either through some carelessness on the part of Nish or Wilson in placing the bar, or possibly (though I do not favour this view), through the fault of those below, including the deceased himself, in handling the barrel which was being raised incautiously.

"After a careful consideration of the evidence I do not think that it can be said that there was any defect in the plant or machinery. Nish says (proof p. 62),—'It did not appear to me that there was any danger about it. It seemed a simple thing.' This seems to have been the opinion of all concerned, and no accident had ever happened before, and no complaint had ever been made to the defenders."

† The Employers Liability Act, 1880 (43 and 44 Vict. c. 42), provides by sec. 1,—"Where . . . personal injury is caused to a workman, (subsec. 1) by reason of any defect in the condition of the ways, works, machinery, or plant,

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to be defective, the fault being want of reasonable precaution for the safety of the men engaged in the work. The cause of the accident was neglect of the reasonable precaution of fixing the iron bar. Besides it appeared that the men were left to use blocks of wood, or stools, or anything else they might find convenient, to support the bar. A master's ordinary common law duty required him to make adequate provision for his men having suitable materials for the work they had to do. The duty here was all the greater because the work was seldom required, and not such as fell within the ordinary duty of a storekeeper.[1]

Argued for defenders;—The machinery was simple, but sufficient, and no fault could be traced to it. The deceased, in any view, knew it well, and had helped to get it ready, and those in his right could not now maintain that it was defective.

Lord Young.—This is a narrow case. The Sheriff-substitute is of opinion that the pursuer has no case at common law. In that the Sheriff agrees. The Sheriff-substitute, however, thinks that there is liability under the Employers Liability Act, 1880. The accident is, in his opinion, attributable to the fault of Nish, a fellow-workman, to whose orders he thinks the deceased man was bound to conform. On that point the Sheriff differs from the Sheriff-substitute. He says that that ground of liability is not set forth on record, and that the pursuer, at the debate on the appeal, admitted that it had not been argued to the Sheriff-substitute, and declined when he (the Sheriff) offered him leave to do so to amend his record in order to raise it. I agree with the Sheriff that the pursuer has no such case on record, and has not in truth such a case as the Sheriff-substitute has sustained. So far I have no doubt. I think the doubtful part of the case is the question which arises at common law. Were the means provided by the employer for raising the barrels such as he was bound to provide in the discharge of his duty to his servants? On that question the authorities and the facts of the case leave my mind not quite free from doubt. There was some danger. The system had been pursued for years, and the accident then occurred. But, on the best consideration I can give to the case, I am not disposed to differ from both the Sheriffs on this question of common law liability. It is pointed out by them both that this is not a proper case of defective machinery, that the case is not one, such as we often have, of failure to supply proper appliances for the performance of the work with safety. Occasionally—once in about nine months—these barrels require to be hoisted. The deceased had, along with Nish, been at the raising of them for about ten years. For about four years the barrels had been raised in the way which was followed here. The appliance was rigged up in sight of the men. The master was never applied to for any additional appliances. It was a simple operation, not requiring, as the Sheriff points out, any particular machinery or engineering skill. It

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connected with or used in the business of the employer . . . the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

[1] Pollock v. Cassidy, Feb. 26, 1870, 8 Macph. 615, 42 Scot. Jur. 303; Robertson v. Brown, May 17, 1876, 3 R. 652; Grant v. Drysdale, July 12, 1883, 10 R. 1159; Bowie v. Rankin, June 15, 1886, 13 R. 981; M'Inally v. King's Trustees, Oct. 27, 1886, 14 R. 8; Heske v. Samuelson, Nov. 20, 1883, L. R., 12 Q. B. D. 30.

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had been attended to by the workmen for years without any suspicion of danger or suggestion that any other means ought to be taken. In these circumstances, although it has been shewn that by a side strain the bar was pulled off and the accident happened, I cannot predicate of the master that he was in fault and was not doing his duty. I am not prepared to differ from the Sheriffs and to impute this fault to him. The case, I repeat, is very near to some of those in which we have held that there was liability. But none of them is so near it as to cause us to decide against the defenders here.

Lord Rutherfurd Clark concurred.

Lord Justice-Clerk.—I also concur in the result, though I think the case a doubtful one.

Lord Craighill was absent.

This interlocutor was pronounced:—"The Lords . . . find in fact that it is not proved that the injury sustained by Robert Watt, mentioned in the record, was caused through the fault of the defenders, or of anyone for whom they are responsible; and find in law that they are not liable, either under the Employers Liability Act, 1880, or at common law, for said injury: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, and assoilzie the defenders from the conclusions of the action, and decern."

Thomas Carmichael, S.S.C.—Drummond & Reid, W.S.—Agents.

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Quin v. Gardner & Sons, Limited.

Mrs Agnes Donaldson or Quin (Quin's Executrix), Pursuer.—*C. S. Dickson—Harvey.*
James Gardner & Sons, Limited, Defenders.—*D.-F. Mackintosh—J. C. Lorimer.*

Process—Proof—Remit to man of skill—Consent.—In an action brought for recovery of an alleged balance of the price of certain contract railway work, the question relating to the construction and scope of a written agreement, the Lord Ordinary (M'Laren) made a remit to a man of skill to report "whether the railway as executed is covered by the contract . . . or whether it differs from the work contemplated . . . in whole or in part, and that to such extent and degree that the schedule prices cannot be fairly applied to the work as executed." The defenders reclaimed and asked for a proof. The Court recalled the Lord Ordinary's interlocutor and allowed a proof,—*holding* that as the remit involved questions of law as well as fact, it was inexpedient, if not incompetent, to make it without the consent of parties.

Observations upon the practice of the Court in making remits to men of skill.

Process—Leave to reclaim—Allowance of proof—Remit to man of skill—Court of Session Act, 1878 (31 *and* 32 *Vict. cap.* 100), *sec.* 28, *and Act of Sederunt*, 10*th March* 1870, *sec.* 2.—In a case where a remit was made by the Lord Ordinary to a man of skill the Court *held* that as the interlocutor was one which virtually settled the mode of proof of at least a part of the case, it was of the class of interlocutors which might be reclaimed against without leave within six days of its date.

1st Division.
Lord M'Laren.
M.

On 17th December 1885 Peter Quin, contractor, made an offer to Messrs James Gardner & Sons, Limited, Meiklehill Collieries, Kirkintilloch, "to execute the work required to make a line of railway and sidings from the Campsie branch of the North British Railway . . . to your No. 2 pit at Meiklehill, in conformity with the plans and specification signed by me as relative hereto, for the slump sum mentioned below, or, in your

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option, at the several prices named in the annexed schedule, and you shall be at liberty to accept the whole of my offer, or only such other parts thereof as you may decide upon. The whole of the operations undertaken by me shall be carried on and completed with the utmost expedition, and to your entire satisfaction. Should you agree to accept my offer for the whole work detailed in specification, I hereby bind myself to finish the same, so as to permit the working of your traffic thereon, within three months from date of your acceptance, &c. . . ." On 26th December following Messrs Gardner accepted the offer, subject to certain stipulations. These, as stated by them, were, *inter alia;*—"We shall have power, during the progress of these operations, to make such changes in the plan and extent of the work detailed in specification as we may deem necessary. . . . The whole quantities of work done shall be measured on the completion of the contract, and paid for at the rates entered in schedule of prices which accompanies your offer, with the exception of the fencing, the rate for which, as verbally arranged, shall be 2s. 2d. per lineal yard. . . ." Thereafter on 23d January 1886 Quin wrote stating "that the work shall be carried on as directed."

The work was begun in January 1886, but it was not till July following that a plan relative to the specification and schedule was furnished.

Quin having died on 1st August 1886, his wife, as his sole trustee and executrix, now sued the Messrs Gardner for payment of £1924, 15s. 1d., being the balance remaining unpaid of the total cost of the work, which, according to measurements made by the pursuer's engineer, was alleged to amount to £3374, 15s. 1d. The defenders admitted a balance due to the pursuer of £338, 10s. 6d., but repudiated both the quantities and the rates stated by the pursuer,—the rates not being the schedule rates and the quantities not being in conformity with those stated in the final measurement certified by their engineers.

The pursuer alleged that after the contract work was begun "the defenders entirely altered the line and levels of the railway in question, so that the work actually done is of an entirely different nature and extent from what was originally contemplated, or covered by, or included in the original contract." She further alleged that the "new scheme involved far more work and labour, and a much longer time for its completion, than had been originally contemplated; in particular, it involved a much greater proportion of deep excavation than the original scheme, through material very different, and very much more difficult to work"; that "prior to Mr Quin's death his foreman and clerk had from time to time pointed out to the defenders that there had been a complete substitution of one scheme for another, and that the schedule rates originally contemplated were no longer applicable"; and that, after Quin's death, it had been intimated that the pursuer would only proceed with the substituted scheme on the footing of being paid fair and reasonable prices therefor.

The defenders answered that the alleged alteration on the contract had been suggested by and arranged with Quin himself; that they had wished to delay the final arrangements until certain necessary consents from persons interested were obtained, but that Quin was very anxious to begin work and had urged the acceptance of his offer, and that the defenders should guard themselves by taking power to alter the extent and plan of the work; and that in consequence the acceptance of 26th December 1886 (quoted above), containing a general power to alter, had been completed. They denied that Quin or his foreman had repudiated the contract rates, and stated that the last receipt signed by Quin prior to his death had borne:—"Received . . . to account of contract price of railway . . . as per prefixed certificate"; and that he had never intimated that the

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contract rates were insufficient or inapplicable, or that he was not working under the contract.

The pursuer pleaded, *inter alia;*—(2) The defenders having as condescended on abandoned the work originally contemplated and concluded in the contract, and required other and more expensive work to be done, they are bound to pay therefor *quantum meruit.*

The defenders pleaded, *inter alia;*—(2) The alterations in the gradient of the line, and consequent thereon, being within the terms of the contract, the work falls to be paid for according to contract rates. (3) The said alterations being within the knowledge and contemplation of the contractor when he concluded the agreement, the work falls under the contract.

The Lord Ordinary (M'Laren), on 17th May 1888, pronounced this interlocutor:—"Remits to George Miller Cunningham, Esq., C.E., to inspect the private railway in question, and to call for documents and explanations, and to report his opinion on the question whether the railway, as executed, is covered by the contract contained in the missives dated 17th and 26th December 1885 and 23d January 1886 and relative schedule and specification, or whether the railway, as executed, differs from the work contemplated in the missives, schedule, and specification, in whole or in part, and that to such extent and degree that the schedule prices cannot be fairly applied to the work as executed, and *quoad ultra* continues the cause." *

The defenders moved the Lord Ordinary for leave to reclaim, which was refused, but a reclaiming note having been presented to the First Division, the Court held it to be competent, on the ground that the interlocutor virtually settled the mode of proof of at least a part of the case, and might therefore be reclaimed against without leave within six days.†

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* "NOTE.—If the referee should find that there is any question of facts on which it is necessary that witnesses should be examined on oath, he may apply to the Lord Ordinary for further powers. After counsel have been heard on the subject of the present remit it will be open to the Lord Ordinary to make a second remit to the same or a different 'referee' to report as to the sum payable by the defenders to the pursuer."

† In a note appended to an interlocutor on a subsequent branch of the case, the Lord Ordinary (M'Laren) took occasion to remark that it appeared that the Inner-House had set aside his refusal to grant leave to reclaim at a former stage, and had notwithstanding entertained a reclaiming note. His Lordship added, —"I must therefore conclude that the Court is of opinion that leave to reclaim is a mere ceremony, and that the Lord Ordinary has no discretion to give or withhold it."

The case having again come under review of the Inner-House, the Lord President said in reference to the note above quoted,—"My attention has been called to the note to the Lord Ordinary's interlocutor of 14th July, from which it appears that his Lordship has proceeded upon a great misapprehension. His Lordship's interlocutor of 17th May directed an inquiry, which really amounted to a proof, regarding certain of the statements upon record, and postponed procedure in regard to others. That was a six days' interlocutor which may be reclaimed against without leave. It falls within the provisions of the 2d section of the Act of Sederunt of 1870, and of the 28th section of the Court of Session Act of 1868, and under these sections it may be reclaimed against as matter of right within six days. The discretion which is given to the Lord Ordinary by the 54th section of the Court of Session Act, 1868, is an absolute and unqualified discretion. The Lord Ordinary is final upon that matter. I feel it necessary to make this explanation, because it appears that Lord M'Laren has been totally misinformed in regard to the nature of our former judgment."

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Argued for the reclaimers;—This was a question of mixed law and fact; and the remit, if not incompetent, was extremely inexpedient. At anyrate, this was not a case for a remit unless parties consented.[1] The question whether the contract covered the work done was a legal question. On the language of the contract the case was excluded, because it covered any alterations or changes that might be thought necessary. In order to decide the legal question it was right and proper that the actings of the parties to it should be ascertained. It was unexampled to make a remit in a case like the present unless with the consent of parties. A proof ought to be allowed, restricted, if need be, as the Court might see fit.

Argued for the pursuer;—The question was whether the work done fell within the agreement. The communings and actings of parties could not affect the matter. A remit was therefore the best way of bringing the matter to a point, and it was a course which had been taken in previous cases,[2] without consent of parties.

LORD PRESIDENT.—It is always in some sense a question of discretion whether this mode of inquiry by way of remit should be adopted or not. But there is also a question of right involved upon both sides. *Prima facie* the pursuer's right is to be allowed to prove his averments, and the defender may maintain that he is not bound to submit to any but the ordinary mode of proof, unless the case is unadapted for that procedure. The remit here is of a fragment of the case only, and the result of the remit, if it be favourable to the pursuer, would not exhaust the case, because the defenders have also made averments on record which would bring their case to a successful issue even assuming that the result of the remit is favourable to the pursuer. If the averments made by the defenders are well founded, it is impossible to hold that the pursuer is entitled to treat the work performed as anything but contract work.

The question which the Lord Ordinary has remitted is one of very doubtful competency as the subject of a remit, because it involves the construction of a contract, the question being "whether the railway, as executed, is covered by the contract, or whether it differs from the work contemplated in whole or in part." The question what was contemplated by the contract is a question of law for the consideration of the Court. No doubt it may be necessary in answering the question to ascertain the facts; but the ascertainment of these facts must result in and involve the consideration of matters of law. The case can of course never be satisfactorily disposed of until the facts upon both sides have been cleared up; for they will have a material bearing upon the ultimate issue whether the contract covers the railway or not.

The present remit goes beyond anything we have ever sustained, and I am not for forcing remits upon unwilling parties to an extent beyond what has been sanctioned by the Court in previous cases.

LORD MURE concurred.

LORD SHAND.—I am of the same opinion as your Lordship, and think that proof of some kind and to some extent is necessary in this case. But while I so think in this case, I also hold that there are cases, more or less numerous, in

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[1] Clerk v. Shotts Iron Co., Feb. 24, 1888, H. L., Weekly Notes.

[2] Lord Blantyre v. Glasgow, Paisley, and Greenock Railway Co., Feb. 1, 1851, 13 D. 570; Smith Brothers & Co. v. Scott, March 17, 1875, 2 R. 601 (L. J.-C. Moncreiff, p. 608); Nisbet v. Mitchell-Innes, Feb. 20, 1880, 7 R. 575.

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which the Court would be right in making a remit to a man of skill, even where there is no consent of parties. The most familiar case of that kind is that of fixtures, where there is a question whether they belong to the heir or executor, and where it is impossible that the Court should see the articles in dispute. Accordingly, the Court is in use to put itself in possession of the facts by making a remit, and thereby, by getting the full description of the articles, their position, and the extent of their attachment to the soil, and the reporter's views generally, is enabled to settle the rights of parties. In such cases it would be out of the question to have a proof. So, too, for example, in a question where the Court is asked to determine whether machinery is conform to contract or not, a remit may often be properly made to save expensive procedure. I am disposed to hold that if the Court should think a remit the best mode of ascertaining the facts in such cases, it has the power to make it, and it is expedient that it should do so, without requiring the consent of parties. But in the present case, I think, a remit is not desirable, because it appears to me that a great deal of light may be obtained from the actings of parties at the time of the execution of the contract, and afterwards, which will be of use in deciding the questions in dispute.

Lord Adam.—I do not see how the reporter could answer the questions of fact in this case without at the same time making up his mind upon the questions of law. That is sufficient to shew me that the remit is an improper one. Besides, it will be very important that the Court should know something of the actings of the parties before we are called upon to determine the questions in dispute.

The Court pronounced the following interlocutor:—" . . . . Recall the said interlocutor: Remit to the Lord Ordinary to allow parties a proof of their averments on record, but excluding from the proof in the meantime all questions of detailed measurement, and all questions as to the rate of remuneration to which the pursuer will be entitled if it be found that the work was not executed under the contract. . . . ."

R. Menzies, S.S.C.—Clark & Macdonald, S.S.C.—Agents.

No. 142.

June 26, 1888.
Thom v. Andrew.

James Wallace Thom, Pursuer (Reclaimer).—*Party.*
Francis Andrew, Defender (Respondent).—*Rhind.*

Expenses—Caution—Bankrupt.—Held (*rev.* judgment of Lord Lee) that an undischarged bankrupt who had brought an action against his landlord for damages on account of the landlord unwarrantably breaking into the premises let and removing furniture and stock therein belonging to the pursuer, was entitled to insist in the action without finding caution for expenses, although the trustee in the sequestration had declined to sist himself as a party to the action.

2d Division.
Lord Lee.
M.

On 4th February 1888 James Wallace Thom, confectioner and medicated lozenge manufacturer, carrying on business in Glasgow, Aberdeen, and Paisley, brought an action against Francis Andrew, auctioneer, Broad Street, Aberdeen, concluding for £1000 in name of damages.

The pursuer averred;—(Cond. 2) "By missive of lease, dated 31st December 1887, the defender let to the pursuer the shop 47 Broad Street, Aberdeen, at a weekly rent of £2, for a period not to exceed three months, unless otherwise agreed upon between the parties; entry to be given on 31st December 1887. . . ." (Cond. 3) "The pursuer duly entered into possession of said shop . . . The pursuer's business was conducted therein in a prosperous manner up till the evening of Tuesday 31st January 1888." (Cond. 5) "On the evening of said 31st January 1888, the said shop was closed and secured in the customary way, and the key taken possession of by the pursuer. . . . The defender sometime between midnight of 31st January and six o'clock the following morning, 1st February 1888, went to the said shop along with joiners and other men, and without giving the pursuer any intimation or warning, forcibly and illegally broke into and entered the said shop, breaking open a wooden partition at the back thereof, or otherwise. . . ." (Cond. 6) "After the defender and those acting on his instructions had effected a forcible entrance into the said shop as aforesaid, he and they illegally, and without any warrant or authority whatever, lifted and carried out into the street the whole contents thereof, embracing shop-fittings, iron safe, manufacturing machinery and plant, drawings, &c. The shelving which had been fitted up by the pursuer in said shop was also torn down and removed. After the whole contents of the shop had been taken out in the street by the order and instructions of the defender, they were placed upon three lorries, which had been brought there by him, and were carried away by the defender, who illegally and unwarrantably retains possession thereof, and refuses or delays to return the same to said shop, although he has been requested to do so by the pursuer." (Cond. 9) "By the said illegal and unwarrantable action of the defender in forcibly breaking open the pursuer's said shop and illegally carrying away and detaining the whole contents thereof as aforesaid, the pursuer has not only sustained loss and damage to the amount of the value of said contents, but he has suffered in his feelings and has been subjected to much anxiety and inconvenience; his trade has been suddenly put a stop to and his credit and reputation have been seriously injured. . . ."

The pursuer pleaded;—The defender having illegally, unwarrantably, and forcibly broken open the pursuer's said shop, taken possession of and carried away the whole contents thereof belonging to the pursuer, and paralysed his business, is liable in damages therefor, and decree should be granted as concluded for, with expenses.

In answer to articles 5 and 6 the defender stated,—(Ans. 5 and 6) "Admitted that on 1st February 1888 the defender removed from the premises which had been let by him to the pursuer the pursuer's effects therein, and deposited them with Mr M'Adam, carting contractor, North Charlotte Street, Aberdeen, for safe custody. This he, on the same day, intimated to the pursuer. *Quoad ultra* denied, and reference is made to the defender's statement."

In his statement of facts the defender further averred that the agreement between him and the pursuer was for a monthly tenancy of the shop (which the pursuer denied); that on 9th January 1888 he had given the pursuer written warning to remove at 31st January following (which warning the pursuer stated he had never received); and that on 1st February he had written to the pursuer in these terms:—"Sir,—As you did not remove from the front part of my shop, No. 47 Broad Street, at the end of your month, I was obliged this morning to remove your effects. They now lie at Mr M'Adam's, carting contractor, North Charlotte Street, who will no doubt deliver them to you on application."

The defender stated that the pursuer was an undischarged bankrupt.

The defender pleaded, *inter alia;*—(1) The pursuer being an undischarged bankrupt, should, *ante omnia,* be ordained to find caution.

On 6th March the Lord Ordinary (Lee) pronounced this interlocutor:—"In respect it is stated that the pursuer is an undischarged bankrupt, appoints intimation of the dependence of this process to the trustee on

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his sequestrated estate, in order that he may, if so advised, sist himself as a party to the action within ten days."

The trustee declined to sist himself, and on 13th March the Lord Ordinary ordained the pursuer to find caution for expenses by the first box-day in the ensuing vacation.

On 29th May the Lord Ordinary pronounced this interlocutor:—"In respect the pursuer has failed to find caution for expenses, assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses," &c.

The pursuer reclaimed.[1]

LORD YOUNG.—In this case, which is an action of damages on account of the alleged actings of the defender in breaking into the pursuer's shop in Aberdeen on the morning of 31st January last, the Lord Ordinary, upon the 6th of March, pronounced this interlocutor:—"The Lord Ordinary, in respect it is stated that the pursuer is an undischarged bankrupt, appoints intimation of the dependence of this process to the trustee on his sequestrated estate, in order that he may, if so advised, sist himself as a party to the action within ten days." That intimation was given to the trustee, but he declined to sist himself. The Lord Ordinary then, on 13th March, ordained the pursuer to find caution for expenses by the first box-day in vacation. No satisfactory caution was found, and in consequence, upon 29th May, the Lord Ordinary pronounced the interlocutor which is the subject of this reclaiming note, by which he assoilzied the defender from the conclusion of the summons, in respect that the pursuer had failed to find caution. The question therefore for our consideration is whether caution for expenses ought to have been ordered as a condition of allowing the pursuer to proceed with his action.

This matter of ordaining a party to an action to find caution for expenses is always a question for the discretion of the Court, and the Court may in its discretion ordain either the pursuer or the defender to find caution, but the Court will not exercise its discretion in the way of ordaining the party to find caution unless the interests of justice appear to require it. It is a general rule that a bankrupt who has been divested of his whole estate by the operation of the Bankruptcy Acts, or who has divested himself by a voluntary deed, shall not be permitted to sue any action relative to that estate of which he has been divested unless he either finds caution or obtains the concurrence of his trustee. That is not on the ground that he is poor and will not be able to pay the expenses should he lose the action and have decree for expenses pronounced against him. That is true of a great many litigants, who, although they may be entirely without funds, are not on that account ordained to find caution. A very familiar example is that of persons on the poor's-roll. It is always true of them that they are not good for the expenses, and yet they are not only permitted to sue without finding caution—they are even provided, through the liberality of the professions, with counsel and agents to conduct the litigation on their behalf. But a man who is divested of his whole estate is in a different position, and in regard to him, as I have said, the general rule is that he shall find caution. The Court, however, has recognised an exception to this general rule in the case of certain actions of a personal character—not an absolute exception, for the Court retains its discretion to require a bankrupt to find caution as a condition of suing even such actions. But a bankrupt is not to be grossly slandered or assaulted and yet have no remedy unless he can either find caution or get his trustee to sist himself as a party to the action, which I should think a trustee, desirous of doing his duty honestly by the estate and the creditors, may in many cases very well refuse to do. Actions of damages for slander or for assault, therefore, are exceptions to the general rule, though, as I have said, not absolute exceptions, as we see from the case of *Clarke* (11 R. 418) which was cited to us, where the other Division refused to allow the bankrupt pursuer of an action of damages for slander to proceed with his action unless he found caution.

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[1] *Defender's Authority.*—Clarke v. Muller, Jan. 16, 1884, 11 R. 418.

Now, considering the present case as I best can from the statements before us, if there is any truth in what the pursuer says, and it does not seem to be seriously denied, I think that the conduct of the defender was really outrageous. Upon a notice of removing of a very few days—a notice which indeed the pursuer says he never received—in the course of the night—it was about three in a January morning—the defender proceeded with a number of men to the shop in which the pursuer carried on his business, and broke open the door, and entering the shop carried off its whole contents. That appears to me a most lawless proceeding on the part of the defender, and no explanation is given on the record, or was stated to us from the bar, which can be regarded as suggesting any sort of justification of it. I think it is a wrong to which the pursuer is not bound to submit merely because he is a bankrupt who can neither find caution nor get his trustee to take up the litigation. I doubt whether the trustee would be warranted in appearing and conducting such a litigation, but I do not think that the bankrupt is on that account bound to submit to this outrage without redress. I am of opinion, therefore, that in the exercise of our discretion we should recall the Lord Ordinary's interlocutor ordaining the pursuer to find caution, and remit the cause to the Lord Ordinary to proceed. Of course the recall is merely *in hoc statu*, for the application to have the pursuer ordained to find caution may be renewed at any stage of the proceedings, should circumstances appear to warrant it.

Lord Rutherfurd Clark.—This is so very peculiar a case that I am disposed to agree in the conclusion at which Lord Young has arrived.

Lord Justice-Clerk.—I have come to the same conclusion as Lord Young. The general rule is that a bankrupt will not be allowed to sue an action without finding caution. This general rule the Court enforces with some stringency, but in actions which are personal to the bankrupt, the Court has from time to time permitted the rule to be relaxed, and I must say that this invasion of the premises of the pursuer appears to me to present rather a strong case for relaxing the rule.

Lord Craighill was absent.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to proceed with the case.

Sturrock & Graham, W.S.—Wm. Officer, S.S.C.—Agents.

No. 143.

June 26, 1888.

Crichton v. North British Railway Co.

MISS CATHERINE CRICHTON AND OTHERS, Petitioners.—*C. N. Johnston.*
THE NORTH BRITISH RAILWAY COMPANY, Respondents.—*J. C. Thomson.*

Process—Arbitration—Diligence for citing havers.—Where one of the parties to an arbitration presented a petition to the Court for warrant to cite witnesses to appear before a commissioner and produce documents conform to specification annexed, the Court *refused* the petition, holding that the approval of the arbiters to the specification ought first to have been obtained.

2D DIVISION.
M.

IN a submission under the Lands Clauses Consolidation (Scotland) Act, 1845, between Miss Catherine Crichton and others, proprietors of certain heritable subjects in Burntisland, and the North British Railway Company, as to the value of these subjects, which had been taken over by the company, the arbiters, on 29th March 1888, allowed a proof, and thereafter, on 31st May, pronounced an order fixing the time and place of the proof, and recommending the Court, and the Sheriffs of the Lothians and Peebles, and of the county of Fife, to grant warrant for citing witnesses and havers.

On 23d June Miss Crichton and the other proprietors of the subjects, presented a petition to the Court praying for warrant for the citation of havers to produce before a commissioner the documents called for in a specification annexed.

The railway company opposed the application.

THE COURT refused the petition, being of opinion that, as they had no knowledge of the facts of the case, the proper course was first to have had the specification approved of by the arbiters, and then, if necessary, to have applied to the Court.

ANDREW WALLACE, Solicitor—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

No. 144.

June 27, 1888.

Campbell v. Maquay.

JOHN CAMPBELL, First Party.—*D.-F. Mackintosh—Murray.*
MRS R. E. MACLAINE OR MAQUAY, Second Party.—*Jameson—Patten.*

Minor and Pupil—Tutor—Mother's second marriage—Guardianship of Infants Act, 1886 (*Act* 49 *and* 50 *Vict. c.* 27).—The 2d section of the Guardianship of Infants Act, 1886, provides that, "on the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act, the mother, if surviving, shall be the guardian of such infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father."

Held that the fact of a mother entering into a second marriage does not affect her right under the statute to be guardian to her children by the first marriage.

1ST DIVISION.
M.

(VIDE *Maquay* v. *Campbell,* March 17, 1888, *ante,* p. 606.)

Miss Rosa Elizabeth Maclaine was married to William Macbean Rankine of Dudhope on 8th July 1874. Mr Rankine died on 31st October 1879. There were three children of the marriage—(1) Violet Campbell Rankine, born 28th April 1876; (2) Walter Lorne Campbell Rankine, born 4th July 1877; and (3) Muriel Campbell Rankine, born 25th September 1878.

By antenuptial marriage-contract between Mr and Mrs Rankine, John Campbell of Kilberry—Mr Rankine's elder brother—and three others were appointed trustees, and they were also nominated tutors and curators to the children of the marriage. Two of the trustees never accepted office nor acted as tutors, and the third having died Mr Campbell was then the only surviving and acting tutor.

On 5th July 1884 Mrs Rankine married Mr William Maquay, a banker, resident in Florence, Italy, and not a domiciled Scotsman, and she afterwards resided there with him.

Mrs Maquay's children by her first marriage for some time resided with their uncle in Argyllshire, but on 17th March 1888, in a petition at Mrs Maquay's instance to have them delivered over to her, the Court, having regard to the provisions of the 5th section of the Guardianship of Infants Act, 1886, 49 and 50 Vict. c. 27, granted the prayer of her petition (*ante*, p. 606).

This was a special case between Mr Campbell as first party and Mrs Maquay as second party, in which the following question was put to the Court:—" Is the party of the second part entitled, jointly with the first party, to the office of tutor to the pupil children of the marriage between her and the deceased William Macbean Rankine, and to perform the duties of the said office?"

It was stated in the case,—" A question has arisen as to the right of the party of the second part to act as tutor to her pupil children, and to be consulted regarding acts of administration affecting their estate. The party of the first part maintains that by the law of Scotland the second party, being a married woman, is not now entitled to act as tutor aforesaid, notwithstanding the provisions of the statute above referred to. The second party maintains that under the provisions of the said statute she is entitled to act as tutor aforesaid, and that she is not disqualified by her second marriage or otherwise from so acting." *

Argued for the first party;—By the law of Scotland a widow, by entering into a second marriage, was absolutely disqualified from acting as tutor to the children by her first marriage. A married woman could not act as tutor, and even if she had been nominated by her deceased husband to act notwithstanding a second marriage, the Court had been in the habit of enforcing the disqualification.[1] That disqualification must be read into

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* The Guardianship of Infants Act, 1886, sec. 2, provided,—" On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act, the mother, if surviving, shall be the guardian of such infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother."

The 6th section provided,—" . . . In Scotland either Division of the Court of Session may, in their discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed."

The 8th section provided, that " in the application of this Act to Scotland the word guardian shall mean tutor, and the word infant shall mean pupil."

The 13th section provided,—" Nothing in this Act contained shall restrict or affect the jurisdiction of the High Court of Justice in England, and of the High Court of Justice in Ireland, or of any Division of the said Courts, and of the Court of Session in Scotland, to appoint or remove guardians or (in the case of Scotland) tutors or factors *loco tutoris*, or otherwise in respect of infants."

[1] Fraser on Parent and Child, 171, 309; Code de Leg., Tut. v. 35, 2; Craig, ii. 20, 14; Stair, i. 6, 24; Bankton, i. 7, 30; Kerbechil, 1586, M. 9585; Stuart v. Henderson, 1636, M. 9585.

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the provisions of the Guardianship of Infants Act, 1886. Section 2 of that Act no doubt enacted that a widow should be guardian to her children, even where she was not so nominated by their father, but that must be subject to the common law condition that she did not marry again. A second marriage was an emerging ground of removal under the 6th section. The law had always been jealous of persons who were under curatory acting as tutors,—a jealousy which was based on a perfectly intelligible fear of the baneful influence which might be exerted by the stepfather. The further fact that the second party had married a husband who was not a domiciled Scotsman was very important.

Argued for the second party;—(1) It was quite true that by the old law of Scotland a married woman was disqualified from acting as tutor to her children by a former marriage. The principle of that disqualification was that under the civil law a woman lost her *persona* by marriage, and became *in potestate viri*,[1] and the old Scottish decisions had followed the civil law. It was noticeable that there was no direct authority to that effect later than the middle of the last century, and the first Lord Meadowbank in the case of *Stoddart*[2] had expressed strong doubts whether the dictum of Erskine on the subject (i. 7, 12), would have been given effect to at that time. In the previous case (*ante*, p. 607), Lord Adam had declined to express an opinion upon the point. Further, in other respects the strictness and rigour of the old law had been relaxed. It had long been the law that a married woman might be a trustee,[3] and that a second marriage did not disqualify a mother from having the custody of her children. Besides the Conjugal Rights Act, 1861, and the Married Women's Property Act, 1877, were in the same direction. So that the Court ought not now to give effect to the old law upon the subject. But (2) apart from that, the provisions of the 2d section of the Guardianship of Infants Act, 1886, were explicit. There was no restriction or condition to be found there; and none was to be presumed. It was important to notice that by the Act very large powers of discretion were given to the Court, the principal object they were to keep in view being "the welfare of the infant." Besides, the power of removal conferred under the 6th section was by petition to the Court, a remedy which it was open to the first party to obtain upon cause shewn. Further, it was no disqualification that a tutor resided out of the jurisdiction. No such disqualification was to be found either in the statutes, or in the institutional writers, or in the decisions of the Court.[4]

Lord President.—This case is presented with regard to the guardianship of the children of William Macbean Rankine and his spouse, now Mrs Maquay. The marriage took place in 1874, and Mr Rankine died in 1879, being a domiciled Scotsman at his death. The marriage-contract between the parties contained a nomination of tutors and curators to children of the marriage, but the only surviving and acting tutor is Mr Campbell of Kilberry. He is the first party to the present case,—Mrs Maquay, who is the wife of a gentleman who is not a domiciled Scotsman, and resides at Florence, being the second party. Mrs

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[1] Langshaw v. Muir, 1629, M. 16,252; Gordon v. Corsan, 1632, M. 16,259.

[2] Stoddart, June 30, 1812, F. C.

[3] Stoddart, June 30, 1812, F. C.; Darling v. Watson, Jan. 14, 1823, 2 S. 607, affd. 1 W. & S. 188; Bell's Principles, 2083; Morton v. Gillon, March 7, 1835, 13 S. 640; M'Callum v. M'Donald, March 10, 1853, 15 D. 535.

[4] Rob v. Rob, Dec. 22, 1814, 18 F. C. 117; Bell v. Henderson, 1784, M. 16,374; Macdonald v. His Next of Kin, June 11, 1864, 2 Macph. 1194, 36 Scot. Jur. 600.

Maquay as the mother of the children maintains that she is in right to be one of the two guardians of her pupil children in virtue of the provisions of sec. 2 of the Guardianship of Infants Act, 1886. Mr Campbell, on the other hand, maintains that he is entitled to be the sole guardian, and that Mrs Maquay is disqualified by law.

The only question of law raised by the case is with regard to this supposed disqualification. Mr Campbell contends that "by the law of Scotland the second party, being a married woman, is not now entitled to act as tutor aforesaid, notwithstanding the provisions of the statute above referred to," while Mrs Maquay contends that "under the provisions of the said statute she is entitled to act as tutor aforesaid, and that she is not disqualified by her second marriage or otherwise from so acting." That raises a pure question of law. There is not, and there could not be under this case, any appeal to the equitable jurisdiction of the Court, and we cannot give any effect to grounds under which tutors may be removed under secs. 6 and 13 of the Act. We are tied down to the question whether Mrs Maquay is disqualified from acting as guardian to these children by the fact of her second marriage.

The words of the section founded on are,—"On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act, the mother, if surviving, shall be the guardian of such infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father." Those words are very strong. The mother "shall be" the guardian. No one is entitled to use any discretion in the matter. I should almost go the length of saying that the widow herself is not left in a position to decline to act, for the words are imperative, the only condition being "if surviving." If she is the widow of the father of the children, she becomes guardian to them either alone or jointly with any guardian or guardians appointed by the father.

Now, it is said that that section must be read under reference to the common law, which makes it a disqualification for a mother to act as her child's guardian if she marries a second time. The rule so decided is quite distinctly laid down in decisions pronounced in the sixteenth and seventeenth centuries, and it may truly be said that nothing has ever been done in later times to shake these authorities. But one cannot help seeing that those judgments were founded not on the principles of common law or equity, but entirely on the authority of the Roman law. The earliest of the decisions to which we were referred—the case of *Kerbechil*—is particularly remarkable as illustrating that fact. It is argued that we should disregard these cases, as the spirit which inspired them is irreconcilable with the spirit of modern legal opinion. That is a somewhat dangerous doctrine to adopt, and I am not disposed to rest my judgment on that ground. It is, however, very clear that the Act of 1886 does not take cognisance of any principle of the common law which might be opposed to the intention of the Legislature. We know that there is a great difference between the law of England and the law of Scotland (how the law of Ireland stands I do not know) in questions regarding the guardianship of children, the status of married women, and the relations of parent and child, and of tutor and pupil. But section 2 of the Guardianship of Infants Act applies to the whole United Kingdom, and, therefore, instead of attempting to reconcile the different rules of the common law in the different countries, the Legislature has made a rule which passes by and takes no cognisance of the common law, and says "the mother shall be the guardian," no matter what the common law is. The other sections illustrate this in some degree, but it is not necessary to go over them to enable us to arrive at the result I have indicated.

The 6th section makes it competent to apply for removal of a testamentary guardian, or one appointed or acting by virtue of the Act, but the ground of that section is that the removal must be "for the welfare of the infant." That is the only ground for removal;—there is no question of a disqualification existing at the time of the father's death, or supervening. The Act simply says,—here is the guardian, there is the power of removal, and the only thing to be considered is whether it is for the welfare of the infant that the guardian should be removed.

The 13th section saves the jurisdiction of the Court to appoint or remove guardians, and it would be very unfortunate if it could be supposed that the passing of this Act interfered in any way with the jurisdiction of the Court in such matters. There are many cases in which the Court exercises a large discretion in regard to the appointment or removal of guardians, but its jurisdiction in that respect is left untouched.

On the whole matter, I have no hesitation in saying that there is no disqualification to prevent Mrs Maquay from acting as guardian along with Mr Campbell.

Lord Mure.—The only question we have to deal with is whether Mrs Maquay is disqualified from acting as guardian to her children. I am unable to get over the express provisions of section 2 of the statute. The Legislature intended to make a change in the law, and it therefore enacts that if the mother be surviving at the time of the father's death, she shall be guardian to the children of the marriage. That assumes that the mother is to continue throughout as their guardian, either alone or in conjunction with any guardian appointed by the father. That being so, I agree that we are bound to answer the question submitted to us in the affirmative.

I do not go into the question whether there may be under the statute machinery to enable any person to ask the Court to remove a guardian from his or her office, for that is not now before us, and I give no opinion what would be a sufficient ground to entitle us to grant such a motion.

Lord Adam.—I cannot say that I have entertained any doubt upon this question ever since the case was opened. By the 2d section of the Act it is clearly provided that on the death of the father the mother shall, if surviving, be the guardian of the children of the marriage. Plainer language could not in my opinion have been used. It is said in this case that the mother has married again, but she does not because of that cease to be the mother of her children by the first marriage. It is obvious that the Legislature must have had in view a person in the position of the second party to this case,—namely, a widow, the mother of children, and married again, because as I said during the argument, there must be hundreds and thousands of widows in the same position, and I think that if it had been intended to exclude all those persons from the operation of this section, it would have been expressly so provided. There is, however, no such provision here, and I have therefore no hesitation in concurring.

Lord Shand was absent on Circuit.

The Court answered the question in the affirmative.

Pearson, Robertson, & Finlay, W.S.—F. J. Martin, W.S.—Agents.

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Mulligan v.
M'Alpine.

PATRICK MULLIGAN, Pursuer (Appellant).—*J. C. Thomson*—*A. S. D. Thomson.*
ROBERT M'ALPINE, Defender (Respondent).—*Murray*—*C. S. Dickson.*

Reparation—Personal injury—Blasting rock—Defective system of working. —In an action by a workman, who had been employed in blasting rock with gunpowder, against his employer for damages on account of personal injury sustained in the course of the employment through the alleged defective system on which the defender carried on the work, the pursuer averred that the gunpowder was stored in a magazine, about five minutes' distance from the work, in small barrels containing about twenty-five pounds of gunpowder each; that when it was desired to fill a charge a barrel of the powder was taken from the store and opened at the work and the required powder taken from it; that while the pursuer was engaged in firing a charge a gust of wind carried a portion of the fuse to the barrel from which the powder had been taken and caused the powder in it to explode, thereby injuring the pursuer; that the system was bad and unnecessarily dangerous; that the usual system was to take the gunpowder from the store in small flasks with narrow orifices, which practically obviated all danger; and that complaints had been made by the workmen to the defender's foreman of the danger of using barrels, which complaints had been unattended to. The Court (*diss.* Lord Rutherfurd Clark) *dismissed* the action as irrelevant.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

PATRICK MULLIGAN, labourer, brought this action in the Sheriff Court at Glasgow against Robert M'Alpine, contractor, for damages for personal injury, at common law or under the Employers Liability Act, 1880.

The pursuer averred:—(Cond. 1) "The pursuer at the date of the accident after mentioned, and for some time previously, was in the employment of the defender in the formation and construction of the Barmill and Kilwinning branch of the Lanarkshire and Aryshire Railway, for which the defender is the contractor." (Cond. 2) "The duties of the pursuer in his said employment were to bore holes in rock for blasting purposes, and to fill the holes so made with powder, and, having done this, to fire the charge." (Cond. 3) "On or about 22d November 1887 the pursuer was engaged in these duties at a cutting in or near Rae Street, Saltcoats. He was engaged in firing the charge, when a gust of wind carried a portion of the fuse or fire to a keg or small barrel of gunpowder, which had been brought from the magazine or store to the working place, and caused it to explode. . . . . ." (Cond. 4) "The effect of the explosion was to injure the pursuer very severely. . . . . ." (Cond. 5) "The said accident, and the pursuer's injuries, were due to the fault of the defender, and of those for whom he is responsible. In particular, the system under which the defender carried on his work was a bad and unnecessarily dangerous one. The powder was kept in a magazine or store, about five minutes' distance from the work, and was carried therefrom to the work in small barrels holding about twenty-five pounds of powder, and averaging in height 14 inches, and in diameter 10 inches. The practice was to remove the cover or top of the barrel with a pick to get the powder out. The said system is unnecessarily dangerous, and is not the usual system. Usually powder flasks, with narrow orifices, are supplied, the use of which practically obviates all risk. The defender could have, and ought to have, supplied flasks, and ought not to have allowed the use of barrels. It was the explosion of the powder in one of these barrels that caused the said accident, which was thus a direct consequence of the defender's fault. . . . Denied that the pursuer kept the key of said store or box, or that it was his duty to take the barrel from the store, and to replace it after the shot had been fired,

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or to remove it to a distance before firing the shot." (Cond. 6) "Before the said accident complaints had been made by some of the defender's workmen of this system, and requests for flasks made to their superiors in the defender's employment, and his foremen and managers were well aware of the danger of his system, and of the condition of his works, machinery, and plant, which, as above stated, were defective and unsuitable for their purpose. It is believed and averred that these complaints and requests, as well as the said system of working, and the condition of the said works, machinery, and plant, were well known to the defender personally. At all events, Keegan, the gaffer, and William M'Alpine, the manager of the defender over the said works, were aware of all this, and when complained to, as above stated, promised from time to time to have the system altered and suitable flasks supplied. This, however, was never done till the day after the accident, when flasks were at length furnished. The defender was thus at fault, and is liable at common law to the pursuer, or, at all events, he is liable, under the Employers Liability Act, 1880, to the pursuer for the consequences of the fault of his said gaffer and manager in not providing for a supply of suitable flasks, and allowing the pursuer and the other workmen to work as above set forth."

The pursuer pleaded;—1. The pursuer having received injuries in his person through the defender's fault (1) in conducting his work under a defective and dangerous system, (2) in exposing his workmen, including the pursuer, to unnecessary risks, (3) in employing defective and unsuitable works, machinery, and plant, is entitled to compensation and to decree in terms of the prayer of the petition.

The defender pleaded;—(1) There being no relevant case stated by the pursuer, the defender should be assoilzied from the action as laid. (4) The injury sustained by the pursuer being the result of a pure accident, or being caused, or materially contributed to by the pursuer's own carelessness, the defender is not bound to compensate the pursuer as craved. (5) The pursuer, being in the knowledge of any risks incident to his employment, or the method of working adopted by the defender, and having worked in the face of any such risks, must be held to have accepted the same, and is barred from insisting on the present action.

On 12th April 1888 the Sheriff-substitute (Guthrie) pronounced an interlocutor sustaining the first plea in law for the defender, dismissing the action as irrelevant, and finding the pursuer liable in expenses.

The pursuer appealed to the Court of Session, and argued;—(1) It was averred that the system in operation was defective, and had been complained of. The apparatus provided by the employer might be sound in itself; that was not enough; if the apparatus was unsuitable for the purpose for which it was provided, it was plant in "a defective condition," and the employer was liable.[1] (2) The rule *volenti non fit injuria* did not apply—or rather the pursuer must have been *sciens* not merely *volens*, and the question whether he had been aware of his danger had usually been decided after a proof. Only a very clear admission of knowledge would entitle the Court to throw the case out on relevancy.[2] The record here presented no such case.

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[1] Heske v. Samuelson, Nov. 20, 1883, L. R., 12 Q. B. D. 30; Cripps v. Judge, Aug. 4, 1884, L. R., 13 Q. B. D. 583; Welsh v. Moir, Feb. 4, 1885, 12 R. 590.

[2] Grant v. Drysdale, July 12, 1883, 10 R. 1159; Murdoch v. Mackinnon, March 7, 1885, 12 R. 810; Yarmouth v. France, Aug. 11, 1887, L. R., 19 Q. B. D. 647.

Argued for the defender;—(1) It was no part of the system here provided by the defender, that his workmen should leave the powder barrel close to the blast with the powder exposed. If, to save themselves trouble, they chose to do so instead of taking it back, or covering the powder, that was their doing, not his; and if an accident happened in consequence, he was not in fault. (2) The record disclosed a clear case of working in face of an obvious danger, and as such was irrelevant.[1] A workman employed in blasting operations could not be heard to plead that he was ignorant of the danger of an open barrel of gunpowder close to a lighted match.

LORD JUSTICE-CLERK.—In this case I have come to be of opinion, although not without some difficulty, that the interlocutor of the Sheriff-substitute should be affirmed, but on this ground simply—that there is no ground for imputing fault to the employer disclosed by the pursuer on record. The fault, which the pursuer desires to prove against the defender, is of this nature,—he says that the squad of men to which he belonged received instructions from the defender as to the method of carrying on the operations on which they were engaged, that this method was incompatible with the safety of the operations, but that nevertheless the men had no alternative but to carry them out. I think that the mere statement of such a kind of fault shews its insecurity as a ground of action.

The general conditions under which the work was carried on appear to have been of this nature. The gunpowder which was used in the blasting operations on which the pursuer and his companions were engaged was kept in barrels in a store at some little distance from the scene of the operations. When it was desired to prepare a charge, one of the barrels was taken out of the store and brought to the place of working, and the necessary powder was taken from it. It was, I think, conceded that there was nothing to prevent the men from returning the barrel to the store after they had taken the charge from it, and had they done so there would have been no danger in the operation. I rather gather that the men generally saw no reason why they should return the barrel to the store before firing the charge; on the present occasion unfortunately a gust of wind appears to have carried a spark from the lighted match in the direction of the powder in the barrel which was lying open. It in consequence exploded, and the pursuer received the serious injuries of which he complains. It does not appear to me that this method of carrying on the work was part of the arrangements made by the defender, or that these arrangements, as they are explained by the pursuer on record, were insufficient or defective. If the accident was not due to the foolhardiness of the workmen themselves, it was, I think, a mere misadventure, for which the defender cannot be held responsible. I do not think it necessary to go into the more intricate questions which have been raised. What I have stated appears to me to be a sufficient ground of judgment. I think the judgment of the Sheriff-substitute ought to be affirmed.

LORD YOUNG.—That is my opinion also, and I only desire to explain that where an accident is attributed to the defective arrangements of the employer's establishment or of the machinery which he supplied, I should be slow to decide

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[1] M'Gee v. Eglinton Iron Co., June 7, 1883, 10 R. 955; Daly v. Arrol Brothers, Dec. 2, 1886, 14 R. 154; M'Ghie v. North British Railway Co., Feb. 26, 1887, 14 R. 499; Fraser v. Hood, Dec. 16, 1887, 15 R. 178.

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the case without inquiry into the facts, but here I think that the whole matter is of a very ordinary and intelligible character.

The pursuer had been engaged by a man who had contracted to do certain blasting operations to perform these operations, and he was provided by his employer with tools to bore the holes, with gunpowder to form the charge, and, I suppose, with matches also to set the charge alight. The gunpowder was kept in a store at some distance from the work, and was made up in small barrels—very portable barrels, as they were only ten inches in diameter—which were carried to the work when it was desired to prepare a charge. Now, I should think it clear that a man who undertakes to blast a rock with gunpowder has an intelligent enough regard for his own safety to see that he does not strike his match so near an open barrel of gunpowder as to run the risk of being blown up. I should attribute at least such an amount of intelligence to him as would lead him to remove the powder barrel to a safe distance before striking the match. Here the barrel was lifted from the store to the hole, the needful quantity of powder was taken from it and poured into the hole, and the barrel, with the powder in it exposed, was then put down so near that a spark from the match was blown on to the powder, which exploded and injured the pursuer. He says that he had not intelligence enough to foresee his danger. I cannot take that off his hands. If he would not take the trouble to return the barrel to the store before lighting the charge, I should have thought that he might at least have put a slate or something of that kind on it, so that a spark could not get at the powder. But this intelligent individual did not take that very simple precaution—he left the barrel open, and then, when the explosion occurred, says that his master is to blame for it, because he did not provide a flask to carry the gunpowder from the store to the hole. I cannot so regard the case. I cannot find in this record any such allegation of fault on the part of the master as will infer his liability in damages to his servants. I think the accident was due to the failure of intelligent men to take ordinary and obvious precautions for their own safety. I therefore entirely agree with your Lordship. I do not think that any relevant ground for inquiry is set forth on this record.

LORD RUTHERFURD CLARK.—I am disposed to think that there should be inquiry here. I do not like to say, without inquiry, that the pursuer has no case. I rather think that his record does disclose a relevant case for inquiry.

The pursuer says that an improper system was in operation at this work, and that that system had been frequently complained of to the defender. It appears to me to be the only safe course to allow an inquiry into that allegation.

Then it is said that the pursuer exposed himself knowingly to an obvious danger. I do not think that the record will sustain that plea. It may very well turn out to be a good plea after the facts have been inquired into, but I do not think the pursuer's record discloses a foundation for it.

LORD CRAIGHILL was absent.

THE COURT adhered.

A. C. D. VERT, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

ROBERT CHRISTIE, Petitioner (Reclaimer).—*Sir Charles Pearson—Cosens.* No. 146.

June 27, 1888.
Christie.

Entail—Power to feu—Consent subject to conditions—Entail Amendment (Scotland) Act, 1848 (11 *and* 12 *Vict. cap.* 36), *sec.* 4.—An heir of entail in possession presented a petition under section 4 of the Entail Amendment Act, 1848,* in which he prayed the Court to grant warrant to him to feu the entailed estate (with certain exceptions), " at such times, in such portions, and for payment of such feu-duties as the petitioner may think fit," subject to the condition contained in a deed of consent by the next heir (whose consent was alone requisite to enable the petitioner to disentail), that no feu-charter or long lease should be granted during the lifetime of the consenter without his consent to the terms thereof. The Court (*rev.* judgment of Lord Trayner) granted the prayer of the petition.

1ST DIVISION.
Lord Trayner.
B.

IN October 1886 Robert Christie of Durie, Fifeshire, presented a petition under section 4 of the Entail Amendment Act, 1848 (the Rutherfurd Act), praying the Court, *inter alia*, " (Fifth) to grant warrant and authority to the petitioner to feu the said entailed lands and estate of Durie, so far as not already feued, or such portions thereof as he may think proper, but excepting therefrom the mansion-house, offices, and policies of the same, and that at such times, in such portions, and for payment of such feu-duties as the petitioner may think fit, all in terms of the said Act 11 and 12 Vict. cap. 36, sec. 4, before specified; to approve of a form of feu-charter for said general feuing purposes as the form to be made use of therefor from time to time as the successive feus shall be granted by the petitioner; to authorise and empower the petitioner to grant said feus in the form or forms so approved of from time to time as he shall think proper, subject to any conditions or stipulations which your Lordships may think proper; or otherwise to authorise the petitioner to grant feus of the parts of the said entailed lands and estate of Durie specified in the petition as delineated and enclosed within a red border on the plan of said estate produced herewith, and that at such times and in such portions as he may think fit; to fix and determine the minimum rate or rates of feu-duty at which the said lands may be feued, and for such partial feuing to approve of the form or forms of feu-charter or feu-contract to be lodged in process, subject to any alteration and to any conditions or stipulations which your Lordships may deem necessary, as the form or forms to be made use of for partial feuing under the present application from time to time as the successive partial feus respectively shall be granted; and to authorise the petitioner to grant the said partial feus in the form or forms so approved of from time to time as he shall think proper, all in terms of the provisions of the before-recited Acts."

The petitioner was born on 24th July 1818, and held the estate under an entail dated prior to 1st August 1848.

The petitioner produced a deed of consent granted by Robert Maitland Christie,—the petitioner's eldest surviving son,—who was the only heir whose consent would be required to the disentail of the lands in terms of the Entail Acts.

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* 11 and 12 Vict. c. 36, sec. 4, enacts " That it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in Scotland, with such and the like consents as by this Act would enable him to disentail such estate, to sell, alienate, dispone, charge with debts or incumbrances, lease and feu such estate, in whole or in part, and that unconditionally, or subject to conditions, restrictions, and limitations, according to the tenor of such consents, the authority of the Court of Session being always obtained thereto in the form and manner hereinafter provided; and such heir of entail shall be entitled to make and execute, at the sight of the Court, all such deeds of conveyance and other deeds as may be necessary for giving effect to the sales, dispositions, charges, leases, or feus so made and granted."

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The deed of consent contained this clause,—"And further I do hereby, subject to the conditions after expressed, consent to the said Robert Christie granting feus of the said entailed lands and estate, so far as not already feued, or of such portions thereof as he may think proper, but excepting therefrom the mansion-house, offices, and policies of the same, and that at such times, in such portions, and for payment of such feu-duties as he may think fit, all without any further procedure; and particularly, without the feu-charters, feu-contracts, or other deeds of conveyance as shall be necessary for giving effect to the said feus so made and granted being executed at the sight of the said Court, and without the said Court approving of a form of feu-charter for said feuing, as the form to be made use of therefor from time to time as the successive feus shall be granted by the said Robert Christie, and without his being authorised and empowered by said Court to grant said feus in the form or forms so approved of from time to time as he should think proper, or without the same being subject to any conditions or stipulations which the Court might think proper, and to the said Court pronouncing an interlocutor dispensing with such procedure; but declaring, as it is hereby specially provided and declared and stipulated, as an express condition of this consent being granted by me, that the said Robert Christie shall not grant any such feus, neither shall he enter into any ninety-nine years' or other building leases of any part of the said entailed lands and estate, excepting as after mentioned; nor shall he execute and deliver any feu-charter or lease, or other deed requisite and necessary, to any feuar or lessee during my lifetime, unless I shall have first signified my consent to the terms of the feu or lease; which consent shall be sufficiently given and proved by a letter of consent under my hand, without my executing such feu-charters, leases, or other deeds themselves; declaring that the above condition shall not apply, nor shall my consent be necessary to feus or long leases" of certain portions of the estate.

In August 1887 the Junior Lord Ordinary (Trayner) remitted to Mr Henry Cook, W.S., to report.

The passage in the reporter's report with reference to the 5th head of the prayer above quoted is fully given in the Lord President's opinion.

On 23d May 1888 the Lord Ordinary granted the prayer of the petition with the exception of the 5th head, which he refused.

The petitioner reclaimed, and argued;—Under the 4th section the imposition of conditions in the deed of consent was authorised. The Court could not examine into the conditions, they only had to see that whatever conditions were adjected were given effect to. The Act contemplated that when once the consents necessary to a disentail were obtained under the 4th section the heir in possession could go on feuing any part of the estate, always, however, under the conditions therein expressed. The heir was in fact in the position of fee-simple proprietor of the estate, and his powers were only limited by the conditions imposed by the consenter.

At advising, and after consultation with the Lord Ordinary,—

Lord President.—In this petition the Lord Ordinary grants the prayer with an exception, that exception being under the fifth head of the prayer. The petition is founded on sec. 4 of the Entail Amendment Act, 1848, and it appears to me that the Lord Ordinary and the reporter, and perhaps the petitioner himself, have failed to understand what are the rights of the petitioner under that section. The reporter, in dealing with this matter, says that the deed of consent "contains a provision which is novel to the reporter, and to which he therefore calls your Lordship's attention, as it is desired that effect shall be given to it in the interlocutor your Lordship is now asked to pronounce. This provision is to the effect that the granter consents to your Lordship giving the petitioner power to grant feus from time to time as he may think fit, and that without any application to the Court, or any model charter being previously authorised, the only proviso being that during the lifetime of the consenter his special approval and consent shall be first obtained to any such transaction.

"The first remark that occurs upon this provision is that if this power is granted, and the present consenter thereafter predeceases the petitioner, the latter will be left free to grant feus of the entailed estate without any consent of the then heir-apparent or other heir next entitled to succeed. Assuming therefore that the present consenter does predecease the petitioner, any feu granted by the latter thereafter would seem to the reporter open to challenge, upon the ground that it was a feu granted by an heir of entail in a way not sanctioned by the Entail Acts, by which alone he can feu out the entailed estate. For by these Acts an entailed proprietor must, generally speaking (1) either get the sanction of the Court to each bargain of feu; or (2) have previously obtained the approval of the Court to the drafts of the special feu-charters proposed to be granted, or to a model form of charter. The present deed of consent is practically providing a third method for obtaining the right to feu, which your reporter cannot see his way to regard as legitimate, and he therefore reports the point for your Lordship's decision."

The Lord Ordinary seems to adopt that view, and to hold that the petitioner is not entitled to obtain under the 4th section of the Act the power he asks, because the effect would be to enable him after the death of the consenter to grant feu-rights without further consent being obtained. The question is,—Is not that just the meaning of the 4th section, that he shall be entitled to go on granting feus unconditionally, except under the conditions expressed in the deed of consent?

The deed of consent here expresses the mind of the consenter thus,—"And further I do hereby, subject to the conditions after expressed, consent to the said Robert Christie granting feus of the said entailed lands and estate, so far as not already feued, or of such portions thereof as he may think proper, but excepting therefrom the mansion-house, offices, and policies of the same, and that at such times, in such portions, and for payment of such feu-duties as he may think fit, all without any further procedure; and particularly without the feu-charters, feu-contracts, or other deeds of conveyance as shall be necessary for giving effect to the said feus so made and granted being executed at the sight of the said Court, and without the said Court approving of a form of feu-charter for said feuing, as the form to be made use of therefor from time to time as the successive feus shall be granted by the said Robert Christie, and without his being authorised and empowered by said Court to grant said feus in the form or forms so approved of from time to time as he should think proper, or without the same being subject to any conditions or stipulations which the Court might think proper, and to the said Court pronouncing an interlocutor dispensing with such procedure." Now, so far the consenter does not express any condition, but merely what he considers to be the legal result of his consent, but he goes on, "but declaring, as it is hereby specially provided and declared and stipulated, as an express condition of this consent being granted by me, that the said Robert Christie shall not grant any such feus, neither shall he enter into any ninety-nine years' or other building leases of any part of the said entailed lands and estate, excepting as after mentioned; nor shall he execute and deliver any feu-charter or lease, or other deed requisite and necessary, to any feuar or lessee during my lifetime, unless I shall have first signified my consent to the terms of the feu or lease; which consent shall be sufficiently given and proved by a letter of consent under my hand, without my executing such feu-charters, leases, or other deeds themselves; declaring that the above condition shall not apply nor shall my consent be necessary to feus or long leases" on a certain part of the estate.

Now, turning from these deeds to the clause of the statute, we have this very wide and full power conferred. The Act 11 and 12 Vict. c. 36, sec. 4, enacts,—"That it shall be lawful for any heir of entail, being of full age and in possession of an entailed estate in Scotland, with such and the like consents as by this Act would enable him to disentail such estate, to sell, alienate, dispone, charge with debts or incumbrances, lease and feu such estate, in whole or in part, and that unconditionally, or subject to conditions, restrictions, and limitations, according to the tenor of such consents, the authority of the Court of Session being always obtained thereto in the form and manner hereinafter provided; and such heir of entail shall be entitled to make and execute, at the sight of the Court, all such deeds of conveyance and other deeds as may be necessary for giving effect to the sales, dispositions, charges, leases, or feus so made and granted."

That is a very wide power, and the present petitioner answering as he does to the description in the statute of an heir of entail in possession who has obtained such consents as would entitle him to disentail, is entitled under the section to sell the estate unconditionally, if no conditions are imposed by the consenter. He does it under the authority of the Court in the usual way, and executes the deeds at the sight of the Court, but his position is just this, that he has a right to deal with the estate with regard to this matter either unconditionally or under conditions if they are imposed by the consenter, exactly as if it were his in fee-simple. No one is entitled to interfere with regard to the price he gets for the estate—he may charge it with any amount of incumbrances he pleases, or he may lease or feu the whole of it.

In the present case the only condition imposed is that so long as the consenter survives, if he predecease his father, or during his father's whole life, if he survive him, he shall be consulted about the granting of feus or leases, and that he shall not be bound by them unless he is consulted and approves of what is done; subject to that condition, the heir in possession is just in the position of a fee-simple proprietor.

Now, the part of the prayer which the Lord Ordinary has refused is,—"(Fifth) to grant warrant and authority to the petitioner to feu the said entailed lands and estate of Durie, so far as not already feued, or such portions thereof as he may think proper, but excepting therefrom the mansion-house, offices, and policies of the same, and that at such times, in such portions, and for payment of such feu-duties as the petitioner may think fit, all in terms of the said Act 11 and 12 Vict. cap. 36, sec. 4, before specified." That is precisely in terms of the 4th section of the statute, and it seems to me that the petitioner is just as much entitled to choose his time for feuing, and the portions he will feu, and to fix the feu-duties, as if he were fee-simple proprietor of the estate. I am therefore for granting that part of the fifth head of the prayer. But the prayer then goes on,—"To approve of a form of feu-charter for said general feuing purposes as the form to be made use of therefor from time to time as the successive feus shall be granted by the petitioner; to authorise and empower the petitioner to grant said feus in the form or forms so approved of from time to time as he shall think proper, subject to any conditions or stipulations which your Lordships may think proper." There I think the petitioner imposes a burden on himself which there is no occasion for him to bear. There is nothing like that part of the prayer in the 4th section. The petitioner is not bound to have the form of the feu-charter adjusted, and he is not bound to conform to any form of charter. Therefore I think that the proper course would be to grant that portion of the fifth head which I have specified. It will, however, be necessary that our interlocutor should bear that it is granted subject to the conditions specified in the deed of consent.

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LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

The petitioner then, under direction of the Court, amended the fifth head of the prayer by striking out from the words "to approve of a form of feu-charter" down to the end, and by substituting therefor the following words,—"But subject always to the conditions contained in the deed of consent by the said Robert Maitland Christie, No. 26 of process, namely, that the petitioner shall not grant any feus, neither shall he enter into any ninety-nine years' or other building leases of any part of the said entailed lands and estate, excepting as after mentioned; nor shall he execute and deliver any feu-charter or lease, or other deed requisite and necessary, to any feuar or lessee during the lifetime of the said Robert Maitland Christie, unless he the said Robert Maitland Christie shall have first signified his consent to the terms of the feu or lease; which consent shall be sufficiently given and proved by a letter of consent under his hand, without his executing such feu-charters, leases, or other deeds themselves; declaring that the above condition shall not apply, nor shall said consent be necessary to feus or long leases of any part of the ground bounded on the east," &c.

THE COURT pronounced the following interlocutor:—"Allow the prayer of the petition to be amended as regards the fifth head thereof, and this having been done at the bar, recall the said interlocutor in so far as it refuses the prayer of the petition: *Quoad ultra* adhere to the same: Further grant warrant and authority to the petitioner in terms of the fifth head of the prayer of the petition as amended, and decern."

MACRAE, FLETT, & RENNIE, W.S., Agents.

HONOURABLE ATHOLL MONSON FORBES, Petitioner (Respondent).—*H. J. Moncreiff—Low.*

JAMES BURNESS (Curator *ad litem* to Ivan Courtenay Forbes), Compearer (Reclaimer).—*Mackay—Begg.*

No. 147.
June 29, 1888.
Forbes v. Burness.

Entail—Disentail—" Heir-apparent "—Entail Amendment (Scotland) Act, 1848 (11 *and* 12 *Vict. cap.* 36), *secs.* 2 *and* 52.—An heir of entail in possession presented a petition for authority, under the Rutherfurd Act, 1848, and subsequent Acts, to disentail the entailed estate on obtaining the consent of his eldest son as his "heir-apparent." The deed of entail provided that the heir in possession should for himself and his "heir-apparent" forfeit all right to the estate in the event of his succeeding to a certain peerage, to which at the date of the petition the former was heir-presumptive.

The second and third heirs maintained that the petitioner's eldest son was not, in respect of the contingency to which his right of succession to the estate was exposed, his "heir-apparent" or, in the words of the 52d section of the

No. 147. Rutherfurd Act defining that term, "the heir next in succession to the heir in possession, and whose right of succession, if he survive, must take effect." *Held* that the petitioner's eldest son was his heir-apparent in the sense of the statute, and that the petitioner was accordingly entitled to disentail on obtaining his consent, the Court being of opinion that the contingency in question was not a suspensive but a resolutive condition, and that the term "heir-apparent" as defined by the Act was to be taken as descriptive of a class of heirs to be ascertained as at the date of the petition, Lord Adam also holding that the "right of succession" referred to in the definition clause was to "the heir in possession" and not to the estate which he might happen to hold.

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1st Division.
Lord Trayner.
M.

THE HONOURABLE ATHOLL MONSON FORBES was heir of entail in possession of the entailed estate of Brux, Aberdeenshire, under a deed of entail dated 15th July 1799 and executed by the deceased Jonathan Forbes of Brux. He brought this petition for authority to disentail the estate with the sole consent of Atholl Laurence Cunyngham Forbes, his eldest son, born in 1882, or otherwise, with the consent of the three next heirs of entail, who were his two sons and his half-brother, the Honourable Walter Robert Drummond Forbes.

The petition was brought under the Rutherfurd Act, 1848, and the Acts amending that Act, viz., the Acts 38 and 39 Vict. cap. 61, sec. 5, and 45 and 46 Vict. cap. 53, secs. 12 and 13.*

The deed of entail provided, *inter alia*, "And whereas it is my wish and intention that the succession to my said lands and estate of Brux and others before disponed should be for ever kept separate and distinct from the succession to the family honours and dignity of the peerage of Forbes while there shall be any of the issue male of the said James Lord Forbes existing besides the person possessing the said dignity for the time and his heir-apparent, and failing the said James Lord Forbes and his issue male, while there shall be any issue male existing of the family or families entitled to succeed to the said dignity and peerage of Forbes, besides the person actually enjoying the said dignity and peerage for the time and his heir-apparent, it is hereby expressly provided that in case any of the heirs of taillie above mentioned descendent of the body of the said James Lord Forbes shall succeed to the honours and dignity of the peerage of Forbes, while there is any other heir or heirs of taillie existing descendent of the body of the said James Lord Forbes besides the person succeeding to the peerage and his heir-apparent, the person so succeeding to the said peerage shall, for himself and his heir-apparent in the said peerage, forfeit, amit, and lose all right, title, and interest which he may have to my said lands and estate, and shall be holden and obliged instantly to denude himself of my said lands and estate, and to convey and dispone the same *habili modo* to the next heir called to the succession of my said lands and estate by these presents, and it shall be competent to the heir next in succession to my said lands and estate to establish his right thereto by declarator, service, or any other method competent by law."

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* The Rutherfurd Act, 1848, sec. 2, provided that any heir of entail born before 1st August 1848, being of full age, and in possession of such entailed estate under an entail dated prior to that date, might disentail the estate "with the consent (and not otherwise) of the heir next in succession, being heir-apparent under the entail of the heir in possession, he being born on or after the said 1st day of August 1848, and being of the age of twenty-five years complete at the time of granting such consent, and not subject to any legal incapacity."

Sec. 3 of that Act provided that such heir of entail in possession should be entitled to disentail, "Provided always that such heir of entail in possession shall be the only heir of entail in existence for the time, and unmarried, or otherwise shall have obtained the consents of the whole heirs of entail, if there be less than three in being at the date of such consents, and at the date of presenting such application, or otherwise, shall have obtained the consents of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise, shall have obtained the consents of the heir-apparent under the entail, and of the heir or heirs, in number not less than two, including such heir-apparent who in order successively would be heir-apparent."

Sec. 52 (the definition clause) of that Act provided that the words "heir-apparent" were to be construed as meaning "the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect."

The Acts 38 and 39 Vict. cap. 61, sec. 5, and 45 and 46 Vict. cap. 53, secs. 12 and 13, provided that consents might be given in the course of the application by the heirs themselves or their curators *ad litem*, and when not given their interests might be valued by the Court and their consents dispensed with.

There was this further provision in the deed,—" But it is hereby expressly provided and declared that if, in consequence of the above provisions of devolution, my said estate should at any time devolve to one who is not the nearest heir in possibility, but the nearest in existence for the time, and a nearer heir should afterwards exist (not being possessor or heir-apparent of the dignity of Lord Forbes), the person upon whom the estate has so devolved or the heirs succeeding to him and in possession in virtue of the devolution at the time of the existence of the said nearer heir shall upon existence of such nearer heir *eo ipso* be deprived of his right to the said estate, which shall vest in and devolve to such nearer heir, and the heir in possession then become remoter shall be obliged instantly to denude himself of my said lands and estate, and to convey and dispone the same *habili modo* to the said nearer heir."

Curators *ad litem* were appointed to the petitioner's two sons, Atholl L. C. Forbes and Ivan Courtenay Forbes, who were in pupillarity.

No answers were lodged for the three next heirs, but it was maintained by the curator for the second heir and by the third heir in succession that the first heir, the petitioner's eldest son, was not in the position that if he survived his father his right of succession " must take effect." This contention was founded upon the fact that at the date of the petition, Lord Forbes, who had succeeded to the title in 1868, was fifty-eight years of age, and unmarried, and that the petitioner (who was Lord Forbes' younger brother) was his heir-presumptive.

The Lord Ordinary (Trayner), on 14th March 1888, found that the petitioner was entitled to disentail the lands in question on obtaining the consent of his eldest son.*

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* " OPINION.—The petitioner, who was born in 1841, is the heir of entail in possession of the lands of Brux under an entail dated in 1799, and he asks under the present application authority to disentail the said lands with the consent of his eldest son, who was born in 1882. In these circumstances the petitioner is undoubtedly entitled, under the provisions of the 2d section of the Rutherfurd Act, to disentail the lands in question, provided his son, whose consent is to be given, falls within the definition of 'heir-apparent' as defined in that Act. That definition is,—' Heir-apparent shall be construed to mean the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect.' It is not disputed that the petitioner's eldest son is the heir next in succession under the entail to the petitioner, but it is maintained by the heirs second and third in succession that the petitioner's eldest son is not in the position that if he survive his father his succession 'must take effect.'

" It appears that under the entail it is provided that if the heir in possession of the lands of Brux should at any time succeed to the 'family honours and dignity of the peerage of Forbes,' he must, for himself and his heir-apparent, denude of the lands of Brux, which then descend to the heir next in succession

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The curator *ad litem* to the petitioner's second son reclaimed, with leave of the Lord Ordinary, and argued;—If the petitioner succeeded to the peerage of Forbes, then his son would cease to be his heir-apparent in the estate of Brux, and both father and son would no longer have any rights in connection with that estate, for the deed of entail provided that the forfeiture should apply to both. So that the son did not satisfy the meaning of the term "heir-apparent," as defined in the 52d section of the Rutherfurd Act. His "right of succession" was not such as "must take effect." So far from that, it really depended upon many other contingencies besides the survivance of his father (of which those referred to by the Lord Ordinary in his note were some). One object of the Rutherfurd Act, and of the Entail Acts which followed, was to cut off remoter heirs, but to preserve so far the rights of the heir-apparent by allowing him full satisfaction in the event of a disentail.[1] It was thus necessary to give the words "heir-apparent" the strictest interpretation in a petition for disentail, and in such a case as the present, where the

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to such heir-apparent. The present Lord Forbes, who succeeded in 1868, is now fifty-eight years of age and unmarried, and the petitioner (a younger brother of the present peer) is his heir-presumptive. If, therefore, Lord Forbes predeceases the petitioner without issue, and the petitioner succeeds to the title, he will be bound to denude of the lands of Brux, which would then pass (other circumstances being the same as at present) to the respondent Ivan Courtenay Forbes, the petitioner's second son. It is upon the possibility or probability of this taking place that the respondents maintain that the petitioner's eldest son is not an heir whose succession, if he survive the petitioner, 'must take effect.' The respondent's opposition is based entirely on probabilities and speculations as to what may happen. If Lord Forbes should predecease the petitioner, if he should not marry, and if married he should have no issue, or, having issue, if that issue should also predecease the petitioner, then the petitioner would succeed to the peerage, and in that event the petitioner's eldest son would not be the heir entitled to succeed to Brux. On the other hand, if Lord Forbes survives the petitioner, if he marries and leaves issue, the petitioner and his eldest son may disentail the lands of Brux.

"If all possible contingencies were taken into account (and I have only noticed some of those which might arise in the present case) it would be almost impossible to give effect to the provisions of the Rutherfurd Act. In the present case, a quite possible contingency would (as I am told) carry away from the respondents their character of second and third heirs in succession to Brux. It appears to me that the only reasonable way of dealing with the Rutherfurd Act is to give effect to its provisions in the circumstances existing at the time when these are appealed to. That I take to be the principle on which the Court proceeded in deciding the case of *Preston Bruce* (1 Rettie, 740). In that case there was a clause of devolution somewhat similar to what we have here, and regarding it the Lord President observed that while it might operate as a resolutive condition, it was not suspensive.

"The case of *Gordon Duff* (Duncan's Manual, p. 227), which was referred to, does not bear upon the present question. In that case the lands of A were held under an entail which provided that those lands and the lands of B should never be held by the same person. The heir in possession of A sought to disentail with consent of the three next heirs, and one of these three heirs was then heir in possession of B. Obviously, therefore (so long as he held B), he could not be an heir of entail of A, but as it was possible he might become so (by renouncing his right to B), it was thought proper, *ob majorem cautelam*, to call the fourth heir entitled to succeed to A. By doing so, it was made certain that the three heirs next in succession to the estate of A were called and consented. But that case decided nothing bearing upon the present question."

[1] Act 16 and 17 Vict. cap. 94, secs. 20 and 21; Act 31 and 32 Vict. cap. 84, sec. 6; Act 45 and 46 Vict. cap. 53, secs. 12 and 13.

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facts raised the presumption that the consenting heir would never succeed to the estate which it was sought to disentail, this argument ought to receive full effect. The term "heir-apparent" meant an heir with an indefeasible right.[1] The cases of *Preston Bruce* and *Lord Kinnoull's Trustees*[2] did not apply. They were clearly distinguished from such a case as the present by Lord Shand in his opinion in the former of them (1 R. 745).

Argued for the petitioner;—The present case was ruled by the principles laid down in the case of *Preston Bruce*.[2] In the present case as in that the condition contained in the deed of entail was a resolutive and not a suspensive condition, and the circumstances were to be judged of as they existed at the date of the presenting of the disentail petition. The term "heir-apparent" was not a *nomen juris* in Scottish legal phraseology, but was a convenient term as inserted in the Rutherfurd Act, and as defined there meant the heir whose succession was certain if he lived. In fact the term was there used as in contrast to the term "heir-presumptive." If the reclaimer's contention was right the right of disentail given by the Act to the heir in possession would be defeated.

At advising,—

LORD PRESIDENT.—The petitioner is heir of entail in possession under a deed of entail dated in 1799, and he proposes to disentail the lands of Brux, with the consent of his eldest son, as his heir-apparent. This eldest son was born in 1882, and he is accordingly still in pupillarity—but although the 2d section of the Rutherfurd Act requires the heir-apparent who consents to the disentail to be twenty-five years of age and not subject to any legal incapacity, that is altered by subsequent statutes, and the consent of an heir-apparent may be given by a curator *ad litem*.

The question in the present case which requires serious consideration is whether under the provisions of the entail the eldest son is an heir-apparent within the meaning of the Rutherfurd Act. He is undoubtedly an heir-apparent in this sense, that he is the eldest son of his father, and if he survives his father, he must succeed to him according to the common law of succession.

The term "heir-apparent" is not known to the common law of Scotland. It was introduced by the Rutherfurd Act, but, at the same time, it was not a term with which a Scottish lawyer was entirely unacquainted. The peerage law of the country recognised it, and used it as meaning the same thing as it is interpreted to mean in this Act of Parliament. We have no corresponding term in our ordinary legal phraseology. The expression "apparent heir" has a very different meaning from the expression "heir-apparent." The former means the person to whom the succession has actually opened, but who has not yet completed his title to his predecessor's estate. But here I think the statute defines the meaning of the words "heir-apparent" by the interpretation clause, so as to make it obvious that the words are to be understood as having the same meaning which they have in peerage law,—that is, the same as they have in the law of England. By the law of England an heir-apparent is defined as being "he whose right of inheritance is indefeasible, provided he outlive the ancestor, as the eldest son, who must by the course of the common law be heir to his father on his death." That definition I take from Wharton's Law Lexicon, and it is stated on very good authority. Now, this being the meaning of the term in the peerage law and in the law of England, I think there can be no doubt about what was intended to be its meaning in the Rutherfurd Act. The form of expression which is used is "whose right of succession, if he survived, must take effect." The words "must take effect" are equivalent to the word "indefeasible" in the English definition. Accordingly the heir-apparent is the person who must succeed if he survives his father, *i.e.*, as his heir.

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[1] Duff on Entails, p. 17; Bell's Principles, 1677; Erskine's Inst. iii. 8, 54.

[2] Preston Bruce, March 6, 1874, 1 R. 740; Lord Kinnoull's Trustees v. Drummond, Feb. 26, 1869, 7 Macph. 576.

The difficulty which is suggested in this case is that in a certain event the petitioner will not be able to hold the estate of Brux, which he now possesses, and which he proposes to disentail, but will lose that estate both for himself and for his heir-apparent. He will have to give it up if he succeeds to the peerage of Forbes. That is the intention of the deed of entail, for it provides,—"And whereas it is my wish and intention that the succession to my said lands and estate of Brux and others before disponed, should be for ever kept separate and distinct from the succession to the family honours and dignity of the peerage of Forbes while there shall be any of the issue male of the said James Lord Forbes existing besides the person possessing the said dignity for the time and his heir-apparent, and failing the said James Lord Forbes and his issue male, while there shall be any issue male existing of the family or families entitled to succeed to the said dignity and peerage of Forbes besides the person actually enjoying the said dignity and peerage for the time and his heir-apparent, it is hereby expressly provided, that in case any of the heirs of taillie above mentioned descendent of the body of the said James Lord Forbes shall succeed to the honours and dignity of the peerage of Forbes, while there is any other heir or heirs of taillie existing descendent of the body of the said James Lord Forbes besides the person succeeding to the peerage and his heir-apparent, the person so succeeding to the said peerage shall for himself and his heir-apparent in the said peerage forfeit, amit, and lose all right, title, and interest which he may have to my said lands and estate." The present Lord Forbes has no family, and he is somewhat advanced in life, and there is accordingly a possibility—perhaps even a probability—that the petitioner may, upon the death of the present Lord Forbes without issue, succeed to the peerage. If so, he will lose the estate of Brux both for himself and for his heir-apparent, and it is said that in consequence of this contingency the so-called heir-apparent is not heir-apparent within the meaning of the statute, because it is not certain "that he must succeed" in the event of his surviving his father.

Now, I think there is a rule established in the case of *Preston Bruce* which applies to this case. The rule is that a condition of this kind is not suspensive but resolutive, and that where there is really a resolutive condition it does not affect such a question as we are here dealing with, because we are bound to take the facts as they stand at the time when the petition for disentail is presented. What we find here is that the petitioner is heir of entail in possession, and that his eldest son and heir-apparent must succeed, if he survives the petitioner. That seems to me to demonstrate that the so-called heir-apparent is really heir-apparent with reference to his father's succession, not only generally but in regard to this estate. I think we shall be doing no violence to the definition of an heir-apparent in the statute in holding with the Lord Ordinary that we must take the facts as they stand. The resolution of the right may never occur. The present Lord Forbes may marry and have issue; the petitioner may predecease Lord Forbes; and many other events may happen to prevent the resolutive condition from taking effect. So the condition in the deed of entail, as it may never apply to the case before us, is necessarily not suspensive of any right. I am for adhering to the Lord Ordinary's interlocutor.

LORD MURE.—This case raises a nice and important question. But upon consideration of the cases of *Lord Kinnoull's Trustees* (7 Macph. 576), and of *Preston Bruce* (1 R. 740), I am of opinion that the difficulty may be got over. In these cases the Court held that what they had mainly to look to was whether the heir who had exercised a power given to heirs in possession, or who had applied for authority to do so, was himself at the time in the position of an heir authorised by the Act to exercise the power. In the case of *Lord Kinnoull's Trustees* it was held that an heir of entail might grant bonds of provision in favour of his wife and children over the entailed estate under the Aberdeen Act, notwithstanding that he held the estate subject to a clause of devolution in the event of his having a second son, in whose favour he required to denude,—and had in fact denuded, in that case,—on the son attaining a certain age. It was, however, there held that the bonds must receive effect, in a question with the successor in whose favour the heir who had granted them had been obliged to denude. In the case of *Preston Bruce*, Mr Bruce was the heir in possession of the entailed estate, which he asked power from the Court to disentail; and it was held that the fact that his right was liable to be extinguished by the emergence of a nearer heir did not afford a good ground for refusing him the powers he applied for.

In the present case there is no doubt of the fact that the petitioner's son is now the next in succession to his father in the estate of Brux. He is his father's eldest son, and according to ordinary language he is his father's heir-apparent. But in the interpretation clause of the Rutherfurd Act we find that the words "heir-apparent" are to be construed, when that construction is not repugnant to the nature of the provision, "to mean the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect"; and it is said that, because the present petitioner may, in certain events, succeed to the peerage of Forbes, in which case he would have to forfeit the estate of Brux for himself and his family, his eldest son is not necessarily in the position of a party whose succession, if he survive his father, "must take effect." But I think the Lord Ordinary is right in holding that the possibility of some such devolution taking place cannot prevent the petitioner from now taking benefit from the disentailing provisions of the statute. There may be many cases in which similar questions may occur. There are many deeds of entail under the provisions of which heirs of entail who commit an irritancy may forfeit for themselves and their children. So that in all such cases there never could be a disentail, if the reclaimer's contention were to receive effect; and in that way many of the leading provisions of a remedial statute would become altogether inoperative. I do not think this could ever have been the intention of the Legislature, or that this interpretation clause is so worded as to oblige us to give effect to any such construction. I am accordingly of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD SHAND.—An heir of entail in possession of an entailed estate is entitled

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under the Rutherfurd Act to disentail, provided he has the consent of the heir-apparent; and the definition of heir-apparent given in the statute is "the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must receive effect." It appears to me that this definition or description of an heir-apparent is ambiguous, and may mean either of two things.

In the first place, it may mean an heir whose right cannot be defeated by any possible contingency that may happen, provided only he survive the heir in possession. The argument for the reclaimer is, that if he can shew that there are any contingencies which might defeat the right of succession of the petitioner's eldest son to the estate of Brux even if he should survive the petitioner, then he is not an heir-apparent within the meaning of the statute. And the contingency to which the reclaimer specially refers is the probable or possible succession of the petitioner to the title of Lord Forbes, in which case all right to the estate would cease both for him and his son. The words of the clause admit, I think, of the reading contended for. If it can be shewn, as I think it can be, that, even if the petitioner's eldest son survive his father, his succession need not necessarily receive effect, then I think it may be predicated of him that his right of succession is not one which, "if he survive, must receive effect."

In the second place, there is another reading, viz., that the words are merely descriptive of a class of heirs. The heir, according to the statute, must be the next heir. But next heirs are of two kinds. First, they are those who must succeed in this sense, that, assuming they survive the heir in possession, their rights cannot be defeated by any nearer heirs; and, second, they are those whose rights may be defeated by a nearer heir coming into existence. The argument for the respondent here is, that, in the words of the statute, we have simply a description of that class of heirs whose rights cannot be cut off by the contingency of the appearance of nearer heirs who may come into existence.

We have to decide which is the more reasonable of these two readings. Do the words refer to the contingency of a nearer heir coming into existence, or do they embrace such wider contingencies such as the possibility of the estate passing out of the hands of the heir of entail in possession and his eldest son becoming disqualified to succeed? I am of opinion that the more reasonable view is that for which the respondent contends.

I cannot say that the case of *Preston Bruce* has in my view any application to the present. There the petitioner was heir in possession. The statute provided that the heir in possession for the time should have power to disentail, and the question raised was, whether, because at a future time he might be required to denude of the estate, this should deprive him of the power to disentail; it was held that it did not. But the petitioner was undoubtedly the "heir in possession." Here the whole question is, whether the petitioner's eldest son has the character of heir-apparent. In the case of *Preston Bruce* the question was, admitting that the petitioner was heir in possession, had he the right to disentail. The contention here is that the eldest son is not heir-apparent, because he is not a person "whose right of succession, if he survive, must take effect."

But other considerations leave me in no doubt as to the point at issue. We must look at the inconvenient and serious consequences which would follow if we gave effect to the reclaimer's argument as to the meaning of the Act. It is conceded that if the argument presented by the reclaimer is to prevail there are many other similar contingencies which might have to be taken into account in questions of the kind which would prevent even a man's eldest son being regarded as his heir-apparent under the Act. For example, if a deed of entail contains a provision that the heirs shall forfeit all right to the estate which is the subject of the entail in the event of their succession to another property. So, too, as Lord Mure has pointed out, with the case of an entail where in the event of a contravention the heir incurs a forfeiture for himself and all his descendants. In these instances, if the reclaimer's interpretation of the words in question were to be given effect to, the heir in possession could have no heir-apparent. And that interpretation would, in point of fact, range over and include so large an area of cases that it leads me to the conclusion that it is not reasonable.

Accordingly I prefer the respondent's reading of the clause. In one branch of the statute, it is provided that the heir in possession may disentail with the consent of the three next heirs, and in another with the consent of the "heir-apparent," being "the heir who is next in succession to the heir in possession," &c. Of course that expression excludes the strict meaning of the term "apparent heir" according to the law of Scotland, by which is understood a person to whom the succession has actually opened, but who has not completed his title, and who is merely an unentered heir—an heir in apparency. But, again, an heir though next in succession may be an heir-presumptive only, who is thus defined in Wharton's Law Lexicon, p. 379,—"He who, if the ancestor should die immediately, would be his heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born." It appears to me that the full and fair meaning of the clause was simply to describe one class of heirs as distinguished from another, to exclude the heir-presumptive and to include the heir-apparent whose relationship is such that his right cannot be interfered with by a nearer heir coming into existence, and upon these grounds I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM.—This is a petition for authority to disentail, and the heir of entail in possession has obtained the consent of his eldest son. In one sense he is his heir-apparent; but it is said that this is not so in the sense of the Rutherfurd Act, because his right of succession is not an indefeasible right. Accordingly it is said that the requisite consents to the disentail have not been given.

My opinion upon the point may be very shortly expressed, and it is founded upon what, I think, is the only proper construction to be applied to the definition of the words "heir-apparent" which we find in the interpretation clause of the Rutherfurd Act. The words are, "heir-apparent shall be construed to mean the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect." His "right of succession" to whom? Surely to "the heir in possession." If that is the meaning no one can deny that that at once affords an answer to this difficulty. For if he survives, this heir-apparent must succeed to his father. I do not think it is a proper use of language to say that the succession is to an estate or a thing; the heir succeeds to the person last in possession of the estate and so acquires right to the estate, but he succeeds to a person only, and that is in my view the only correct construction of the language. If a person be the next heir for the time being to the heir in possession, then he is heir-apparent.

It is said that the definition which I have read requires that the succession

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to the entailed estate "must take effect." If that be so, I think the principles which were laid down by the Court in the cases of *Preston Bruce* and *Lord Kinnoull's Trustees* would have been applicable. Upon these grounds I think the Lord Ordinary's interlocutor ought to be adhered to.

THE COURT adhered.

SKENE, EDWARDS, & BILTON, W.S.—W. & J. BURNESS, W.S.—Agents.

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Thomson v. Stewart.

HUGH THOMSON, Pursuer (Appellant).—*Gloag*—*G. W. Burnet.*
MRS ANNE STEWART, Defender (Respondent).—*Murray.*

Master and Servant—Wrongous dismissal—Disobedience to orders—Coachman.—Held that a mistress was entitled to dismiss her coachman for having, against her orders, carried friends of his own in her carriage.

2D DIVISION.

Sheriff of Elgin and Nairn.

I.

IN June 1887 Hugh Thomson, coachman, raised an action in the Sheriff Court at Elgin against Mrs Stewart of Logie House, his former mistress, for £71, 14s., being the amount of his wages for one year, with certain other sums alleged to be due to him.

The pursuer stated that he was a yearly servant, and pleaded;—(1) The defender having illegally and unjustifiably dismissed the pursuer, he is entitled to wages, and to the price or value of his other emoluments, as concluded for, with expenses. (2) The pursuer having been engaged by the defender, and illegally and unjustifiably dismissed, the defender is liable in damages; and the damages claimed being fair and reasonable, the pursuer is entitled to decree as craved, with expenses.

The defender stated that the pursuer had been engaged by the month, and further that she had ordered him not to use her carriages for the conveyance of friends of his own, which order he had disobeyed.

The defender pleaded;—(1) The pursuer having disobeyed the defender's lawful instructions was legally and justifiably dismissed by the defender, and she is therefore entitled to be assoilzied, with expenses. (2) *Separatim,* The pursuer not being a yearly servant, either by convention or by presumption of law, the defender was entitled to dismiss him on a month's notice without cause stated, and ought therefore to be assoilzied, with expenses.

A proof was allowed. The evidence shewed that the pursuer had been in the defender's service for over twenty years. His wages were £57 a-year, paid half-yearly, with certain other emoluments. There was a conflict of evidence as to what, if any, was the express agreement as to the period of service. The evidence as to the order alleged by the defender was not very distinct, but, as both the Sheriff-substitute and the Court were of opinion that orders had been given by the defender that her carriage should not be used for the pursuer's friends, it is unnecessary to refer to the evidence on that point. The pursuer admitted that he had carried his friends in the defender's dog-cart. The defender dismissed the pursuer on 14th May 1887 on a month's notice. He remained in her service for the month, at the end of which she offered him a month's wages and emoluments, which he declined.

The Sheriff-substitute (Rampini), on 17th December 1887, pronounced this interlocutor:—"Finds that the pursuer got express orders from the defender not to drive any person or persons in her carriages without her express permission: Finds that, on the 14th of May last, after driving the defender from Logie House to Forres, he was returning to Logie driving

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the defender's landau, and that he then gave a drive therein to two men: Finds that this was an express and wilful act of disobedience, and that the defender was entitled to dismiss him for the same: Finds that, on this ground, she, on the 16th of May, dismissed him: Finds in law that the said dismissal was justifiable: Therefore assoilzies the defender: Finds the defender entitled to her expenses," &c.*

The pursuer appealed, and argued;—The defender had failed to prove that the express order alleged had been given. It had not been given in such a way as entitled the defender to dismiss the pursuer for what was at the most a trifling affair. There had been no wilful disobedience of a distinct order. That being so, the pursuer was entitled to the whole sum sued for. The presumption of law was that he was a yearly servant, and no agreement to the contrary had been proved.

Argued for the defender;—The order alleged had been proved. But even if it had not, at most the pursuer was entitled only to a month's wages, with emoluments, he being by express agreement, if not by presumption, a monthly servant. Most servants were now engaged by the month, whatever the practice might at one time have been, and the presumption (assuming it to have been at one time in favour of coachmen being yearly servants) being merely a presumption of fact, must be held to have altered with the altered practice.

LORD JUSTICE-CLERK.—This case is narrow in some of its aspects, but I have no hesitation in coming to the same conclusion as the Sheriff-substitute. I do not enter into the question whether a coachman has his engagement for twelve months or not. I think the question has been doubted, and I am not sure that it has been absolutely settled. Most of the domestic servants in towns are certainly hired from term to term. Farm servants, on the other hand, are

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* "NOTE.—In his pleas in law the ground on which the pursuer bases his claim to wages and damages is his alleged illegal and unjustifiable dismissal by the defender, and, as the Sheriff-substitute has arrived at a conclusion adverse to the pursuer upon this point, it seems only necessary for him to indicate the grounds on which this conclusion is founded, without burdening this note with any detailed analysis of the terms of the contract which subsisted between the servant and his mistress. It matters little what the nature of that contract was, if the defender was in law entitled to put an end to it by the dismissal of the pursuer. At the same time, the Sheriff-substitute may observe that, in his opinion, the pursuer has failed to prove a yearly contract, while the defender's evidence goes far to establish a contract of a very different character. That the defender actually did dismiss the pursuer is not disputed; the question is whether that dismissal was justifiable. . . . The pursuer will, no doubt, think that Mrs Stewart has acted very inconsiderately, not to say harshly, by him, in dismissing him because he gave a couple of friends a lift in one of his mistress's carriages on the 14th of May. No one can prevent the servant thinking so, if he pleases, but the law will not sanction any such opinion. If the mistress's order was a lawful one—as undoubtedly it was here—the servant was bound to obey it whatever might have been his own views as to its reasonableness or unreasonableness. Moreover, whether it was or was not the first occasion on which he had offended in this way, there can be no doubt that the servant had been previously warned that such conduct would not be permitted. This added greatly to the offence. It aggravated the wilful character of the disobedience, and, to quote the words of Lord Fraser in his work on Master and Servant, 'where a servant deliberately violates his master's orders, or refuses to obey them when given, he is clearly guilty of the grossest breach of contract.' That is what, in the opinion of the Sheriff-substitute, the servant has done here, and it is for this that he assoilzies the defender from the conclusion of this petition."

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understood to be engaged for a year. But I do not enter into that question here. My opinion is that the act, the immediate act, that prompted the dismissal of the appellant was a sufficient ground of itself; and I do not think it necessary to go further than that. That ground was that the coachman had, contrary to orders, used his mistress's carriage for the conveyance of other people. I do not say that that might not in certain circumstances be regarded as a venial offence. No master however is bound to submit to it, and any master is entitled to dismiss a servant that does it. On the other hand, there are circumstances that might induce a master to be good-natured; but I can only say I think the thing itself is quite a sufficient reason for dismissing the coachman who does it. I think the admitted fact that the coachman took up certain wayfarers and allowed them the use of his mistress's carriage was in itself an indecorum and impropriety, and that his mistress was quite entitled, if she saw fit and ample reasons to her own mind for so doing, to treat it as disrespect to orders, which it was, and to dismiss him. That is the general view I take of this matter. I think that the Sheriff-substitute's interlocutor is right.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG and LORD CRAIGHILL were absent.

> THE COURT pronounced this interlocutor:—"Find in fact that the pursuer before his dismissal by the defender had repeatedly used her carriage for the conveyance of other people than herself or members of her family, notwithstanding repeated orders to the contrary: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-substitute," with expenses.

ROBERT STEWART, S.S.C.—STUART & STUART, W.S.—Agents.

No. 149. — July 3, 1888. Craig v. North British Railway Co.

ROBERT HUNTER CRAIG, Pursuer.—*Ure.*
NORTH BRITISH RAILWAY COMPANY, Defenders.—*Murray.*

Proof—Diligence—Action of damages for personal injuries—Defender's right to recover pursuer's business books and income-tax receipts.—In an action of damages for personal injuries alleged to have been sustained through the defenders' fault, in which the pursuer alleged that his business had suffered from his inability to attend to it owing to the injuries, the defenders moved for a diligence to recover the pursuer's business books for the preceding four years, and his income-tax receipts for the same period. The Court *refused* the motion.

2D DIVISION. I.

ROBERT HUNTER CRAIG, merchant in Glasgow, brought an action against the North British Railway Company for £2000 as damages on account of personal injuries alleged to have been sustained by him in a collision on their line.

The pursuer averred that owing to the shock he had sustained he had been "obliged to abstain entirely from business for several weeks, and for several weeks thereafter was able to attend only partially to business"; and further, that "in consequence of the injury he sustained he had been put to considerable expense, and owing to his inability to attend to business he had further sustained serious loss and damage therein."

Notice of trial having been given for the Summer Sittings, the defenders moved the Court for a diligence for the recovery of "all the business books, cash books, ledgers, balance-sheets, statements of profit, accounts, receipts for payment of income-tax, and all other books and documents kept by or for the pursuer, or by or for any firm of which he has been or is a partner during the last four years, in order that excerpts may be taken therefrom of all entries shewing or tending to shew the pursuer's income from his business during these years."

The pursuer's counsel opposed the motion, and argued;—The pursuer only averred that he had been incapacitated from business for several weeks after the accident; it was unreasonable, therefore, to force him to disclose the state of his business for so long a period as four years. The defenders were quite entitled to see his books with reference to all his transactions during the period named in his record, and that was their only right.

The defenders replied;—The diligence craved was the usual one in such cases. The matter was of vital importance to companies like the defenders. The pursuer sued for a lump sum of £2000, but a large part of that would no doubt be put down to business loss. It was not possible to ascertain the profits of the business, and consequently the existence and the amount of the alleged loss, unless the defenders were allowed access to his books. The books for the few weeks of his absence would give no means of comparison, but the books for the last four years would enable an average to be struck, and so would give a basis of fact on which to cross-examine.

LORD YOUNG.—I think this motion is altogether unreasonable. I think the pursuer may very fairly be asked to name the sum which he puts on the loss his business has sustained through his absence for several weeks. But this is a motion for a diligence calling on him to produce his books for the last four years. That is, I repeat, an altogether unreasonable demand, and I am therefore for refusing the whole diligence.

LORD RUTHERFURD CLARK.—I think the pursuer puts his business affairs in issue here, for he says that his business has suffered loss through the injuries he has sustained. I think, therefore, that he puts his books in issue on the demand of the defenders. Whether they are entitled to see the books extending over so long a period as four years is another question. I am not so clear about that. But that they should see his books is a right which I think the defenders plainly possess, for if they do not get the information their interests may suffer. With respect to the income-tax receipts, I confess I have considerable doubt. I do not know what the practice of the Court has been with regard to them. For my own part, I should prefer to limit the diligence to the business books, which I daresay will sufficiently serve the defenders' purpose.

LORD JUSTICE-CLERK.—I am not for granting this application as it stands. I do not say that an application very much restricted might not be entertained. I give no opinion on that. I think this proposal is a great deal too wide. It is oppressive in its nature, and has no foundation, as far as I can discover, in the allegations which the pursuer makes.

LORD CRAIGHILL was absent.

THE COURT refused the motion.

WEBSTER, WILL, & RITCHIE, S.S.C.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

No. 150. **William James Semple**, Petitioner (Reclaimer).—*Balfour—W. Campbell.*
Thomas Tennent, Respondent.—*J. C. Thomson—Strachan.*

July 3, 1888.
Semple v. Tennent.

Curator bonis—Minor—Special powers—Liability for unauthorised expenditure—Building new mansion-house.—A *curator bonis* to a minor, without applying to the Court for special powers, entered into contracts for rebuilding the mansion-house on his ward's estate. When the operations were partially completed, the ward, in an action of choosing of curators, nominated a curator, and thereafter presented a petition for recall of the appointment of the *curator bonis.* In the proceedings following thereon, *held* that the *curator bonis* had acted illegally in rebuilding the house without having obtained special powers from the Court, and that, therefore, he was liable for the entire sums expended in the building operations by himself and by the curator in implement of the contracts, but reserving to him any claim he might be able to establish in respect of any benefit accruing to the ward's estate in consequence of the said expenditure.

1st Division.
Lord Trayner.
B.

On 9th July 1885, William James Semple, of East Overton, Strathaven, Lanarkshire, with consent of John Baird, his curator, presented a petition, in which he prayed the Court to recall the appointment of Thomas Tennent, banker, Strathaven, as *curator bonis* to the petitioner, and to remit Mr Tennent's accounts to the Accountant of Court, and thereafter to exoner and discharge him of his actings as *curator bonis* foresaid.

The petitioner averred;—"That the petitioner is the only son of the late James Semple, of East Overton, Strathaven, aforesaid. The said James Semple died intestate on or about 9th July 1873. At the time at which the said appointment was made (on 15th May 1883) it was intended by the petitioner that he should choose a curator by action in the ordinary form, but through some misunderstanding the aforesaid petition for a *curator bonis* was presented. The petitioner having now chosen a curator in the ordinary way, the office of *curator bonis* to him has been rendered unnecessary and superfluous, and entails needless expense on his estate."

On 16th March 1887 the Lord Ordinary (Trayner), in respect of a report by the Accountant of Court, exonered and discharged Mr Tennent, and further decerned against the petitioner for £142, 5s. 4½d., "being the balance reported by the Accountant of Court . . . to be due by him to the said Thomas Tennent as *curator bonis* at 18th July 1885."

The petitioner reclaimed to the First Division, and stated objections to certain items of Mr Tennent's accounts being allowed.

On 9th July 1887 the Court remitted to Mr Molleson, C.A., to inquire into the whole circumstances of the case, and to report. To enable him to do so power was given to him to examine witnesses.

In Mr Molleson's report several objections were set forth as having been taken to the curator's account, but only the second, which was as follows, requires to be noticed,—"Second, Objection is taken to the outlays in connection with the building of a new dwelling-house upon the property, the cost of which has been partly entered through Mr Tennent's accounts, and partly through those of his successor in office (Mr John Baird), and altogether amounts to £3698, 7s. 6d."*

From the report it appeared that the heritable estate belonging to the petitioner yielded a gross annual rental of £800. The public burdens, &c., amounted to about £200, leaving a nett income of about £600. At

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* Throughout the case it was taken that the sum expended on the mansion-house amounted to £3500, certain small sums having been disallowed on various grounds.

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the time when the building of the house was commenced there was a deposit of £1630 in bank belonging to the petitioner.

The petitioner's mother, Mrs Dougal, who was aged forty-two, had, under her marriage-contract with the late Mr Semple, an annuity provided to her of £300, and also the liferent of the mansion-house and garden of Overton. That house contained two public rooms, two bedrooms, and a closet, and was infested with rats, and badly drained.

The new house was well and substantially built, and at a moderate cost. It was admitted that Mr Tennent did not apply to the Court for special powers before entering on the contracts for the new house.

Mr Tennent, in his evidence before the reporter, with regard to the building of the house, stated that Dr and Mrs Dougal complained that the house was unhealthy and infested by rats, that witness had got plans for repairing the house, but that this would have cost £1900, and would have been useless expenditure. "I never approved of the (new) house at any time. I objected to it from first to last. I objected to it on the ground that William James Semple had land that needed improvement, and houses that were not in good order, and I thought that when he became of age he would be a better judge of what was needed. That was my opinion. (Q.) You did ultimately give your approval? (A.) I signed the contracts. (Q.) How did you come to do that? (A.) Mr Turnbull, the architect, brought them to my own house, and I did it. (Q.) Why did you agree to them? (A.) I do not know; it was a very stupid thing. (Q.) Was it on account of the pressure brought to bear on you? (A.) It was just that. (Q.) By Dr Dougal? (A.) And his wife. (Q.) Who entered into the contracts? (A.) Mr Turnbull entirely. (Q.) Did he consult you about them? (A.) I think he might consult me when he shewed me the plans, but he never consulted me on a single movement in the matter. I signed the contracts with the builder and the joiner. I think that was all I signed. (Q.) You were not consulted in any way about the house? (A.) No. I might have a conversation with Mr Turnbull, but very rarely. (Q.) Did you ever interfere in any way with the operations? (A.) Never. (Q.) Did you know that Dr Dougal and his wife did? (A.) Yes. (Q.) Did they consult you about what was wanted? (A.) No. (Q.) Anything they wanted was done at their own hands? (A.) At their own hands. They gave all the instructions to Mr Turnbull without consulting me. Everybody knows that I disapproved of it *in toto*."

Argued for the reclaimer;—He had suffered lesion owing to the building of this new house. The cost of it largely cut down his income, and there was little prospect of his being benefited[1] by getting a better house, the liferentrix being still young. Besides, in the profession he intended to adopt (that of a doctor) a house of that magnitude would only be a burden to him. The curator ought to have come to the Court for special powers before incurring an outlay on such a subject,[2] and as he admitted that he never approved of the building of the new house, powers would never have been granted to him. That was enough for the decision of the case, but if it came to a question how far the reclaimer had benefited by the building, in the first place, there were no materials for deciding the question in this process, and second, the *onus* of shewing any benefit at all lay on the respondent. The only proper course for the Court was to disallow the whole sum expended on the house, whether by Mr Tennent personally, or by his successor in office, under contracts entered into by him.

Argued for the respondent;—The ward was benefited by the build-

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[1] Maitland, July 11, 1863, 1 Macph. 1104, 35 Scot. Jur. 632.

[2] Graham v. Earl of Hopetoun, 1798, M. 5599.

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ing of the house, which was absolutely necessary, and was erected at a moderate cost. The liferentrix might have repaired the old house at a larger cost, and at the termination of the liferent her heirs would have had a claim against the fiar for all that was laid out.[1] The question came to be one between the liferentrix and the fiar, the contracts having been entered into at the express wish of the liferentrix.

Lord President.—The ward in this case on the death of his father succeeded to a heritable estate of which the gross rental is £800, and the nett rental, after deducting public burdens, &c., £600. He had also £1630 in bank on deposit-receipt. Now, if the ward had been proprietor of that estate without its being burdened with a liferent, and had been of full age, I should not have been prepared to say that the expenditure of £3000 on rebuilding the mansion-house would have been imprudent. The sum expended does not in itself seem excessive. But the position of matters here is very different. The mother had under a marriage-contract an annuity of £300 settled on her, and she had also the liferent of the house. The effect of this, as Mr Molleson says in his report, was,—"The clear £600 per annum of revenue in the curatory exhibited on the preceding page must, however, suffer diminution from the £300 of an annuity secured to Mrs Dougal during her lifetime. It does not seem good management for one in the possession of a surplus income of but £300 to reduce same by the interest on money to be borrowed in order to erect a house manifestly in excess of the needs of one whose income so further reduced could not much exceed £200. It may also be noticed that the ward has entered upon his studies for the profession he has chosen, which is the same as that of his step-father Dr Dougal, and that his future career renders it uncertain as to what need he may have for a mansion-house."

In such circumstances, I think nothing could be more imprudent than that the ward's guardian should have consented to proceed with the building of this house. The effect of his doing so was that the money deposited in bank was all expended, and in addition a sum sufficient to make up the whole cost of the house, on which of course the ward has to pay interest. The result of the building of the house is therefore to create a very great prejudice to the ward, without even a prospective advantage. The liferentrix is only about forty years old, and the boy has his income reduced by this proceeding to £200 a-year, and that is his sole provision so long as the widow is alive.

It is not necessary to go into the circumstances of the case, for nothing could be more candid than Mr Tennent's own account of what happened. He says that he disapproved highly of the house being built, and thought it a very stupid thing to do. Being asked why he consented, he said he was just over-persuaded. He, in short, surrendered his judgment to the widow and others, and in obedience to their order entered into contracts for the building of the house.

That being so, I cannot see what defence can be made to this objection. Everything that could be said has been said about Mr Tennent's good faith and good intentions, but we cannot listen to that in the face of his own confession. His position was that of a *curator bonis* appointed by this Court, and his duty before dealing thus with the estate was to come to the Court for special powers, and without obtaining such powers what he did was utterly illegal. It

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[1] Scott v. Forbes, 1755, M. 8278; Haliday v. Gardine, 1705, M. 13,419.

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is perfectly plain that if he had come to the Court with a petition, and stated his honest opinion as to the proposed building of a new mansion-house, the petition would at once have been refused. He could not honestly have said that what he asked would be for the benefit of the ward, and without his asserting that, the petition would not have been granted.

That being so, the question comes to be, whether this illegal expenditure is to be allowed as an item of his account. There is no answer but one to be given. The expenditure was illegal, and consequently it must be disallowed.

I have listened carefully to the grounds on which it is proposed to make a reduction from the amount for which the curator is thus liable, viz., that the ward has to some extent been benefited by the expenditure in that he will get a better house when the liferentrix dies than he would otherwise have had. Now, if the curator can make out a claim by way of recompense I am far from anxious to shut him out from making it, but I more than doubt whether that matter can be taken up in this process; but if it were competent, we have not the material to decide it. If we were asked what is the extent of the reduction which ought to be allowed,—that is, to what extent has the ward benefited,—I can see nothing to enable us to deal with the question. I am, however, disposed to acquiesce in the proposal that any claim for recompense be reserved, and if the curator thinks he has any claim for recompense against the ward's estate, it will be open to him to make it hereafter. I am therefore for disallowing this expenditure.

As regards the other objections, I am not for sustaining them.

Lord Mure.—I should be glad if I saw my way to come to any other conclusion than that stated by your Lordship, but I cannot read the evidence without seeing that the position of Mr Tennent is that he has in this matter done what he had no title to do, having been induced to do so by the relatives of the ward. Before entering on these contracts he ought to have come to the Court for special powers, but not having done so, what he did was clearly illegal. That being so, the question is, how is the matter to be put right? I listened with great interest to the suggestion of another course than that of disallowing the expenditure, and at first I was inclined to think that the curator should be debited with the interest of the money which the ward has lost, and that the matter should so be left till the death of the liferentrix. But as your Lordship has said we have no materials here to enable us to judge as to that proposal, and therefore all we can do is to adopt the course taken in *Lord Hopetoun's* case, that is, to disallow the expenditure, under reservation, however, of the claims your Lordship alluded to.

Lord Adam.—The question here is, are certain items of expenditure in the curator's accounts to be disallowed? I have no hesitation in concurring with your Lordship with regard to the expenditure on the mansion-house. No one disputes that the curator had no power to expend this sum of money on rebuilding the house without coming to the Court for special powers. The result of his not having done so is that the expenditure is *prima facie* illegal. It is true that the Court does not always disallow extraordinary expenditure made by a curator without first having obtained special powers, but here I cannot help feeling that had the curator come to the Court for powers which would have enabled him to build this house the Court would never have granted them.

No. 150. I think therefore we have no alternative but to disallow this item. I am equally clear that that is the only matter before us. It is said that there may be a claim against the ward by the curator in respect that the former has been benefited by the expenditure, but that question is not before us, and if it were we have no material on which to decide it.

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LORD SHAND was absent.

THE COURT pronounced the following interlocutor:—"Recall the Lord Ordinary's interlocutor dated 16th March 1887: Find that the respondent, Thomas Tennent, as *curator bonis*, acted illegally in entering into contracts which involved the expenditure of the ward's funds to the amount of £3500 in rebuilding the mansion-house of the estate of East Overton: To that extent and effect sustain the second and third of the objections, No. 46 of process, for the reclaimers to the accounts lodged by the said Thomas Tennent, and to the reports, Nos. 37, 39, 40, and 45 of process, of the Accountant of Court: Repel the other objections, and remit to Mr Molleson to reconsider the curator's accounts in accordance with the above finding: Reserving to the curator any claim which he may be able to establish in respect of any benefit accruing to the ward's estate in consequence of the said expenditure, and to all other parties their answers as accords: Reserving also all questions of expenses."

GILL & PRINGLE, W.S.—JOHN WALLS, S.S.C.—Agents.

No. 151. JOSEPH JOHN ARMISTEAD, Pursuer (Respondent).—*Jameson—R. L. Orr.*
JAMES BOWERMAN, Defender (Reclaimer).—*D.-F. Mackintosh—Salvesen.*

July 3, 1888. Armistead v. Bowerman.

Reparation—Nuisance—Neighbourhood.—The purchaser of a quantity of fallen timber in a plantation in the course of removing the timber dragged it across a stream which flowed through the plantation and fed a salmon-hatchery below. The result was that the stream became fouled, and that the ova in the hatchery were destroyed. In an action of damages by the proprietor of the hatchery against the purchaser of the timber, it was proved that the latter had continued his operations after he became aware of their probable consequences to the ova, but was willing to take any reasonable precautions which did not materially impede the removal of the timber, he being under contract with the proprietor of the plantation to remove the timber within a limited time. *Held* (*rev.* judgment of Lord M'Laren) that the pursuer was not entitled to damages, the defender having followed the ordinary method of carrying out an ordinary and legitimate operation.

2D DIVISION. Lord M'Laren. I.

ON 9th February 1881, Mr J. J. Armistead, a pisciculturist, obtained from Lord Herries a lease for fifteen years of about five acres of ground at Kinharvie, in the stewartry of Kirkcudbright. The lease provided, *inter alia*,—"First, the said ground is let to the said Joseph John Armistead for the sole purpose of breeding fish, with liberty to use the land not so employed as garden, orchard, or for growing crops, and for this purpose he shall be at liberty to excavate the ground for the formation of ponds to the satisfaction of and under the superintendence of the proprietor's factor, or a person to be appointed by him. Second, the tenant shall have right, so far as the proprietor can give him such right, to divert water from the Newabbey and Tannox Burns where they pass through or adjoin the ground hereby let, for the purpose of supplying the ponds to be constructed as aforesaid; and he shall construct to the satisfaction of the proprietor an outlet for the water so diverted after passing through the said ponds. . . . Ninth, the proprietor reserves the right to remove through the land hereby let the timber cut on the lands adjoining without being liable to the said Joseph John Armistead in any damage caused by the removal of such timber."

Armistead established a fish hatchery on the ground thus let, including among other apparatus ponds for the hatching of the ova. These ponds were supplied with water from the Tannox Burn, and also from another burn which came to be called the Hatchery Burn. Both burns before reaching the hatchery passed through a large timber plantation.

In 1883 a large part of the timber in this plantation was blown down. The fallen timber was sold by Lord Herries, and the purchaser resold it to James Bowerman. The contract of sale with Lord Herries provided,—"1. The wood to be removed by 31st of December 1886, and if any is left it shall be in Lord Herries' option to remove the same at the buyer's expense, or to dispose of it as he may think fit without payment or compensation . . . 4. The buyer shall remove the wood by such roads or tracks as may be pointed out by the forester across the lands occupied by Lord Herries or his tenants, without liability for surface damage, but shall be bound to repair all gaps made in the fences in removing the wood."

In carrying out the removal, Bowerman dragged a good deal of the timber across the Tannox Burn, and also across the Hatchery Burn. The result was that the filters of the ova portion of the hatchery became fouled with pieces of fallen timber to such an extent that they ceased to act, and the unfiltered and fouled water came over the top and destroyed the ova.

Armistead in consequence brought an action of damages against Bowerman.

The pursuer, *inter alia*, averred;—"During the last week in December 1886 the defender commenced removing the wood lying to the south-west of the hatchery, and notwithstanding the warnings given to him by the pursuer, and his promise to take proper precautions, the defender, or those for whom he is responsible, wrongfully, recklessly, and in total disregard of pursuer's interests, dragged the timber by means of horses and otherwise through the stream, which at that time fed the hatchery, and fouled it to a very serious extent. . . . The defender was aware of the nature of the pursuer's operations, and that he required a supply of pure water therefor, and for the supply of his household, and it was the defender's duty to take all precautions proper and reasonable in the circumstances, by the use of log-bridges and otherwise, to prevent the pollution of said streams, and consequent loss and damage to the pursuer. In spite, however, of repeated warnings by the pursuer, and promises by the defender or his representatives to adopt precautions which are usual and reasonable in the circumstances, and to put a stop to said pollution, the defender neglected to take any steps (except by using a log-bridge for a day or two about 9th March 1887), to prevent said pollution, and persisted in carrying on his operations in a wrongful, negligent, and reckless manner, so as to cause a nuisance and serious damage to pursuer. The defender, or those for whom he is responsible, by said operations, carried on and persisted in as above described, have maliciously, or at all events wrongfully, recklessly, and unnecessarily damaged the pursuer's property and business, and put himself and his household to great inconvenience, loss, and expense as above described. In consequence of the defender's said operations and whole actings as condescended on, the pursuer has suffered loss, injury, and damage to the extent of at least the sum sued for."

The pursuer pleaded;—(1) The defender, or those for whom he is

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responsible, having polluted the streams which feed the pursuer's works and supply his house, to the nuisance of the pursuer, and having thereby caused him loss, injury, and damage, the pursuer is entitled to reparation as concluded for, with expenses. (2) The defender, or those for whom he is responsible, having maliciously or, at least, wrongfully, recklessly, and unnecessarily damaged the pursuer's property and business, the pursuer is entitled to reparation as concluded for, with expenses.

The defender pleaded;—(3) The defender having acted within his rights in the removal of the said timber through the streams in question, is entitled to be assoilzied, with expenses.

The general nature of the proof sufficiently appears from the Lord Ordinary's opinion, *infra*.

The Lord Ordinary (M'Laren), on 6th March 1888, pronounced this interlocutor:—"Finds that the pursuer had right as tenant to a supply of pure water for his fish hatchery from the streams flowing through Lord Herries' plantation: Finds that the defender had right to remove the fallen timber in said plantation, and that it was his duty in doing so to take reasonable precautions against fouling the streams supplying said hatchery: Finds that the defender was negligent in the performance of this duty, and that through such negligence the pursuer has lost the greater part of the fry or young fish hatched in the season of 1887, and has sustained damage to the extent of £300: Decerns in favour of the pursuer for this sum, and *quoad ultra* assoilzies the defender from the conclusions of the action: Finds the pursuer entitled to expenses," &c.*

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* "OPINION.—The pursuer, Mr Armistead, is lessee of a house and land, with certain water rights, which he rents from Lord Herries, for the purpose of carrying on the business of fish-hatching and fish-culture. According to the evidence, this comparatively new branch of industry has already attained a considerable development in Great Britain. One of the essentials of its successful prosecution is the supply of a constant flow of perfectly pure water, and the right to such a supply was the subject of special stipulation in the lease which Mr Armistead obtained. At the same time, Lord Herries stipulated for the right to remove fallen timber through the land which was given in lease to Mr Armistead. Since the commencement of the lease a large number of trees on Lord Herries' property were blown down by a gale of wind, and as Mr Armistead's enclosure is situated at the foot of the slope of the plantation, and was the most convenient access to the plantation, it became necessary that Lord Herries should exercise his reserved right under the lease. Instead of employing his own foresters or workmen to remove the fallen timber, Lord Herries sold the timber in 1884 to an English firm, who resold it to the defender Mr Bowerman, with the right of removing it, which Lord Herries had reserved. In removing the timber the defender on various occasions fouled the water which supplies the pursuer's fish-hatchery and breeding-ponds. The young fry in the hatchery were completely destroyed as the natural and inevitable result of the pollution of the water; and there was also a considerable destruction of the fish in the breeding-ponds, which the pursuer attributes to the same cause. For this loss the pursuer claims compensation from the defender.

"I may here observe that the removal of the timber on the occasions complained of was subsequent in point of time to the period within which the defender was bound by his contract to complete the clearance of the fallen timber. On this circumstance the pursuer has founded a separate argument, to the effect that the defender must be regarded as a trespasser, or as a person interfering without a title. In considering the case I have not felt at liberty to give any weight to this contention, because I conceive that the circumstance of the defender having exceeded the limits in time within which he was to complete the removal of the timber only raised a question between him and Lord Herries. Lord Herries might have granted an extension of time without consulting the

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The defender reclaimed.

The arguments fully appear from the Lord Ordinary's opinion and the opinions of the Court.[1]

pursuer, or he might, without granting an express extension, acquiesce in the defender removing the timber after the expiration of the agreed-on time. It appears to me that as the defender had undoubtedly acquired the timber by purchase, he must be taken to be in the lawful exercise of his rights in removing it, so long as he was allowed to do so without objection on the part of Lord Herries.

"The next and only other general question is one which is raised in the interest of the defender. It is contended on his behalf that the acts of pollution averred and proved do not constitute an infringement of the law of neighbourhood. If the defender is not a trespasser, he is only responsible, as it seems, for the observance of the law of neighbourhood: hence it is urged that the acts complained of do not give rise to an action unless they amount to a nuisance. It must be admitted that the fouling of a stream by dragging fallen timber across it would not amount to a nuisance; but I cannot accept the defender's view that an injury done to a neighbour is not actionable unless it amounts to a nuisance. The obligation of neighbourhood is expressed in the maxim *sic utere tuo ut alienum non lædas.* A supply of pure water is essential to the pursuer's business; the pollution of the streams which feed his hatcheries was calculated to destroy the whole produce of his undertaking for the year. Assuming (but only for the purpose of testing the argument) that this was known to the defender, I conceive that the obligation of neighbourhood required the defender to use a reasonable degree of care and trouble to avoid injurious pollution.

"There are then three points for consideration with reference to the alleged injuries:—

"(1) Was the defender made aware of the injury which the temporary fouling of the water would cause to the hatcheries?

"(2) Was it possible by the use of reasonable and inexpensive expedients to avoid the fouling of the water?

"(3) Was the defender negligent in the performance of the duty of taking reasonable care to avoid fouling the water?

"These questions will be considered with reference to the facts as proved.

"I may here observe that I do not hold it proved that the defender had been made aware, before 30th December 1886, of the necessity of using means to avoid the pollution of the streams which fed the pursuer's establishment.

"There is evidence that the defender and his son (who was in charge of the timber) had separately visited the pursuer and seen the fish-hatchery. But these were visits of a friendly character, and the hatchery was most probably shewn to the defender and his son just as it might have been shewn to any member of the public attracted by curiosity or scientific interest. If the attention of the defender and his son had been drawn to the subject, they might, no doubt, have inferred that pure water was necessary. But they were not naturalists, nor were they persons conversant with fishing or fish-culture. Therefore, it is not to be assumed that they ever thought of the quality of the water. They probably saw the filters; but these might only suggest that the pursuer had the means of protecting his hatchery from the effects of pollution. In point of fact, the filters are only efficacious against such pollution as results from natural causes—a heavy shower, for example, washing a certain amount of turbid water into the stream. But if the water is mixed with any considerable amount of

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[1] *Authorities.*—Mackintosh v. Mackintosh, July 15, 1864, 2 Macph. 1357, 36 Scot. Jur. 678; Laurent v. Lord Advocate, March 6, 1869, 7 Macph. 607, 41 Scot. Jur. 329; Water-Works Commissioners of Dumfries v. M'Culloch, June 4, 1874, 1 R. 975; Chalmers v. Dickson, Feb. 18, 1876, 3 R. 461; Cameron v. Fraser, Oct. 21, 1881, 9 R. 26; Hislop v. Fleming, Dec. 22, 1882, 10 R. 426.

At advising,—

LORD JUSTICE-CLERK.—This is a case of some interest. The Lord Ordinary

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soil or mud, the filters become choked, and the water flows over the frames instead of passing through them. The pursuer states that when he shewed the defender the hatchery he spoke of the necessity of having pure water, and requested the defender to use means of avoiding pollution. The defender denies that such communications were made to him. As the evidence on this point is conflicting, I think it is best to assume it as unproved that the defender or his son were originally made aware of the requirements of the hatchery or of the injurious effects which would follow from the temporary pollution of the water.

"On the morning of the 30th December 1886, the pursuer, on proceeding to inspect his hatchery, found that the water flowing into it was fouled with mud, that the filters were choked, and the muddy water flowing over the frames into the hatchery, forming a muddy deposit on the fish ova. The pursuer did what was possible to clean the ova; but notwithstanding his endeavours they were to a large extent lost, their vitality being destroyed by the muddy deposit which prevented the access of fresh aerated water which is necessary to their development. The pursuer immediately saw the defender's son, and informed him of the mischief that had been done. The pursuer says that it was eventually arranged that during the ensuing week, the weather being frosty, the defender should proceed with the removal of the timber, as it was considered that when the ground was hard there would be little disturbance of the soil by dragging the timber across or in the neighbourhood of the stream. Assuming that this was so, the defender did not keep to the arrangement, but on the 3d January 1887, during a heavy fall of rain, he continued the work at the same place, with the result that the filters were again choked, and what remained of the ova and the young fry were completely destroyed. The pursuer purchased a fresh supply of ova, for which he paid £58, 10s. I am of opinion that the defender is excusable for the injury done on the 30th December, but not for what was done on 3d January. He ought either to have suspended the work during the thaw, or have laid down a bridge of logs over the water-course, for which materials lay ready to hand, or at the least he ought to have consulted the pursuer, and given him the opportunity of making a log bridge, or doing what was necessary to preserve the water from contamination.

"On the occurrence of this second injury, the pursuer again remonstrated; and this time he indicated that he would apply to Lord Herries or his factor to have the removal of the timber stopped, unless some arrangement was made. Lord Herries had the means of putting pressure on the defender, because the latter had exceeded the time allowed by his contract. But it was not necessary to refer to Lord Herries or the factor, because the defender's son agreed to defer the removal of the timber from this part of the plantation until the middle of March, when it was understood that the fish would be fully hatched, and the risk of injury much lessened.

"I may here explain that the pursuer makes use of two small streams coming from the plantation. The stream already referred to flows direct into the hatchery, and thence into one of the fish-ponds. It is referred to in the evidence and argument by the name of the Hatchery Stream. The remaining fish-ponds are supplied by the other small stream known as Tannox Burn. The arrangement of the ponds and their feeders is shewn in a plan which the pursuer gave in at the proof.

"Before the next pollution complained of, the pursuer had made a change in his arrangements, and his whole establishment, including the hatchery, was then supplied from the second stream. What was the reason for this change does not clearly appear; but I understand it was done to enable the defender to remove what remained of the timber without taking precautions against polluting the 'Hatchery Stream.' All the timber had to be taken across the Hatchery Stream, and it would have been difficult, even if bridges had been constructed, has decided in favour of the pursuer, who is a cultivator of fish near Dumfries and has established a hatchery on the lands of Lord Herries in the neighbour-

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to avoid causing some pollution. It was necessary, however, that part of the timber should be taken across the small rills which flow into the Tannox Burn, and it was supposed that by forming log bridges across these the amount of pollution would be so small that when mixed with the larger volume of water in the Tannox Burn it would be rendered insensible. I think that counsel on both sides are agreed that this would be so.

"I now come to the 7th of March, when, according to what I hold was the arrangement between the parties, the removal of the timber was to be recommenced. On the 8th March the pursuer observed that the water coming into the hatchery and pond was discoloured. This was found to be caused by the dragging of timber across one of the rills that flow into the Tannox Burn. At the pursuer's request, the defender, who happened to be on the spot, at once agreed to place planks or logs across the rill; and over such an extemporised bridge the rest of the timber in that part of the plantation was drawn, and damage avoided. No serious damage resulted from the slight disturbance to the water in the morning; partly because the disturbance was stopped before it had time to take effect upon the habitants of the hatchery and pond; and also because the fry were so far advanced that they could be cleaned by washing in pure water.

"Matters went smoothly, with one exception, which I do not stop to narrate, until 1st April, when a further pollution of the Tannox Burn took place, alleged by the pursuer to be the most serious of all; and according to his evidence it destroyed the whole of the fish of that year's hatchery. On 1st April the defender's work-people had cleared the timber so far up the bank that it now became necessary to cross two other rills feeding the Tannox Burn. They formed no log bridges, took no precautions of any kind, and gave no notice to the pursuer to protect himself. They commenced at an early hour in the morning to drag the timber across the two tributary rills, the banks of which were trodden into mud by the men and horses engaged in the work. The mud of course went down the Tannox Burn into the hatchery. The pollution was not discovered by the pursuer until its effects were irremediable. All the young fry died, with the exception of about 2000, which were chiefly from the lot of ova which had been bought in January to replace those that were first destroyed. According to the pursuer's evidence, which on this point is not open to criticism, he and his men spent weeks in tending and cleaning the ova and young fry, in the hope of removing the effects of the flooding of 8th March and 1st April; but their efforts were unavailing. The pursuer evidently thinks the flooding which took place on the 1st April was the more injurious of the two, and has no doubt that the destruction of the ova is attributable to the inflow of muddy water. I think that his conclusion is in entire accordance with the facts of the case.

"Besides the destruction of the young fry, the pursuer also claims damages for the destruction of fish in certain of the ponds into which water runs from the hatchery. The fish in these ponds were attacked by fungus disease, which the pursuer attributes to organic impurities coming from the hatchery, which of course contained a certain amount of putrescent matter coming from the dead fry or ova. The fish in ponds which are not supplied with water through the hatchery were not affected by the disease. It is therefore probable that the mortality amongst the grown fish is in some way attributable to the water connection between the hatchery and the ponds in which these fish were contained. But assuming the correctness of the pursuer's explanation, and the soundness of the corroborative evidence given by Mr Chambers on this subject, it only proves to my mind that it was a bad arrangement ever to allow the ponds to be supplied with water passing through the hatchery. It is agreed that the mortality among the young fry is always considerable, and therefore the risk of disease spreading to the fish exists independently of the exceptional mortality among the fry which occurred in the 1887 season. I suppose that the pursuer's men would

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hood of a wood which has given rise to the dispute here. His complaint is that in the course of carrying away the timber off the adjoining lands the defender, who is a wood contractor, and who is under contract with Lord Herries to clear the wood, has fouled the rivulets which feed the hatchery, and that the result of that, continued over a considerable period of time, has been to cause great damage to the article of commerce in which the pursuer is engaged.

I own to feeling great regret for the loss, which, as far as the pursuer is concerned, has been considerable. The operations in which he was engaged were scientific, and were not only interesting, but exceedingly valuable to him and profitable; and certainly one must regret that by an incident of this kind so much loss should have been sustained. But I must fairly own that I am unable to follow the Lord Ordinary in his reasoning. It appears to me that the whole ground of action is false. I think that the defender incurred no liability in consequence of anything which he did. I think that he acted simply as he was entitled to act in the exercise of his ordinary rights, and that there was no ground of complaint whatever in any part of his proceedings. On the other hand, I think —although the proof, voluminous as it is, is very slender on this point—that if the pursuer had taken reasonable precautions this injury would have been avoided. If instead of insisting on the defender taking measures which only impeded the operations in which he was engaged the pursuer had simply applied himself to see how the injury might be avoided, I think that he would have succeeded, and that with no great exertion, and at a moderate expense.

That is the general nature of the action and of the views I have come to form upon it. It is necessary, however, to consider the questions which have been raised a little more in detail.

Lord Herries is the proprietor of the whole subjects, which consist of the large pine wood which the defender was engaged in clearing, and also of the subjects which had been let for the purpose of these piscicultural operations. The defender was under contract to Lord Herries, and he was under contract to clear the forest within a particular time. It was a time bargain which he had made with Lord Herries, and therefore it was a matter of very considerable consequence to him not to be impeded in carrying out the clearance. The operation began in the winter time, when, of course, the hours of daylight were short, and when it was therefore of importance to proceed as rapidly as circumstances would permit. The ground has been indicated by a plan, and it appears that this fish hatchery was fed by a few small rivulets, some of them, the witnesses say, having no water in them at all during summer, some of them more or less. The mode in which the defender cleared the forest of the wood was by horse-power and dragging the trees along the ground, using certain drag roads which had been made on previous occasions by the forester—a very simple, and, as far as the evidence

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remove the dead fry from time to time as they were observed, and if this was done regularly, it would not follow that there was more organic contamination of the ponds in this than in other seasons. Therefore, while accepting the evidence that the fish were attacked by disease consequent on impurity in the water, I am disposed to hold that the damage is not proved to be the result of the defender's pollution, but is rather attributable to defective arrangement for which the pursuer is himself responsible." The Lord Ordinary then proceeded to estimate the amount of the damage, arriving at the conclusion stated in his interlocutor.

goes, a perfectly legitimate mode. The question is, was the "lower proprietor," as I may call him, engaged in these fish culture operations, entitled to object to the defender clearing the ground according to the ordinary way?

The Lord Ordinary has put three questions, which, he said, ought to be answered. (1) Was the defender made aware of the injury which the temporary fouling of the water would cause to the hatcheries? (2) Was it possible by the use of reasonable and inexpensive expedients to avoid the fouling of the water? (3) Was the defender negligent in the performance of the duty of taking reasonable care to avoid fouling the water? I think there are two questions omitted there. The first is, did the defender use more than his own legal rights in carrying out the operation which he performed, and did he perform it in the ordinary and well-defined way? and, secondly, did the pursuer observe the precautions which he might have observed for avoiding the fouling of the water? I am of opinion that both of these questions must be answered in favour of the defender. It was nothing more than an ordinary agricultural operation in which the defender was engaged, and if a man chooses to set up a scientific laboratory at the foot of a stream he must take his chance of the effect of ordinary agricultural operations which may go on higher up. I put the case of drainage. This is a moss, according to the evidence, with a forest on it. Now, if the proprietor of this plantation had chosen to clear the forest and to drain the moss, that would have fouled the streams which fed the hatchery beyond all doubt. But could it be said that any lower proprietor was entitled to object to those operations on the part of the upper proprietor? It is impossible to put in the balance against those operations any such damage as is founded on here. I am afraid the defender exercised no more than his right in carrying out his contract in the ordinary and usual method.

But there is another matter. The pursuer complains that the defender did not put bridges across the stream and haul the timber along these bridges. But would that have been an execution of his contract? I see that the defender's son is asked why he did not put bridges over the tributaries farther up at drag road No. 5, and he answers to that not unreasonably. He says,—"If we had done that we should have had to do it at a hundred and fifty places, because there were trees lying across these burns allwheres." Was the contractor bound to delay his execution of the contract to do all that? He had the greatest interest in this matter, for I see it is actually pleaded against him that he was too late in the fulfilment of his contract. The pursuer in this action actually puts himself into the right of Lord Herries, and pleads that he can claim damages because the defender was a trespasser, and had no right to be there at all. That is the very best possible reason why the defender should not have wasted time in making log bridges across the stream. The defender did not desire to carry that further than was reasonably necessary. If it could have been done reasonably and simply, then the defender had no desire to put the pursuer to expense; but when it is pleaded as a matter of right against the defender that is a different question. I think, further, that there are clear indications that the pursuer might if he had chosen—it might have cost him something, but there is no reason why it should not have cost him something—have well avoided the consequences of the fouling of the water.

On the whole matter I think that the action is unfounded, and that the contractor was only exercising his right in clearing the ground in the way he did. I am for assoilzieing the defender.

Lord Young.—I am of the same opinion. I think that the only questions which we can decide are, whether the defender did or did not commit a legal wrong against the pursuer, and, if he did, what was the damage consequent on that legal wrong? I agree with your Lordship in thinking he committed no such legal wrong, and consequently that no question of damages arises.

I do not dissent from the general proposition, as a general proposition, that anyone executing lawful operations—of course I am only dealing with such—upon his own property is bound to have a reasonable regard to the interests of his neighbour. He is not entitled to perform the operations in a particular way when he has ascertained that that will be hurtful to his neighbour, if there be another way equally available for his purposes which would not be injurious to his neighbour. He is not entitled to do his neighbour harm and then defend himself from liability by saying that his purpose was effected by carrying on his business in a particular way, when that particular way was not necessary for carrying on his business. As to what is required by considerations of right feeling and good neighbourhood we cannot enter on that except in a very rough way, and it is sufficient for me to say here—though it is somewhat out of the case—that I do not, upon the evidence, think there is any ground for imputing to the defender any want of right feeling or due consideration of his neighbours' interests. But, I repeat, the question for us is whether he committed a legal wrong? If the averment is true that what he did was done wilfully, maliciously—quite unnecessarily, as far as his own interest was concerned, and maliciously in order to inflict damage on the pursuer—then I am prepared to say that what he did would be actionable. But that view of the case, though presented on record, is utterly untenable on the evidence, and was not maintained to us in argument.

Then what is the case? The pursuer has quite lawfully established a sort of fish nursery—a hatchery—on the banks of a stream or burn called the Tannox Burn, and that burn—the Tannox Burn—receives into it several little tributaries. These tributaries are in reality mere ditches running through the woods of Kinharvie with some water in them—rain water chiefly—in winter, running dry when the weather is fair, and quite dry generally in summer. The largest of them is that which is marked on the plan "Hatchery Supply." That is the name which the pursuer has given to it, because he has run a pipe into it—quite lawfully, though it is outside the subject of the lease to him. That is the largest of the tributaries, and it is described by a surveyor very much in the language I have used—a ditch running through the wood. The others are smaller ditches running through the wood of Kinharvie.

Now, we know from the evidence that the wood through which these ditches pass suffered very severely from the storm of 1883-84, I think; that the trees were blown down all through it to an enormous extent, so that the right to take them away was purchased for many hundred pounds—I think a good deal over £1000. Well, they fell into these ditches, as they fell everywhere else, and the purchaser contracted to remove them. It was his right to remove them, but there were special stipulations between him and the landlord as to the removal. In removing them he dragged them over these ditches, because the ditches presented no impediment to dragging them over. If they had, he would have had to overcome the obstacle as he best might, but there being no impediment, what legal wrong did he commit in taking his horses and dragging over the ditches in the wood the blown-down timber which he had purchased and had contracted to carry away? The pursuer says,—"Oh, but a duty to me arose, for I had some very delicate ova in cradles in the hatchery, and if the mud is stirred up in the ditches it would get in among them in my premises through my pipe, and would do the ova an injury." I am of opinion that the defender was under no legal duty whatever in regard to this. It is nothing to the purpose to say that the defender could have prevented the injury at little expense. I rather think he could have done it at no great expense, and when it was brought prominently under his notice he did do something, I think, merely from good feeling and good neighbourliness, and not because he thought he was under any obligation. I refer to this only to illustrate what I meant when I said I thought there was no ground for imputing a want of right neighbourly consideration to the defender. But why did not this gentleman who was hatching these young fish attend to his own filtering operations? It would be extravagant on the statement of it to suggest that he could not have made his filters so as to prevent the mud stirred up by the operations of the defender from passing in among those fishes. I must assume that he could have done it at very trifling expense. But if he could not—if the expense of doing it made it not worth his while to do it—then that is just one of the results of putting his hatchery where he did, and the purchaser of the timber blown down in the forest had no concern with it at all. I think that what one right-minded man might be expected to do towards another the defender was willing to do, and did do, at some inconvenience to himself, and even cost. But to say that the duty was put upon him in this matter, of so clearing the forest of the blown-down timber as to cause the pursuer's hatchery no injury is, I think, a proposition for which there is no ground in reason, and certainly no authority.

I only wish to add that as at present advised I should not have allowed evidence here on the record as it stands. On the question of wilfully and maliciously, I should have required some statement of facts indicating the nature of the wilfulness and the malice, and the grounds for inferring their existence. When I put the question to the pursuer's counsel, and asked him what he founded on as indicating wilfulness and malice on the part of the defender, his answer was merely the fact that the defender did not put bridges at the places where they took timber across, or give the pursuer notice so that he might do so. I do not think I should have received that as any statement of wilful and malicious proceeding, and apart from that I should not have thought that there was on record any relevant statement to be remitted to probation. But taking the case as it is presented now—the concluded case—I think that the pleas for the pursuer ought to be repelled, the defences sustained, and the defender assoilzied.

LORD RUTHERFURD CLARK concurred.

LORD CRAIGHILL was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and assoilzied the defender.

J. KNOX CRAWFORD, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

No. 152.

July 4, 1888.
Earl of Rosebery.

THE EARL OF ROSEBERY, Petitioner.—*Maconochie.*
HONOURABLE BOUVERIE F. PRIMROSE AND ANOTHER, Compearers.—*Murray.*

Entail—Railway—Consigned money—Loan by trustees to heir in possession on security of fee-simple estate.—An heir of entail in possession prayed the Court to authorise trustees, who held a sum of money, consigned by a railway company as the price of part of the entailed lands taken for the purposes of their undertaking, in trust for himself and the succeeding heirs of entail, to lend the money to him on the security of an estate belonging to him in fee-simple. The Lord Ordinary (Trayner) reported the case to the First Division. The Court *remitted* the petition to the Lord Ordinary to sanction the proposed loan, on his being satisfied with the sufficiency of the proposed security.

Innes, March 8, 1848, 10 D. 870, 20 Scot. Jur. 303, *distinguished.*

1ST DIVISION.
Lord Trayner.
B.

IN 1885 the Forth Bridge Railway Company, in virtue of powers conferred by the Acts under which they were incorporated, took certain portions of the entailed lands of Dalmeny and others, Linlithgowshire, then held by the Earl of Rosebery as heir of entail in possession.

The price of the lands taken by the company was, under the authority of the Court, invested in the purchase of £5110, 18s. 9d. consols, which were taken in the names of the Honourable Bouverie F. Primrose, C.B., and James Auldjo Jamieson, W.S., who executed a deed of trust in 1886, whereby it was declared that they held the said consols in trust for the petitioner and the heirs of entail succeeding to him in the said entailed lands and estates, and whereby they bound and obliged themselves, at any time when required and under the direction of the Court of Session, to divest themselves of the said consols in favour of such party or parties or in such manner as the said Court should direct.

In April 1888 Lord Rosebery presented a petition to the Court in which, founding on secs. 67 and 68 of the Lands Clauses Consolidation (Scotland) Act, 1845, he prayed the Court to authorise the trustees "to exchange the said consols, held by them in trust as aforesaid, for an equal amount of new stock created under the National Debt Conversion Act, 1888, and thereafter to sell the said new stock," or otherwise, to sell the foresaid sum of £5110, 18s. 9d. of consols, and, in either case, to "lend the proceeds to the petitioner on the security of his fee-simple estate of Malleny, in the county of Edinburgh." The Lord Ordinary remitted to Mr H. B. Dewar, S.S.C., to report.

Mr Dewar in his report reported in favour of the first part of the prayer being granted, but with reference to the second part, viz., that the trustees should be authorised to lend the sum produced by the sale of the consols (which was deposited in bank), he drew the attention of the Lord Ordinary to the case of *Innes*, March 8, 1848, 10 D. 870, as a decision against the granting of the authority craved.

The Lord Ordinary (Trayner), on 19th May 1888, reported the case to the First Division.*

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* "NOTE.—The petitioner prays the Court (1) to authorise the sale of certain stock held by trustees for behoof of the heirs of entail of the estates of Newhalls and others, of which he is at present the heir of entail in possession; and (2) to authorise the said trustees to lend the proceeds of such sale to the petitioner 'on the security of his fee-simple estate of Malleny.' The first part of the prayer I have granted, but with regard to the second part, it is pointed out by the reporter that in the case of *Innes* (10 D. 870), a case in all essential particulars the same as the present, it was announced by the Lords of the Second Division (after consultation with the other Judges) that it had been 'deter-

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Argued for the petitioner;—(1) The present case was distinguished from the case of *Innes*[1] by the fact that here the fund was held by trustees for the heirs of entail, while the petitioner in the case of *Innes* was both granter and grantee of the bond. (2) There was no indication in the report of *Innes* upon what principle the Court based their decision, but probably it was that it was thought inadvisable that an heir of entail in possession should as such deal with himself in his individual capacity. But the Legislature and the Court had recognised such dealings, *e.g.*, an heir of entail in possession could excamb part of the entailed estate with his own fee-simple estate.[2] Again, an heir of entail in possession could advance money for improvement expenditure, and grant a bond and disposition in security in his own favour over the estate, or could buy his own fee-simple estate with consigned money, and add the lands so bought to the entailed estate.[3] Further, an heir of entail when disentailing might charge the valued interest of the next heir upon the estate which was to become his in fee-simple.[4] That was a statutory recognition of a transaction precisely similar to that here proposed. The sole question came to be as to the sufficiency of the security, and that must be made the subject of inquiry.

During the hearing the trustees lodged a minute stating that they were willing that this part of the prayer should be granted if the security proved sufficient.

Lord President.—The money in the hand of the trustees arose from the circumstance that a portion of the entailed estate was taken by a railway company for the formation of a railway, and the compensation money paid by the railway company was lodged in the hands of the trustees, and invested by them in consols for the benefit of the heirs of entail. The object of the petition is to get authority to sell the consols and invest the money in heritable security, and it is proposed that the money should be lent to the heir of entail in possession on security of Malleny, an estate belonging to him in fee-simple. I should not have had any doubt of the propriety of this proposal, if the trustees are perfectly satisfied, which they seem to be, with the security offered, if an objection had not been raised by the reporter, and stated for our judgment by the Lord Ordinary. The objection is, that the proposal is opposed to the opinion of the Court in the case of *Innes*. That case occurred before the passing of the Entail Amendment Act, 1848, and it is plausibly suggested by the reporter that under the existing Entail Acts the objection would not be received with the same favour. Probably it is enough to say that the present case is quite distinguishable from the case of *Innes*. In that case the bond was granted by the heir of entail in possession, as proprietor of an estate in fee-simple, in favour of himself and the

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mined never again to sanction the money being lent to the heir of entail himself.'

"That being so, I regard myself as precluded from considering whether the authority prayed for is unreasonable in itself, or from doing anything except giving effect to the determination of the Court so announced. The Court, however, may reconsider and, if it think fit, alter the decision announced in *Innes'* case, and I have reported this matter that the petitioner may have the opportunity which he desires of being heard thereon before the Court."

[1] Innes, March 8, 1848, 10 D. 870, 20 Scot. Jur. 303.

[2] 6 and 7 Will. IV. c. 42 (Rosebery Act, sec. 3).

[3] Duke of Hamilton, June 12, 1858, 20 D. 1134, 30 Scot. Jur. 669.

[4] Entail Amendment Acts, 1875 (38 and 39 Vict. c. 61), sec. 5 (2) *b*, and 1882 (45 and 46 Vict. c. 53), sec. 3.

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heirs under a deed of entail. That was an anomalous proceeding and one which might well startle the Court. The granter and grantee in the deed were the same. Now, there is nothing of that sort here. There is an independent trust, and the trustees hold a sum of money for the benefit of the heirs of entail, and it is proposed that these trustees should advance the money to the heir of entail in possession. If the security is good, I can see no objection to their doing so. The independent body of trustees is a separate person from the borrower, and the relation of debtor and creditor may competently subsist between them. The case is accordingly quite distinct from the case of *Innes*, and I propose to remit to the Lord Ordinary to sanction the loan, if he is satisfied with the sufficiency of the security.

LORD MURE.—I agree with your Lordship that this case is different from the case of *Innes*. I concur also that the application may be granted, subject to the approval by the Lord Ordinary of the sufficiency of the security. The application is by trustees who hold a sum of money, and the proposal is that the money should be invested on the security of the unentailed estate of Malleny. The relation of the parties is quite different here from the relation of the parties in the case of *Innes*. I see no difficulty in granting the trustees power to lend the money.

LORD ADAM.—I can see no objection to the proposal which is made. I understand that the trustees propose to lend money over the estate of Malleny, which is held in fee-simple. I also understand that they will not lend unless satisfied with the sufficiency of the security. I do not see any objection to giving them power to do so. It has been suggested that the proposal is against the case of *Innes*, and Lord Trayner, though he has no difficulty himself, has stated the case for our judgment. There are no opinions in the case of *Innes*. All that is there said is, that it had been determined "never again to sanction the money being lent to the heir of entail himself." Probably the facts would warrant the two additional words "by himself." That was the fact there. I give no judgment as to the case which would arise if the same state of facts came up again, but I am clear that the present application does not fall within the case of *Innes*.

LORD SHAND was absent.

THE COURT remitted to the Lord Ordinary to sanction the proposed loan on being satisfied of the sufficiency of the proposed security.

TODS, MURRAY, & JAMIESON, W.S., Agents.

No. 153.

July 4, 1888.
Paterson v. Linlithgow Police Commissioners.

GEORGE PATERSON, Applicant.—*Davidson.*
LINLITHGOW POLICE COMMISSIONERS, Compearers.—*James Mackintosh.*

Poor's-roll—Circumstances warranting admission.—A man earning 27s. a-week with a wife and family dependent on him who had been found to have a *probabilis causa litigandi, held* (*diss.* Lord Rutherfurd Clark) entitled to the benefit of the poor's-roll.

2D DIVISION.
M.

GEORGE PATERSON, blacksmith, Linlithgow, applied for admission to the poor's-roll in order that he might bring an action of damages for personal injury against the Linlithgow Police Commissioners.

On 22d June 1888, when the application was moved in the Single Bills, the Police Commissioners objected that the applicant's circumstances were not such as to entitle him to the benefit of the poor's-roll. The Court

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remitted to the reporters to inquire and report whether the applicant had a probable cause of action, and also whether his circumstances entitled him to the benefit of the poor's-roll.

The reporters reported that the applicant had a probable cause of action, that his wages were 27s. a-week, and that he had a wife and four children dependent on him, the eldest child being nine years of age, and the youngest six weeks.

The Police Commissioners again opposed the application, and argued that the practice of the Court was to refuse admission to one in such circumstances[1] as the applicant's. A man earning 23s. a-week had been refused admission.[2]

The applicant was not called on.

LORD JUSTICE-CLERK.—I think we should admit this applicant.

LORD YOUNG.—I also am for admitting him. I must own that I have heard with surprise certain observations in the cases which have been cited to us, for they appear to me to proceed on an erroneous consideration of the matter. The professional bodies are good enough—I rather think a law, a benignant law, requires them, but it is a law which they always gladly obey—to appoint members of their respective professions to act as agent and counsel for poor people who cannot afford the ordinary costs of litigation; but they give this gratuitous aid on the condition that no person shall have the benefit of it unless it is ascertained that he has a probable cause of litigation, and is in poor circumstances. That is for their protection, and I have always thought for nothing else, because where anyone sues another for an alleged wrong it is infinitely better for the defender, there being a probable cause of action ascertained, that his adversary should be in the hands of the agent and counsel for the poor than in the hands of others who take up his case only upon speculation. Therefore the report upon *probabilis causa* and poverty is really to protect the professional bodies against that gratuitous assistance being given to persons who are well able to afford the cost of litigation or who have no *probabilis causa.* Now, there is a probable cause of litigation here, and the poverty is that the applicant has a wife and family, and earns 27s. a-week. Looked at in the light of good sense, is a man in such circumstances able to pay a law-agent and counsel? I must say I think he is not, and I cannot concur with any observations, from whatever source they may come, to the effect that a man with a wife and family, who only earns 27s. a-week, is able to pay for counsel and agents.

I am, therefore, without any hesitation, of opinion that this man is entitled to admission.

LORD RUTHERFURD CLARK.—I should prefer to follow what I think has been the practice of the Court, and refuse the motion. I do not think that we ought to establish a practice inconsistent with that of the other Division. There may be cases of exceptional circumstances which may prompt the relaxation of the ordinary rule, but this is not such a case. I am therefore for refusing the application.

LORD CRAIGHILL was absent.

THE COURT admitted the applicant.

JAMES D. TURNBULL, S.S.C.—J. C. S. MILLAR, W.S.—Agents.

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[1] Collins v. King & Co., Feb. 28, 1867, 39 Scot. Jur. 257.

[2] Robertson, July 8, 1880, 7 R. 1092, per Lord President.

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Yuille v.
Rushbury.

ANDREW YUILLE, Pursuer (Appellant).—*Rhind*—*Watt*.
W. T. RUSHBURY AND OTHERS, Defenders (Respondents).—*J. C. Thomson*—*Napier*.

Property—Theatre—Letters-patent—Patrimonial right.—In 1878 the lessee of a theatre in Glasgow, holding letters-patent granted by the Crown (under the Act 43 Geo. III. c. 142) authorising him, "his executors, administrators, and assigns," to maintain a company of players in a certain theatre in Glasgow, or any other theatre in a suitable place in Glasgow, for a certain term of years, assigned the letters-patent to the proprietor of the theatre. Subsequently the proprietor granted a bond and disposition in security for £13,000, which conveyed the subjects with the "parts, pertinents, and privileges thereof." The bondholders having entered into possession, let the theatre to a new tenant. Their lessee having continued to produce stage plays, and having no licence to do so except in so far as he had right to the letters-patent, the proprietor brought an action against him and the bondholders to have them interdicted from producing stage plays in the theatre in virtue of the licence in the letters-patent, the right to which he maintained was still in him.

The Court *held* that the pursuer had no title to sue, the Lord Justice-Clerk and Lord Young on the ground that the licence in the letters-patent was not a right of property separable from the theatre, and Lord Rutherfurd Clark on the ground that the pursuer had, by granting the bond and disposition in security, divested himself of his right to the letters-patent.

2D DIVISION.
Sheriff of
Lanarkshire.
M.

BY royal letters-patent, dated 26th May 1868, proceeding on the narrative of the Acts 43 Geo. III. cap. 142, and 6 and 7 Vict. cap. 68,* Her

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* The Act 43 Geo. III. cap. 142, enacts,—"Whereas a licensed play-house in the city of Glasgow would be of convenience to the said city, and to persons resorting there: May it therefore please your Majesty that it may be enacted, and be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, that so much of an Act of Parliament which passed in the tenth year of his late Majesty's reign, intituled an Act to explain and amend so much of an Act made in the twelfth year of the reign of Queen Anne, intituled 'An Act for reducing the laws relating to rogues, vagabonds, sturdy beggars, and vagrants into one Act of Parliament, and for the more effectual punishing such rogues, vagabonds, sturdy beggars, and vagrants, and sending them whither they ought to be sent,' as relates to common players of interludes, whereby all persons are discharged to represent any entertainments of the stage whatever, in virtue of letters-patent from His Majesty, or by licence of the Lord Chamberlain of His Majesty's household for the time being, except within the liberties of Westminster, or where His Majesty is residing for the time being, be, and the same is hereby repealed so far as the same respects the city of Glasgow, suburbs, or neighbourhood thereof: And that it shall and may be lawful to His Majesty, his heirs and successors, to grant letters-patent for establishing a theatre or play-house in the city of Glasgow, suburbs, or neighbourhood thereof, subject to such restrictions as to the number of persons to be interested therein, and in the profits thereof, and with such privileges and under such provisions and regulations for the due and orderly conducting and managing the same, as to His Majesty shall seem fit.

"Provided always, and be it enacted, that the said theatre or play-house, and management thereof, shall be under and subject to the control and inspection of the Lord Provost, Baillies, Dean of Guild, and Deacon Convener of the Trades and city of Glasgow, and of the Sheriff-depute of the county of Lanark, for the time being.

"And it is hereby enacted that this Act shall be deemed and taken to be a

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Majesty gave and granted unto "William Glover, of the city of Glasgow, gentleman, his executors, administrators, and assigns, for and during the full term and period of twenty-one years, to commence from the 24th day of June in the present year, 1868, and to determine upon the 24th day of June in the year 1889, full power, licence, and authority to assemble, form, support, govern, keep, and maintain a company of players or comedians for our service for performing and acting such tragedies, plays, operas, and other entertainments of the stage only as have already been allowed or licensed, or shall hereafter be allowed or licensed by the Chamberlain of our household, within the premises lying on the east side of Dunlop Street, in the said city of Glasgow, now occupied as a theatre, and formerly known as the Old Theatre of Glasgow, or within any other theatre built, or to be built, at any other suitable place within the city of Glasgow, the suburbs, or neighbourhood thereof, instead of the said theatre in Dunlop Street aforesaid, ... which said company of comedians shall consist of such members as the said William Glover, his executors, administrators, or assigns, shall from time to time think fit. And we do hereby for ourselves, our heirs and successors, grant to the said William Glover, his executors, administrators, and assigns, full power, licence, and authority to permit such persons at and during the pleasure of him, the said William Glover, his executors, administrators, and assigns, from time to time to act plays and entertainments of the stage of all sorts, peaceably and quietly, without impeachment or impediment of any person or persons whatsoever, for the honest recreation of such as shall desire to see the same. . . . Declaring always that these our letters-patent shall be revocable by us, our heirs and successors, at our and their pleasure, and without any cause given, and that thenceforth the right of the said William Glover, his executors, administrators, and assigns, shall cease and determine. . . ."*

In 1869 the theatre in Dunlop Street was acquired by the Glasgow City Union Railway Company, and Glover leased another theatre in Hope Street, which thereafter was known as the Theatre Royal, in virtue of the foregoing letters-patent.

In 1878 this theatre was bought by Andrew Yuille and John Rae, and

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public Act, and shall be taken notice of as such by all Judges, Justices, and others in all Courts and places, without specially pleading the same."

The Act 6 and 7 Vict. cap. 68 (an Act for regulating Theatres), sec. 2, enacts,—"It shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain for the public performance of stage plays without authority by virtue of letters-patent from Her Majesty, her heirs and successors or predecessors, or without licence from the Lord Chamberlain of Her Majesty's household for the time being, or from the Justices of the Peace." The section then goes on to enact penalties.

* The letters-patent, after declarations prohibiting representations injurious to the christian religion or to good government, further bore,—"And our mind and will being that in future our theatre may conduce to the promotion of virtue and the improvement of human life, We, by these presents, command and order that no new play, or any old or revived play, shall be acted under the authority granted in these presents containing any sentiments or words hurtful to piety or good morals, until the same shall be corrected and purified by the said William Glover, his executors, administrators, and assigns, from all hurtful and offensive sentiments and expressions. Provided always that the said theatre or play-house, and the management thereof, shall be under and subject to the control and inspection of the Lord Provost, Bailies, Dean of Guild, and Deacon Convener of the Trades of the city of Glasgow, and of the Sheriff-depute of the county of Lanark for the time being."

Glover on 10th May 1878 assigned the letters-patent to Yuille and Rae, and "their heirs and assignees," in consideration of the sum of £400.

On 23d May 1878, Yuille and Rae, in security of an advance of £13,000 from a Mrs Anderson, granted a bond and disposition over the theatre in her favour. This bond contained no express reference to the letters-patent, but it conveyed,—"All and Whole" (here followed a description of the land by boundaries and measurements, including the following words, viz., "and partly by other property belonging to us, along which it extends 82 feet 1 inch or thereby, on the centre of the gable-wall and range thereof of the Theatre Royal"), "with the whole houses and buildings erected or to be erected on the subjects above disponed, parts, pertinents, and privileges thereof, and free ish and entry thereto, . . . and we assign the writs, and we grant warrandice."

The theatre was burned down in 1879, but was rebuilt in 1879-80. In July 1881, Mrs Anderson's trustees entered into possession of it under the bond and disposition in security. Thereafter the right under the bond passed to Mr and Mrs Richmond's marriage-contract trustees, by whom, in August 1887, the theatre was leased to William Thomas Rushbury.

In November 1887 Yuille (Rae being then dead) presented a petition in the Sheriff Court at Glasgow against Rushbury to have him interdicted "from producing stage plays in the buildings known as the Theatre Royal, Hope Street, Glasgow, in virtue of the licence and authority contained in the royal letters-patent for the performance of stage plays in a theatre in Glasgow granted to William Glover, artist and theatrical manager in Glasgow, in the year 1868, to remain in force for the period of twenty-one years from the date thereof, and from using the said royal letters-patent in any manner of way without permission from the pursuer, or from interfering with the pursuer in any way in his use and enjoyment thereof."

The pursuer averred that the defender was performing stage plays in the theatre, and pleaded, *inter alia*;—(2) The pursuer is, in virtue of his titles, entitled to claim the protection of the Court against the acts of the defender complained of.

The defender did not dispute that he was performing stage plays in the theatre, but pleaded;—(1) No title to sue. (2) All parties are not called. (3) The pursuer having been divested of any right he may have had in the letters-patent cannot enforce his present claim. (4) On a sound construction of the deeds and documents, and of the actings of parties as set forth on record, the bondholders are now in right of any interest which the pursuer may have possessed in the said letters-patent.

The bondholders—Richmond's trustees—were subsequently sisted as defenders, and adopted the defences for Rushbury.

The Sheriff-substitute (Lees), on 26th November 1887, sustained the first plea for the defenders, and dismissed the action.

The Sheriff (Berry) on appeal adhered.

The pursuer appealed, and argued;—The bond and disposition in security did not carry the right to the letters-patent. These the pursuer retained as his property, and they could be used by him as applicable to any theatre in Glasgow. Or he might assign his right, for the right was in terms assignable. The defenders called their theatre the Theatre Royal, which implied that they were in right of the patent. He was entitled to interdict against that assumption of right.

Argued for the defenders;—The pursuer had no title to sue. The bond carried the patent as a pertinent of the theatre, and without that word the patent would have been carried as an essential of the theatre. The right under the grant of letters-patent was not separable from the theatre. Even if it were, the defenders were in no way infringing the pursuer's rights, for at the most his argument came to this, that they were using the theatre without a licence, and that was no concern of his.*

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Lord Justice-Clerk.—It may turn out to be true, and we have heard a very able argument to that effect, that the present proprietors or occupants of this theatre are not entitled to the benefit of these letters-patent, but I do not think that in the position in which the parties now stand the remedy of interdict is open to the pursuer. It appears to me that the whole question resolves itself into this. Is it the case that the pursuer has by assignation a right to these letters-patent for the purposes for which they were granted? I rather think he has, but I apprehend for no other purposes whatever. If the nature of the letters-patent is to confer the benefit of them on the person who is in the act of carrying on the business of the theatre, I do not see that the grantee of the letters-patent may not assign them for that purpose if he pleases, but unless he carries on the business of the theatre himself, or assigns the letters-patent to another for the purpose of producing stage plays at the theatre, I think he cannot have any right effectual in his own person. That appears to me to be the necessary result, and consequently I think that it is not within the right of the pursuer to ask us to interdict the defenders from taking upon themselves to say that they are entitled to use the letters-patent, of which the pursuer himself makes no use except to withhold them from the defenders. It may quite well be that he is entitled to assign these letters-patent to the defender if he chooses, and for any consideration which he pleases. That is a totally different matter. But apart from the right to use these letters-patent himself or to assign them to someone else for the purpose of producing stage plays at the theatre, the pursuer has, I think, no right at all in the letters-patent. I am of opinion therefore that he is not entitled to succeed in this application.

Lord Young.—I have come to the same conclusion, and I must take the liberty of saying that in my opinion the case is an exceptionally clear one in several views of it.

I think the legal character of the letters-patent here has not been sufficiently attended to. Letters-patent in their legal character are only the licences for a particular theatre as a place of public amusement, nothing more. Such places of public amusement may be otherwise licensed. They may be licensed by the Lord Chamberlain or by the Justices of the Peace, but by whomsoever granted the licence itself is not property. It is a matter of mere police regulation for the preservation of good order and decency, and I do not think that letters-patent such as these here, any more than licences by Justices of the Peace or licences of the Lord Chamberlain, can be regarded as in any sense patrimonial estate.

The patent with which we are here dealing proceeds on the Act 43 Geo. III. c. 142, which proceeds on the narrative that a licensed play-house in the city of Glasgow would be of convenience to the said city, and to persons resorting thereto, and it authorises the Sovereign "to grant letters-patent for establishing

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* It was stated at the bar that in the case of the Edinburgh Theatre Royal, which was also licensed by royal letters-patent in virtue of an Act of Parliament similar to that of the Glasgow Theatre, the letters-patent were in favour of the Duke of Buccleuch, Mr Cowan, M.P. for the city, and the Lord Provost for the time being and their "heirs, successors, and assigns."

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a theatre or play-house in the city of Glasgow, suburbs, or neighbourhood thereof, subject to such restrictions as to the number of persons to be interested therein, and in the profits thereof, and with such privileges and under such provisions and regulations for the due and orderly conducting and managing the same as to His Majesty shall seem fit." That is the authority given to the Crown to promote the convenience of the city of Glasgow by licensing in the form of letters-patent a play-house in that city. The letters-patent, proceeding on that narrative, go on to grant a licence to the then proprietor of the theatre in Dunlop Street, Mr Glover, and his "executors, administrators, or assigns," and make the licence applicable not only to that theatre but to any other theatre which might be put up in substitution therefor. The grant in favour of Glover, his heirs, executors, and assigns, is mere words of style, for we were told that the letters-patent in the case of the Edinburgh Theatre Royal are in favour of the Duke of Buccleuch, Mr Cowan, M.P., and the Lord Provost for the time being. On them is put the duty of regulating everything connected with the proper conduct of the theatre, it being reserved to the Crown to revoke the letters-patent at any time, and that gives some security that the letters-patent would be used for the purpose for which alone they were granted.

Now, what we have to consider in one view of the case is whether these letters-patent are separable from the theatre, so that they may be separate patrimonial estate, saleable in the market, and putting the owner for the time being into the position of being able to make a pecuniary exaction from any person conducting performances in the theatre. I asked during the argument whether such a thing had ever been heard of. I was told it was quite common. I must say I do not believe it. I doubt whether such a thing has ever occurred. It would be quite foreign to the purpose, nature, and legal character of such letters-patent or other licences that they should be patrimonial estate, saleable or marketable property, such as would pass to a trustee in bankruptcy or could be attached by creditors. That is not their nature. However, Glover, when the theatre was sold, went through the form, which I should have thought unnecessary, of assigning the letters-patent to the purchasers Rae and Yuille. I think that he could not have assigned the letters-patent to anyone else, nor could he have retained them as a separate rent-yielding subject himself. I therefore think that the pursuer has no estate in the letters-patent at all in virtue of which he can present this application, and that any right, privilege, or profits under them are with the respondents in virtue of the title they have to the theatre to which the letters-patent apply.

But there is another view upon which I am equally clear, and it is sufficient for the decision of the case in my opinion. I have already pointed out that according to my views these letters-patent do not differ in their legal character from licences of the Lord Chamberlain or Justices of the Peace. They are of the same character, for the well-being of the citizens, and of people going to the theatre, to secure orderly performances. What is the consequence to anyone performing stage plays without letters-patent or a licence from the Lord Chamberlain or from Justices of the Peace? It is not a matter of the law of property, but of police regulation and order, for I find in the Act of Parliament that such persons are liable to prosecution. The Act of 1843 (6 and 7 Vict. cap. 68), in its second clause enacts that any person carrying on a theatre without certificate by letters-patent shall be liable in a penalty. Now, what other virtue can there be in a licence or in letters-patent except to exempt from penalties. It is said that

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the respondents proclaim that they are holders of a licence by royal letters-patent. What interest has the pursuer in that? None that I can see. It is a mere announcement that they consider that they have the right to perform plays which letters-patent give them. It can be the interest only of those who have to prosecute for the public to inquire into that. The licence can be of no use whatever except as an answer to a prosecution for penalties. I cannot see how it concerns Mr Yuille in any way. I am, then, clearly of opinion that Mr Yuille has no patrimonial estate in the letters-patent at all, and no title to sue.

Lord Rutherfurd Clark.—I have come to be of the same opinion. At first I had some hesitation arising from the circumstance that the pursuer had an express assignation to the letters-patent, and that the defenders had no express right to the letters-patent at all. If it were true that the defenders had no right, it might have been maintained on plausible grounds that, whatever the character of letters-patent, the pursuer as assignee might prevent the defenders using them, or even claiming to have right to them. But further consideration has satisfied me that the pursuer divested himself of them in favour of the defenders,—the bondholders,—so far as necessary at all events to enable them to use thereafter the subjects of the security. He disponed to them the theatre with "parts, pertinents, and privileges," and I do not think a debtor so disponing to creditors could prevent them making the best use of the theatre in order to realise their debt. The contention of the pursuer really comes to this, that although he has given a security to them as his creditors it nevertheless shall not avail them to the best effect. I think the effect of the security was to enable them to use it as best they could, and that one of the ways, and indeed the only available way, was to use it as a theatre for which the licence was held by the owner. That right is, I think, fairly covered by the word "privilege," but even if that word had not been in the bond I should have come to the same conclusion.

Lord Craighill was absent.

The Court adhered.

William Officer, S.S.C.—Tait & Johnston, S.S.C.—Agents.

Catherine Munro Warrand and Others (Warrand's Trustees) and Burgh of Inverness, Pursuers (Respondents).—*D.-F. Mackintosh—C. N. Johnston.*

Angus Mackintosh, Defender (Reclaimer).—*Darling—Low.*

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Fishings—Salmon-Fishings—Competing Title—Possession.—In an action brought by the burgh of Inverness and others, for declarator that the pursuers had the exclusive right of salmon-fishing in the river Ness from both banks from the stone X to the sea, the pursuers founded on a crown charter dated in 1591 ratifying all former grants to the town, and conveying "aquam de Nyss omnesque partes ac utrumque latus . . . . cum omnibus piscationibus et piscariis tam salmonum quam aliorum piscium." Defences were lodged by the proprietor of the estate of Holme on the south bank, part of which was situate above the stone X and part below that mark. The defender held one half of the lands of Holme under Fraser of Balnain as superior upon a title which did not carry any right of fishing, and the other half of the lands as a feu from the Earl of Moray, on a title in which the subjects were described as "toto et integro dimidio villæ et terrarum de Holme . . . cum dimidio salmonum piscarium super aqua de Ness ad dict. terras apertans," the superior's title being

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a charter granted by Queen Mary in 1566 in favour of the Earl of Moray, conveying "dimidietatem terrarum de Holme cum salmonu et aliis piscariis earundem in aqua de Nyss." The disputed portion of the fishings (below the stone X) was *ex adverso* of part of the lands held of the Earl of Moray; the upper portion of the Holme fishings, which was not in dispute, was partly *ex adverso* of the remainder of Lord Moray's feu and partly of Fraser of Balnain's feu. The defender did not dispute the pursuers' right to fish for salmon *ex adverso* of Holme below the stone X, but claimed a right along with them. The defender admitted that he had possessed the salmon-fishing *ex adverso* of the upper half of Holme. As regarded the possession *ex adverso* of the lower half it was proved that for almost the whole period from 1820 to 1840 the Holme fishings and the town fishings were let to the same tenant; that in 1843 the defender had in a petition for interdict unsuccessfully attempted to prevent the tenant of the town's fishings from fishing on the Holme side of the river; that since 1843 the defender had granted successive leases of the salmon-fishings of Holme, sometimes describing them as extending from the western boundary of Holme to the eastern, and that the tenants had fished for salmon with net and coble to 1853, and from that date with the rod, without challenge down to the eastern or lower boundary of Holme.

The Lord Ordinary (M'Laren) held that the pursuers' title ought to receive effect according to its terms, the defender's title not being contradictory thereto when construed, as it might be, as a grant of the salmon-fishings *ex adverso* of the upper half of Holme.

On a reclaiming note, *held* that the defender was entitled to absolvitor, in respect (1) that the grant to the Earl of Moray of one-half of the salmon-fishings of Holme was to be construed as a grant of one-half *pro indiviso* of the fishings pertaining to the whole lands of Holme; (2) that in the absence of evidence to the contrary, these were to be regarded as the fishings *ex adverso* of the whole lands; and (3) that the defender's possession was sufficient to preserve his right; *diss.* Lord Rutherfurd Clark, who held that the defender's possession of the salmon-fishings *ex adverso* of the upper half of Holme had identified these as the half of the fishings granted to the Earl of Moray, and that he had proved no possession of salmon-fishings *ex adverso* of the lower half sufficient to deprive the pursuers of the exclusive right conferred on them by the charter of 1591.

Opinion (*per* Lord Young) that a general grant of fishings may be explained to include salmon-fishings by possession thereof in other ways than by net and coble fishing. *Opinion contra per* Lord Rutherfurd Clark.

2D DIVISION.
Lord M'Laren.
M.

THIS was an action by the marriage-contract trustees of Mr and Mrs Warrand of Bught and the Provost and Magistrates of Inverness against Angus Mackintosh of Holme, in the county of Inverness, and Charles Innes, solicitor, Inverness, for any interest he might have, for declarator that the pursuers and the defender Innes had "the sole and exclusive right of salmon-fishing in the river Ness from both banks, from the Stone of Clachnahagaig to the mouth of the river where it joins the sea at low water, with the exception of the fishing known as the Duke of Gordon's Fishing, below the Castle Hill, and the fishing further down the river known as the Friars' Fishing or Friars' Shot." The pursuers further sought declarator that the defender Mackintosh had "no right or title to fish for salmon upon the said river within the bounds foresaid, and, in particular, has no right or title to fish for salmon in that portion of the river which is immediately below the site of a cottage upon the east bank of the same, opposite or nearly opposite the point upon the west bank where the lands of Bught marched with the lands of Dunain prior to the construction of the Caledonian Canal."

The titles on which the pursuers founded commenced with a charter from the Crown dated 1st January 1591, granted by King James VI. This charter ratified all former grants in favour of the town of Inverness, and conveyed, *inter alia*, to the town of Inverness,—"Totam et integram aquam de Ness, omnesque partes, ac utrumque latus ejusdem, inter lapidem vocat Clachnahaggag et mare, cum omnibus piscationibus et piscariis tam salmonum quam aliorum piscium." Infeftment followed on this grant. The pursuers were in right of this grant along with the defender Charles Innes. The fishings belonging to the town of Inverness, as granted by the charter and described in it, subject to the exception hereafter stated, having been exercised at one time by four cobles, were known as the Four Cobles Fishings. The fishings were feued off by the town from time to time in cobles and fractional parts of a coble to various burgesses and heritors, the right of each feuar extending over the whole, and being exercised in common with that of the other feuars. The pursuers, Warrand's Trustees, had three and a-third cobles, the defender Innes one-sixth, and the Magistrates retained one-half.

The pursuers stated that they had, in virtue of their title, exercised along with Mr Innes, peaceably, from time immemorial, or at least for more than forty years, the sole and exclusive right of salmon-fishing from both banks between the Clachnahagaig stone and the sea. They admitted, however, that between that stone and the sea there were two places at which they had no right under these titles, and had not exercised any possession. These were the two fishings known as the Duke of Gordon's Fishings and the Friars' Shot. These fishings had been given out by the Crown by still more ancient grants. The former belonged to the Gordon family. The latter had been given out to a religious house by a charter of Alexander III., but by a charter of 1567 it was granted to the town of Inverness.

Defences were lodged for Angus Mackintosh of Holme, whose estate extended along the right bank of the river for about a mile above and a mile below the site of the Stone Clachnahagaig. The stone had been removed when the Caledonian Canal was formed, and the pursuer averred that it was opposite the point where the lands of Bught marched with the lands of Dunain.

The defender claimed right to salmon-fishings *ex adverso* of Holme, and averred that he and his authors had enjoyed continuous possession thereof.

The defender's title began with a crown charter, dated 1st June 1566, bearing that "Henry and Mary," "King and Queen of Scots," granted and confirmed to James Earl of Moray the whole lands of Moray, containing " . . . dimidietatem terrarum de holme cum salmonu et aliis piscariis earun. in aqua de Nyss." The defender produced no infeftment following on this charter. The charter, "togidder with the precept and instrument of seesing following thairupon," was ratified by Parliament on 5th June 1592, by a "ratification to the Erll of Moray of his infeftments."

That half of the estate of Holme came into the defender's family from the Earls of Moray, and was still held of the Earl of Moray as superior at the date of this action. On 4th September 1706 the Earl of Moray granted in favour of John Mackintosh of Holme a precept of *clare constat*, in which the lands were described,—"toto et integro dimidio villae et terrarum de Holme et in dimidio molendini de Holme astrictis multuris et sequelis ejusdem cum dimidio salmonum piscarium super aqua de Ness ad dict. terras apertans. . . ."

The other half of the defender's estate of Holme came into his family from the Laird of Cawdor in 1706. There was in the title to it no mention of fishings. At the date of the action now reported that half was held of Fraser of Balnain as superior.

The fishings in dispute (below the Stone Clachnahagaig) were *ex adverso* of part of the feu from Lord Moray. The fishings above the

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stone, which were possessed by Holme, were *ex adverso* of the remainder of Lord Moray's feu and of the feu held of Fraser of Balnain.

A marriage-contract of the laird of Holme in 1780 described Holme as comprehending " the mains and manor-place thereof, Belnahoan and Ness-side, holden of the Earl of Moray, the milltoun of Holme, goosecroft, mill, and mill lands, holden of the laird of Calder."

Miltoun of Holme and Ness-side were on the bank of the river above the Stone of Clachnahagaig.

A proof was led.

It appeared that in 1843 the defender, then in minority, had applied to the Sheriff for interdict against Archibald Tait, a perfumer and fishing-tackle maker in Inverness, lessee of the town fishings, to prevent him from fishing for salmon on the Holme side of the Ness, immediately opposite to Holme, and drawing his nets on the Holme bank. Tait denied the defender's right to salmon-fishings below the Clachnahagaig stone, and stated that he himself had right to the salmon-fishing, and had held exclusive possession thereof. Interim interdict having been granted, the Sheriff allowed the respondent a proof and to the petitioner a conjunct probation. Proof was led for the respondent in 1843, 1844, 1845, and 1846, but was not closed, and on 21st December 1848 the Sheriff renewed the order and prorogated the period for reporting the proof. No further procedure took place until 8th July 1852, when a summons of wakening was raised by the respondent Tait. No proof was led for Mr Mackintosh, and the interdict was recalled in February 1853. In the present action the defender thus explained the reason for no proof being adduced by him :—" In June 1852 I was kidnapped at Edinburgh, and forcibly conveyed to Saughton Hall, where I was kept for six weeks. I effected my escape. I came to reside at Ness Side early in the winter of 1852, and was there when the interdict was recalled. Mr Charles Stewart was my law-agent. I was so engrossed by what had occurred that I could think of nothing else, and in these circumstances the interdict came to be recalled, and the action fell asleep after that. I believe this was the history of it: I being then in the country, the other party, knowing the troubles I had been involved in, thought it would be a good opportunity to revive the action, which had been asleep since 1846, and get it settled; and, through my agent, I had notices served upon me that it was necessary for me at once to proceed with the proof, or, if that was not done, the interdict would be recalled. Being entirely engrossed with other matters, I felt I could not resume the question, and that I must acquiesce; but I knew that any action to finally settle my rights would require to be raised in the Supreme Court."

In the present action the Lord Ordinary admitted the respondents' proof in the interdict process. In it a witness named M'Naughton deponed that he had had a lease for a year from Angus Mackintosh of Holme, who died in 1817, of the Holme fishings, who had pointed out to him the march at a point close to the spot where the Stone of Clachnahagaig was said by the pursuers to have been, and had told witness that he could not give him permission to go farther down the river. It appeared, however, that from 1820 to 1830 a man named Stevenson had held the town fishings and Friars' Shot, and also the Holme fishings, as a tacksman. He failed in 1830, and for a time had not the town fishings, but afterwards got part of them again. He had retained during his difficulties the Holme fishings. He continued to hold both the town and the Holme fishings till 1839.

In the proof led before the Lord Ordinary both parties endeavoured to establish exclusive possession of fishings below the alleged site of

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the Clachnahagaig stone, *ex adverso* of the lands of Holme, but in the Inner-House the defender did not maintain that he had an exclusive right. The following facts appeared from the proof:—

In 1840 and 1841 Mr Mackenzie, banker, was tenant of the fishings at a rent of £30. They were let to John Grant of the Caledonian Hotel, Inverness, for the years 1843, 1844, and 1845 at a rent of £50, and were described in the lease as extending from Ness Cottage, the eastern boundary of Holme, to the march with Lady Saltoun on the west. Alexander Paterson deponed that he was a member of the fishing crew under Grant's foreman,—"We fished with the net over the whole of the water," "from the Saltoun march to Ness Cottage. We did not go to the lower water unless we could not get salmon at the top. The top water was the best. We were never stopped or challenged." Other witnesses gave evidence to the same effect in regard to the fishing by those in right of Holme for the period down to 1849. The defender deponed,—"Since 1850 my tenants have always been sporting tenants, though they have power to use net and coble if they choose. Previous to 1849 I think the tenants had the water principally for netting purposes." From November 1853 to November 1861 the Holme fishings were let to Nathaniel Weekes. Alexander Fraser deponed,—"Mr Weekes fished with the net. I was one of his crew. He liked us to fish for an hour or two at night. I have seen him net the river down to Ness Cottage."

For the season 1862 a lease of the Holme fishings from the western boundary of Holme "downwards to the point at which the mill-lead of Holme Mills re-enters the river" (this was about a third of a mile above Ness Cottage, the eastern march), was granted to a Mr Reeve of London. Another lease was granted to Mr Reeve for the next five years "with power to fish with cobles, nets," &c.—rent £135.

The fishings, described in the same terms, were let for the five years 1868 to 1872 to Mr Alfred Dennison, London, at £330. Mr Dennison had subsequent leases which expired in 1879.

Mr Charles Innes, who was the defender's factor from 1869 to 1884, deponed,—"I rented in 1876 and 1877 two cobles belonging to Muirton and Bunchrew, and Mr Mackintosh, finding that Mr Denison did not care much about the lower fishings, and hardly ever went there, allowed me to fish that lower water, consisting of the Redbraes, Pooley, and the Mill Stream down to the tail of the mill-lade. I acquired an infinitesimal portion of the Four Cobles, and another portion in 1880, making together one twenty-fourth of the Four Cobles. In 1880 I became a regular tenant of Holme, and took from him the lower water from Redbraes downwards. I have had these waters ever since." I have in every year given permission to various individuals to fish in the water rented by me from Holme, but when I did that I always gave a written order, and made it distinctly understood by these people that what they were to do was to exercise the right derived by me from Mackintosh of Holme. I never delegated the one twenty-fourth right which I had as proprietor to any of these occasional fishers. I have myself very little time for fishing. I am always out of that part of the country during the time when the salmon are running, and I have only fished in the Holme water in the spring occasionally. I paid £5 a-year of rent for several years, and since the granting of the lease in 1884 I have paid £10." There was evidence of rod-fishing by persons who got permission from Mr Innes.

The defender also led other evidence to shew that the water in question had been fished with the rod by those in his right, and that he had turned off people who did not have right from him.

The Lord Ordinary (M'Laren), on 10th January 1888, pronounced this

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* "Opinion.—The conclusion of the action is, that it should be found and declared that the pursuers and Mr Innes, who is called for his interest, have the sole and exclusive right of salmon-fishing in the River Ness from both banks, from the Stone of Clachnahagaig to the mouth of the river where it joins the sea at low water, with the exception of two pools there described, and which are known to belong to other parties. The defender maintains that the fishing on the right bank of the Ness, from the Stone of Clachnahagaig to his march, is his private property. The question of title is therefore limited to the fishing of a small part of the right bank of the river. Each party founds on a crown title, and a considerable mass of documentary and parole evidence has been imported into the case. I have carefully considered the documentary evidence embraced in the joint print for the parties, including the proof taken before the Sheriff of Inverness-shire in a previous action. While the weight of the evidence is, in my opinion, altogether favourable to the case of the pursuers, whose title is derived from the Magistrates of Inverness, I judge that the element of chief importance is that of title, which I shall accordingly proceed to consider.

"For the better understanding of the evidence, it is necessary to keep in view that the right of fishing, as derived by the Magistrates from the Crown, whatever its extent may be, was at an early period divided into the fishing of 'four cobles.' This arrangement apparently suggests a practice of fishing by no more than four persons or parties at a time. But it is in evidence that the rights of the proprietors of the different cobles were split into smaller portions, and these fractional rights were understood to confer a privilege of rod fishing on the possessors. This circumstance does not really affect the merits of the present case. Apparently the whole of the shares into which the four cobles came to be divided have been acquired by the pursuers and Mr Innes, and their title is the title of the Magistrates of Inverness.

"The existing title of the Magistrates to the burgh property is a charter granted by King James VI. in 1591. . . . . The charter conveys to the Magistrates 'the water of Ness in its whole extent, and on either side thereof, betwixt the stone called Clachnahagaig and the sea, with all fishings and fishing stations of salmon, as well as other fish.'

"The title of the defender is founded on a charter of Queen Mary in favour of James Earl of Moray and spouse, dated 1st June 1566—twenty-five years earlier than the charter in favour of the Magistrates. This charter conveys to Lord Moray 'one-half of the lands of Holme, with the salmon and other fishings of the same in the water of Ness.' These are the only words that appear to me to be material to the question.

"Now, in the absence of any competing title, I do not doubt that the charter in favour of Lord Moray would be a sufficient title to the defender to support his claim to the salmon-fishings *ex adverso* of the entire river boundary of his estate. The fishings conveyed with the half of the lands of Holme are 'the fishings of the same in the water of Ness'; and, in the absence of a competing right, I should conceive this to be a perfectly good title to all fishings on the water of Ness which are situated in or adjacent to the property conveyed. But I am also of opinion that the grant of the salmon-fishings is susceptible of a more limited interpretation. A grant of the fishings 'of the same,' that is of the lands, means, in my judgment, fishings which have been possessed along with the lands, whatever these may be; and it is only in the absence of a competing right that the grant of fishings would receive an interpretation co-extensive with the boundary of the lands.

"The grant to the Magistrates is expressed in a different way. It is not a general grant of fishings in the Ness pertaining to the burgh, but is a grant of

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"Comparing the grant to the Magistrates with the grant to the proprietor of Holme, my opinion is that the right given to the Magistrates by precise and defined bounding description must prevail over the undefined grant in favour of Holme where the two titles come into competition. It is urged against this view that the Holme title is the earlier in date, and to this the pursuers reply that the charter of the Magistrates bears to be a confirmation of three previous charters, going back to the time of King William, and which, it is supposed, were in identical terms. When the question is one of boundary, and especially of a river boundary, which is liable to physical changes, I do not think that it can be assumed that the terms of the previous charters were identical with that under consideration. At the same time, it is a circumstance in favour of the Magistrates' charter, that it bears to be a renewal grant; and that unquestionably the greater part of the salmon-fishing confirmed to the Magistrates by the charter of King James had been in their possession from very early times. I do not understand that this is disputed. It is therefore much more probable that, in the matter of salmon-fishing, the charter of King James merely echoed the words of grant of previous charters than that it professed to take away, by the device of a new bounding description, part of the fishing right which had been previously given to Lord Moray. But I conceive that this result can be reached through the titles themselves without taking into account the probabilities of the case as regards previous possession. The grant to the Magistrates includes both banks of the river, from the Stone of Clachnahagaig downwards; but there is a reasonable extent of river boundary above the Stone of Clachnahagaig which the proprietors of Holme have enjoyed without dispute, and this fishing includes what all the witnesses agree in declaring to be the best fishing pool in the Ness. It appears to me, therefore, that there is no real contradiction between the two titles. The title of the Magistrates ought to receive effect according to its boundaries, and sufficient effect is given to the conveyance of the fishings of Holme to Lord Moray by holding that conveyance to apply to so much of the water as has admittedly been possessed by the proprietors of Holme without dispute.

"The observations which I have made express my judgment on the point, independently of the evidence, or as it would have been given if the parties had agreed that no light could be thrown upon the question by evidence of past possession. I cannot say that the evidence is very strong or conclusive in favour of the pursuers, had evidence been necessary to sustain their claim. I shall, however, indicate briefly my view regarding it. Both parties are founding upon historical documents, which have been traced out with much industry and research from local records. The most general result derivable from the early documents is, that from 1680 to 1769 the town of Inverness and the proprietors of Holme, whose title was derived from Lord Moray, were at variance regarding their boundaries, or it might be more correct to say, regarding a tract of debateable land which lay adjacent to the site of the fishing now in dispute. This land appears to have been claimed by the Magistrates under the name of the Burgh Moor. It was also claimed by the Mackintosh family by their estate title; and it appears from the burgh records that at various times portions of the moor had been enclosed by the proprietors of Holme, and converted into arable land. Eventually the burgh acquiesced in the claim made by the Mackintoshes; and there can be no doubt that for a period much exceeding that of prescription,

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by their title alone they would hardly prevail, for their title gave them the whole fishings from Clachnahagaig to the sea, but they admitted that

the defenders' family have been unquestioned proprietors of the land *ex adverso* of the disputed fishing. It was argued for the pursuers, founding upon the ancient plan, and on the records here referred to, that the lands *ex adverso* of the fishings were originally the property of the burgh; and that while the Magistrates had lost their right to the lands by negligence or acquiescence, they had successfully maintained the possession of the adjacent fishings. This appeared to me at the time to be a somewhat hazardous argument for the pursuers. If the lands and the fishings do not necessarily or probably go together, then the argument comes to nothing. If I am to assume it as natural and probable that the lands and fishings were held together, I must take it as a fact that Mr Mackintosh is proprietor of the lands, and I cannot enter into the consideration of whether the possession was justly acquired, or whether it was in reality an encroachment. The presumption, of course, is in favour of a just title, and that presumption will operate entirely in favour of the defender. But for the reasons stated, I do not consider that it is necessary to assume that the lands and fishings were conterminous. The charter defines the fishings by proper descriptive words, and apparently is less explicit in regard to the boundaries of the burgh property. It seems to me that what is the subject of precise description does not stand in need of illustration from what is confessedly more or less doubtful and undefined.

"With respect to the parole evidence, it is not necessary that I should analyse it in detail, because its import is very evident. In an action of interdict instituted by the guardian of the present proprietor in 1843, the Sheriff allowed the respondent (the lessee under the Magistrates' title) a proof of his averments, and to the petitioner (Mr Mackintosh) a conjunct probation. Under this order proof was adduced by the respondent, which will be found in the Joint Print, pp. 68-109. Its import is, that for forty years prior to the action, the possession of the Magistrates, their disponees and tenants, had been co-extensive with the boundary in the charter of King James; and in particular that the Magistrates' right of fishing had been exercised through tenants during the whole or a great part of that period by fishing from the shore, and drawing nets to the shore, on that part of Mr Mackintosh's estate which lies below the Stone of Clachnahagaig. No proof was offered for Mr Mackintosh, and some years later the interim interdict, which had been originally granted by the Sheriff, was recalled. The defender offers an explanation intended to displace the inference, which might be drawn, that he had no contrary proof to offer. His explanation is quite intelligible, and is offered, I am sure, in perfect good faith. But the effect remains, that a strong case on the evidence was made by those deriving right through the Magistrates; that this proof was not seriously shaken by cross-examination, and that no evidence to the contrary was adduced. Another period of forty years has since elapsed, and of course it is no longer possible to obtain further parole evidence applicable to the possession in the earlier part of the present century. So far as we have proof applicable to the period 1800-43, it must be taken that the possession was in conformity with the charter. This result, in my opinion, is not displaced by the evidence adduced in the present case.

"With respect to the evidence as to the possession subsequent to 1843, it is admitted by counsel on both sides that the state of possession is ambiguous. Neither party acquiesced in the claim of the other; and while I think that there has been more regular and effective possession by the proprietors or tenants of the Four Cobles Fishing than by the defender, yet during this period the defender has sufficiently asserted his right to keep the question open for future consideration. The matter has now been raised for the first time in a form which will enable the question of right to be brought to a final decision; and, so far as that depends on my judgment, I give it in favour of the pursuers."

"NOTE.—20th Jan. 1888.—In the argument addressed to me no question was

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they had neither the Duke of Gordon's Fishings nor the Friars' Shot, both of which were within that boundary. It was therefore clear that they could not rely wholly on their title. The defender's title comprehended the fishings in question.[1] It was a title to half the lands of Holme with salmon-fishings "of the same," *i.e.*, "of these lands." The pursuers' title, when it came into collision with such a title, would require exclusive possession in order to exclude the defender. But they had had no exclusive possession. At the best they had joint possession with the defender. It was said that the defender's exclusive possession of the upper water both explained and satisfied his title. But that was to omit the fact that his possession had not been of the upper water alone but of the whole. Title and possession were conclusive in *Stuart's* case.[2] The defender's title was of older date than the pursuers', and the latter ought therefore, if harmonising were needed, to be explained so as to consist with it. The Lord Ordinary seemed to adopt an opposite course.

Argued for the pursuers;—The pursuers' title bore to be a ratification of an older title, and, it must be presumed, was in the same terms as that older title. But further, it was in itself unambiguous and exclusive. The fishings which were admittedly the exclusive property of the defender fully satisfied and explained his title. It seemed doubtful if in early times, when the charter was granted, the lands of Holme extended below Clachnahagaig. It rather appeared they did not, but that the town had claimed the lands now part of Holme up so far as Clachnahagaig. The old case in 1775,[3] though the defender's author, no doubt, was not a party to it, shewed that it was not then suggested that the laird of Holme had any fishings below Clachnahagaig. The evidence in the process of interdict in 1843 seemed conclusive of the pursuers' exclusive possession for forty years before that date. Even if the possession since then had been divided and disputed, such disputed possession could not constitute a joint right in the defender, for each party was claiming to possess exclusively. The defender's alleged possession was by rod-fishing. But net and coble was the only possession whereby he could prescribe a right. Even his alleged possession by rod-fishing failed. Admittedly one of his tenants, Dennison, never fished the disputed water, and it was an insufficient explanation that the upper water was better. The possession of Mr Innes was very recent. It was also immaterial, for he was one of the proprietors of the Four Cobles Fishing along with the pursuers, and they were entitled to attribute his fishing to that right. On the whole case the defender must fail, because (1) though he had right to half the fishings, that had been explained by use to be a particular half; (2) because a title to a half could never start prescription of the whole.

At advising,—

Lord Young.—This is a case not at all devoid of interest or difficulty.

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raised as to the topographical position of the Stone of Clachnahagaig; and I was under the impression that, although the stone had disappeared, the parties were agreed as to its true situation. It has since been pointed out that there is some discrepancy in the evidence regarding the situation of this landmark. The summons is not very well adapted to raise such a question; and the case is now beyond my control, because I have given decree in terms of the conclusions of the summons. It will be for the Inner-House, either by themselves or by a remit to the Lord Ordinary, to settle the position of this landmark, assuming that the parties are unable to come to an agreement regarding it."

[1] Mackenzie v. Davidson, Feb. 27, 1841, 3 D. 646.

[2] Stuart v. M'Barnet, March 30, 1867, 5 Macph. 753, aff. July 21, 1868, 6 Macph. (H. L.) 123, 40 Scot. Jur. 633.

[3] Magistrates of Inverness v. Duff, 1775, M. 14,257.

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The question regards the fishings *ex adverso* of the lands of Holme in the river Ness below the site of the cottage mentioned in the summons, and which does not now remain. The first thing to consider of course is the title of the parties. They are in conflict about these fishings in the Ness *ex adverso* of the lands of Holme below that cottage, and about nothing else. As I say, the first question is, what are their respective titles? Now, I do not refer at all particularly to the title of the pursuers, because their title to fish in the river at the part of it in question is not disputed. Their title is not given to them, and they do not hold it, in connection with any lands. The leading pursuers, Mrs Warrand's trustees, hold the lands of Bught on the north side of the river, but the fishings are in no way attached to those lands, nor is the title to them connected with those lands. They derived their title from the town of Inverness, and the town of Inverness is represented here by the Provost and Magistrates of the burgh, and they—I mean the town—still hold, according to the averment in the case, and according to the assumption I am going to make, a part of the fishings in question. Another party—Mr Innes—holds a third part. These fishings were held in what are called "cobles"—I suppose the right being measured by the number of cobles which the holders, who were more or less numerous, were entitled to use. The fishing here was called the Four Cobles Fishing, and it is explained in the condescendence that the leading pursuers, Warrand's trustees, are the proprietors of three and a-third of these cobles. For the purpose of making this division more satisfactory I have taken the cobles in sixths. Three and a-third will make three and two-sixths; the town of Inverness are proprietors of three-sixths of a coble, and Mr Charles Innes, who is called as a defender here, is the proprietor of the remaining sixth. I repeat that their title to these fishings is not in dispute, except in so far as they allege it to be and ask us to declare it to be exclusive. The defender does formally in one of the pleas dispute their right, but it is only in a plea in law, and it was quite formally conceded in the debate before us from the outset that the defender did not dispute the pursuers' title to fish in the part of the river in question, but only maintained his own right, and disputed their right to interdict him. The question therefore is, whether the pursuers are entitled to have their right declared to be exclusive, and so to interdict and prohibit the defender from fishing within the specified bounds—that is, *ex adverso* of his lands below the cottage, the site of which I have referred to.

Now, what is the title of the defender? He is admittedly proprietor of the lands of Holme. That part of the lands of Holme *ex adverso* of a portion of which are the fishings in dispute he holds by a title proceeding from a subject superior, the Earl of Moray, under whom he holds. That part of the lands of Holme which are described in his title as proceeding from the Earl of Moray is a half of the lands of Holme. The other portion he holds under Mr Fraser of Balnain. It is explained by the pursuer in the first article of the condescendence "that the lands of Holme are held of different superiors and under separate titles, viz., one-half under the Earl of Moray and one-half under Mr Fraser of Balnain." There is an explanation added, to which I shall refer immediately, the point to which I call attention now being merely that the defender is proprietor of the whole lands of Holme—a half of the lands so described being derived from and held under the Earl of Moray, and the other half being derived from and held under Fraser of Balnain.

Now, the Earl of Moray, before he granted the one-half of the lands to the

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defender—or the predecessor of the defender, I should say—held them under a crown charter, in which they are described as "dimedietatem terrarum de Holme cum salmonu et aliis piscariis earundem in aqua de Nyss." That is all in the charter that need be attended to. That is the charter of one-half of the lands of Holme, with the salmon and other fishings thereof in the water of Ness. I may notice here—and I may take it in connection with the explanation of the pursuers in the first statement—that the title to the other half is derived in this way. I read from what is called a description of the half of Holme held by the Laird of Cawdor, now of Balnain—that is, from a sasine in favour of John Mackintosh of Holm, dated in 1706, following upon a precept of *clare constat* in his favour by William Campbell, Laird of Cawdor, in 1700, and it says—"Toto et integro dimidio villæ et terrarum de Holme, et dimidio molendini, earundem," and so on. There is nothing about the fishings. It is just half of the lands of Holme, I think, quite accurately translated.

Now, where these halves are situated does not appear from the title. It must be matter of evidence, and we have it as matter of evidence in this case. I take it really from the evidence of Mr Innes, to which I am not going to refer particularly, and it has this result. Upon the plan—to which Mr Innes refers in his evidence—the lands coloured green, and marked No. 4, are the one-half of the lands held of the Earl of Moray, and derived and held from him. The other half—the half held of Balnain—are No. 6.

Now, what are the fishings of the lands of Holme? We cannot discover that from the title of course; they must be ascertained otherwise. I read the description in the crown charter, which is in Latin, "fishings of the lands," salmon and other fishings of the lands. The title is to one-half of the land. The conveyance is—"Dimedietatis terrarum de Holme cum salmonu et aliis piscariis earundem in aqua de Nyss." In the sasine which we were referred to as the first sasine which was produced the description is—"Toto et integro dimidio villæ et terrarum de Holme et in dimidio molendini de Holme astrictis multuris et sequelis ejusdem cum dimidio salmonum piscarium super aqua de Ness ad dictas terras apertans"—that is, pertaining to those lands. What is the meaning of the grant of fishings here given? the fishings of the lands of Holme, or the one-half of the fishings pertaining to the said lands. If you are to construe a grant of the fishings pertaining to certain lands bordering on the river, I suppose that *prima facie*, and in the absence of anything satisfactory to the contrary, the grant would be taken to signify the fishings in the river *ex adverso* of the lands—pertaining to them—reaching to them—touching them. It might be shewn to be otherwise. The word "pertaining" might be taken in another sense on satisfactory evidence to that effect. It might be shewn by evidence that the fishings which were attached to certain lands in a title were not *ex adverso* of those lands at all, but were elsewhere; for salmon-fishings, being a royal privilege or franchise,—*inter regalia*,—may be alienated by the Crown without reference to any lands, or with reference to any lands whatever. They may be given in the same way. But in the absence of anything satisfactory to the contrary, a conveyance of fishings in a river appertaining to lands through which the river flows would clearly, in my opinion, be taken to mean the fishings in the river *ex adverso* of the lands. And so with respect to the half, if you take the grant to be of the half of the fishings pertaining to those lands, *prima facie*, and in the absence of anything to the contrary, it would be one-half of the fishings in the river *ex adverso* of those lands. Taking the fishings *ex adverso* as a whole, one-half of the fishings is thus conveyed. That does not even *prima facie*, certainly not necessarily, signify that the fishings are to be divided into two by measurement along the banks, the one half of the measurement being the one half, and the other half of the measurement being the other half. You ascertain as best you can what are the fishings appertaining to the lands in the absence of anything to the contrary, that being in my opinion the fishings *ex adverso* of the lands. In the case of the conveyance of the half, the fishings are divided into two, and the half only is conveyed. I am merely considering the matter of title at this moment. It is, in my opinion, clear, taking the conveyance of the Earl of Moray, and the sasine which we have in favour of the defender's predecessor upon that title, that his right under it was and now is to one-half of the lands of Holme—of the whole lands, that is—to be ascertained in the usual way, because there is no description in the title of one-half of the whole lands of Holme, and to one-half of the whole fishings pertaining to the whole lands. That is my opinion of the title; the defender has a title to one-half of the whole lands and one-half of the whole fishings thereto pertaining. It is not a title to one-half of the whole lands and one-half of the whole fishings appertaining to that half. There is no mention of fishings pertaining to one half or another half, and the pursuers say upon record that there are no fishings appertaining to the other half which the defender holds of Balnain. That is the case stated on record,—probably without much consideration of the matter or of what consequences it might lead to,—that the defender has no fishings pertaining to the half of the lands which he holds of Balnain, but has only fishings pertaining to the half held of the Earl of Moray.

Having made it thus clear what the title is according to my view, I proceed to consider the evidence. Let me—in order that there may be no dubiety about it—repeat the conclusion at which I arrive as to the state of the defender's title. I think he has a title to one half of the lands of Holme, held under Lord Moray, and I think he has a title to the other half of the lands of Holme held under Balnain. With respect to the fishing, I think he has under the crown grant to Lord Moray—regularly and properly transmitted to him—a title to one-half of the whole fishings pertaining to the whole lands of Holme. There is no grant of fishings in the title held under Balnain, and his title to fishings, so far as we see, stands upon the crown grant to the Earl of Moray, properly transmitted to him, of one-half of the fishings pertaining to the whole lands of Holme.

Now, I just point out here that in this case—except as matter of history and as throwing light upon what requires light—we have no concern with the fishings *ex adverso* of the lands held under Balnain. The pursuers lay no claim to these or to fish in the river *ex adverso* of the lands of Holme held under Balnain. How, upon a question between the parties interested in those fishings and having conflicting interests, the title might be held to stand in regard to possession or otherwise, I cannot tell. But, for the purposes of this case, I take it that the defender has a crown grant to one-half of the fishings *ex adverso* of the whole lands of Holme.

That title, however, might be lost *a non utendo*, and it might be acquired by some other party—that is to say, it might be lost to the one party by the negative prescription and acquired by another party by the positive prescription. I assume that to be quite possible. I am only speaking of the title before proceeding—as I shall immediately do—to consider the evidence of possession.

What, then, appears to have been the possession? It appears quite satis-

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factorily to my mind that the lairds of Holme have in all time to which the evidence extends asserted a right to fish *ex adverso* of the whole lands of Holme, and that under the title to one-half of the fishings pertaining to these lands, and which I must take—for the reasons I have stated, if there be nothing satisfactory and conclusive to the contrary—to mean the fishings *ex adverso* of the whole lands. In regard to the other half of the fishings pertaining to the lands of Holme, we have seen no title to any half except that which the defender has. I suppose, however, that there is another half, and that that half might be alienated by the Crown in any way and under any name. At all events it has not been alienated under the name of the half of the fishings pertaining to the lands of Holme. We have not the means of inquiring into that. I see there is a suggestion—and I think it is not without plausibility—in the course of the proceedings in 1843 before the Sheriff at the instance of Holme against a Mr Tait, who was a hairdresser and fishing-tackle dealer in Inverness. I suppose he had, as lessee, a right to the fishings which are now in the pursuers. Those proceedings were instituted in 1843 against him to stop him from fishing *ex adverso* of the lands of Holme, and particularly to stop him from fishing from the Holme lands at all. Well, there was this suggestion by his law-agent, Mr Duncan M'Lennan,—"On their own shewing"—that is, on the shewing of Holme—"they have only one half of the fishings attached to the lands of Holme, and there is nothing set forth in the petition inconsistent with the assumption that the other half belongs to the respondent, as the tenant of the lower heritors." The defender is the proprietor of one-half, and he is not maintaining an exclusive right, at least so far as the portion of water which alone is here in dispute is concerned. Whether or not he has an exclusive right further up, and if so, what that exclusive right to fish further up is to be attributed to, we are not now in a position to inquire, for we have not the parties in that question here. But what has been his possession? I repeat that he has, from as far back as memory can reach or evidence can go, by himself or his predecessors, asserted a right to fish *ex adverso* of the whole lands, and he has fished *ex adverso* of the whole lands. I cannot find any evidence here that he or his predecessors were ever stopped. Certainly they were never effectually stopped, and I do not find them challenged in fishing *ex adverso* of the whole lands. It so happened that the upper fishings were very much more valuable than the lower. If you take a stretch of a river extending along an estate, the probability is that the fishings at one point will be very much more valuable than the fishings at another part; and it so happens here that the fishings *ex adverso* of the lands held of Balnain are much more valuable—for they let for hundreds of pounds—than the fishings in question *ex adverso* of the lands held of the Earl of Moray, which are let for only £10 at this moment. But they were all possessed latterly—and for a quarter of a century at least—indeed for a good deal more they have been exclusively possessed for rod-fishing. I shall have a word to say by-and-bye about rod-fishing in questions in regard to salmon-fishings. But in the meantime, let me say that these fishings were let, and let for large rents, for more than a quarter of a century for rod-fishing; Mr Dennison, for instance, had them for upwards of twenty years, and paid £300 a-year for them. He was a fastidious fisher, and fished only the best water. But we have abundant evidence, in my opinion—and for myself I should not think it necessary to go beyond the evidence of Mr Mackintosh himself and Mr Innes—that continuously these fishings were possessed as far down as the

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lands extended, although chiefly by rod-fishing. There was never much coble-fishing; latterly, I think, there was none at all except at the very end of the season, when there was a sort of gala-day. At the same time there was a little coble-fishing, and coble-fishing down to the very end of the property. There is the evidence of Alexander Fraser and of Mr Mackintosh himself. They speak to a good deal of net-fishing below as well as above. Alexander Fraser says,—"I remember Mr Weekes, an Englishman, having the Holme fishings. He fished with the net. I was one of his crew. He liked us to fish for an hour or two at night. I have seen him net the river down to Ness Cottage. He could not net Redbraes, because there were stakes in it, but I have seen him net below that. I remember when the Ness Club was in existence. I fished the river with them one night with the net on the Holme side, beginning at the Saltoun march and going down to Kessock Ferry at the mouth of the river." There was some trespass in that if it was not done by permission, although it probably was done by permission. Then he goes on,—"Donald Nichol was present. I was not regularly employed by the club—perhaps an hour to-night and two hours to-morrow night, and so on. Cross.—When we netted the lower water we dragged the boat back; we did not use a cart. Mr Weekes was not the last who netted the disputed water. I think Tait netted it after that."

"There is some ambiguity" is the expression which the Lord Ordinary uses about the possession. He proceeds on the footing that both parties have had possession, but there is an obscurity in the evidence as to the facts on possession. There seems to have been an interchange of courtesies and civilities—each party giving rights to the other. Even the public were tolerated, and tolerated with boats to a considerable extent. There is therefore some confusion in the matter of possession, but I should have no hesitation in pronouncing as my verdict on the evidence that there has been continuous uninterrupted possession by the lairds of Holme of the salmon-fishings in the river Ness,—that is to say, that they have continuously and uninterruptedly fished salmon in the river Ness along the whole of the course *ex adverso* of their lands.

An argument was stated to us that no possession was to be looked to or was of any legal value except possession by net and coble. I desire to say distinctly that I am not of that opinion. I quite assent to the proposition that we have authority, which I shall not go back upon, which goes this length, that a general grant of fishings shall not be converted or explained into a grant of salmon-fishings by mere fishing with the rod. We have no case here to consider about explaining a general grant of fishing to mean a grant of salmon-fishing. That is not the kind of case before us at all. Where there is a general grant of fishing it has been held—and I repeat that I shall not be disposed to question the decisions, or the grounds on which they stood, or to go back upon them—that that shall not be explained into a grant of salmon-fishings by saying that the grantee fished or that his successors fished for salmon with the rod. That is not *positivi juris*, but a conclusion reached upon rational and intelligible grounds, or, to speak in the singular, upon a rational and intelligible ground, the ground being that fishing by net and coble was at the date of those decisions regarded as the only serious mode of salmon-fishing. The people of that day would have opened their eyes with some amazement if they had heard of £200 or £300 a-year being paid for fishing by rod in the river *ex adverso* of the lands held of Balnain, but a great deal has occurred in modern times, and now the most profitable use which can be made of salmon-fishings in many places is to abolish the fishing by net and coble altogether, and to hire out the fishings to tenants for rod-fishing only. Although no such question arises before us, I am not at all prepared to say that I should not hold a general grant of fishing to be explained by possession into a grant of salmon-fishing by such commercial and profitable use as could be had of it,—for instance by letting it out for rod-fishing at those great rents to which I have referred. What I say at present, however, is that the decisions about explaining a general grant into a special grant of salmon-fishing proceed upon a rational and intelligible ground, and not upon a rule *positivi juris* that there must be net and coble-fishing. Net and coble-fishing may go out of existence altogether, and another mode of fishing quite foreign to net and coble—although perhaps, a more profitable use of the salmon-fishings—may come into existence, and to say that then a grant of fishing cannot possibly be explained into a grant of salmon-fishing at all would in my opinion be extravagant. As I have already said, however, we have no case of that kind here. We are only considering whether what is *prima facie* and on the face of it a good title to salmon-fishing in a particular part of the river will be lost *non utendo* because the person holding the title has only fished for salmon with the rod. I could not assent to such a proposition for a moment. It would come to this, that if a man who had, as here, an admitted indisputable grant of salmon-fishings *ex adverso* of his land, chose to take the most profitable use of his fishing by means of rod-fishing he might lose the subject of the grant, while another proprietor, on the opposite side of the river, with a similar grant applicable to his side, might acquire the whole of it, because he had simply fished his part of the stream by net and coble. The man who lets his fishings for rod-fishing may make hundreds, or it may be thousands, a-year. It seems that rents have gone that length. They may do that continuously now. Now, to say that he, who has thus never ceased to utilise his fishings in the best way, was liable to lose his right of salmon-fishing *a non utendo* on the mere ground that he did not fish with net and coble, would in my opinion be extravagant.

But if I am right that there is a *prima facie* good title to salmon-fishing *ex adverso* of these lands, the question is whether the possession has not been such that it has been lost to this party and acquired by another. Now, even if his fishing had been confined to the rod, which I think it was not, I do not think that consequence would have followed. That is the view in which the case presents itself to my mind. I think there is a good title to begin with. I think that title has throughout and without interruption been acted upon. There is no ground for maintaining that there has been any abandonment of the right. Therefore I think there is no ground upon which we can cut out the defender by declaring the pursuers' right to be exclusive, and so interdicting him from fishing there at their instance. I think that would be unjust. I think he properly failed in interdicting Mr Tait in 1843. Of course, in saying that, I assume that the same title in Tait's authors was exhibited which the pursuers are exhibiting here. I think it is a good title. The defender himself thinks it is a good title, and never contended for a moment before us to the contrary effect. There was therefore a proper failure of the attempt to stop Tait in 1843. I think there is an equally good title and an equally available possession put before us here, and just as the defender in 1843 failed to turn out Tait and to prevent him from fishing, so I am for giving no countenance to their attempt now to interdict the defender.

I have only a word to say on the view on which the Lord Ordinary proceeded. I think he proceeds on the assumption that both parties have had possession, and have been continuously in possession. He thinks the evidence explains the defender's title, so that the salmon-fishings under it are *ex adverso* of the lands held under Balnain, and not *ex adverso* of those acquired from and held under the Earl of Moray. I do not assent to that view. I have stated already that *prima facie* in my opinion, and in the absence of anything satisfactory to the contrary, the fishings pertaining to the lands must be taken to be the fishings *ex adverso* of those lands. I am taking the case where the lands are on the river bank, and I think there is nothing here satisfactory—I myself happen to think there is nothing even plausible to the contrary; for the other view is this, that when the Crown granted the lands on the lower part of the river as one-half of the lands of Holme with the fishings pertaining thereto, the meaning of that was that these were the fishings *ex adverso* of the other half of the lands situated up the river, which were not—I mean the lands—the subject of the grant at all. So that the Laird of Holme is in this position that he has the undisputed possession and an indisputable right to the fishings *ex adverso* of the lands which he has without any grant of fishings at all, but no right to the fishings *ex adverso* of the lands which he has with that grant. That is a little paradoxical, and I do not assent to it. But it is sufficient to say that in my opinion, for the reasons which I have endeavoured to explain, the pursuers must fail here. I should sustain the defences in so far as they do not proceed upon a denial of the pursuers' right, and assoilzie the defenders from the conclusions of the action. We do not need to declare the pursuers' right to fish on those lands. We only need to negative their exclusive right which they ask us to declare, and upon declaring which they ask us to interdict. We cannot define the respective rights of the parties to use the banks on the one side or on the other. We can only proceed on the view on which this action is presented.

Lord Rutherfurd Clark.—By crown charter dated 1st January 1591, King James VI. conveyed to the town of Inverness, *inter alia*,—"Totam et integram aquam de Ness, omnesque partes ac utrumque latus ejusdem, inter lapidem vocat Clashnahagaig et mare, cum omnibus piscationibus et piscariis, tam salmonum quam aliorum piscium." The pursuers, along with Mr Charles Innes, are now in right of this grant. It is not disputed that infeftment followed in favour of the burgh, and that the title of the pursuers and Mr Innes has been properly deduced. For the sake of simplicity I shall speak of these fishings as if the pursuers were the sole proprietors. That Mr Innes holds a part is not in any way material. The legal meaning of such a grant is not doubtful. It conveys the whole salmon-fishings within the specified limits with a right to fish on both sides of the river. So far there is no controversy.

It appears, however, that by a crown charter dated 1st June 1566, Henry and Mary conveyed to the Earl of Moray "dimidietatem terrarum de Holme cum salmonum et aliis piscariis earundem in aqua de Nyss." No infeftment following on this charter has been produced. But there is a "ratification to the Earl of Moray of his infeftment" granted by Parliament on 5th June 1592, by which is ratified the charter of 1st June 1566, and the precept of sasine following thereon. We do not, however, see whether the infeftment contained the half of the lands of Holme and the fishings thereof which are mentioned in the charter.

The lands of Holme came into the present family by two different titles—one half from the Earl of Moray, the other half from the Laird of Calder. The former half still continues to be held of Lord Moray. The other is now held of Mr Fraser of Balnain. On 4th September 1706 the Earl of Moray granted a precept of *clare* in favour of John Mackintosh of Holme, "toto et integro dimidio villæ et terrarum de Holme . . . cum dimidio salmonum piscarium super aqua de Ness." This right is continued in the successors of the grantee till the present time. With the other half of the lands of Holme flowing from the Laird of Calder no right of salmon-fishings is conveyed.

The titles standing thus, the pursuers seek declarator that they are the proprietors of the whole salmon-fishings in their grant, with two exceptions, which I shall notice hereafter. On the other hand, the defender claims the salmon-fishings *ex adverso* of his lands of Holme within the limits of the pursuers' grant, although at the discussion he admitted that he could only maintain that he had a joint right along with the pursuers.

The first point to consider is, whether there is any competing title. The defender maintains that his title is preferable to that of the pursuers in respect that it is of an earlier date. If this point is to be made, the infeftment of the Earl of Moray should have been produced, because there can be no competing title without competing infeftments. But I am willing to take the case on the footing that the infeftment of the Earl was conform to his charter, and to examine the title on that footing.

When salmon-fishings are given out along with lands the meaning of the grant is that the grantee has a right to fish *ex adverso* of his lands, and from his lands. Such a grant may support a larger or different possession. But on the face of the title it means no more than what I have stated.

The charter in favour of Lord Moray would thus import a right to the fishings *ex adverso* of that half of the lands of Holme which belonged to him. The title in the person of the defender is more limited, though perhaps more accurate in its expression. For he holds only one-half of the salmon-fishings of the lands of Holme. Under that title he can never have more than one-half of these fishings, nor, in my opinion, would the title support a prescriptive right to the whole. But judging by the title alone, I should be disposed to hold that the fishings were the fishings *ex adverso* of that part of the lands held of Lord Moray. So far therefore there is a competing title. For it seems that the lands held of Lord Moray form the lower portion of the lands of Holme, and in so far as the pursuers claim the fishings *ex adverso* of these there appears to be another title, and it may be a prior title, in the person of the defender.

But questions of this kind which relate to grants of so ancient a date can never be satisfactorily decided by reference to the title alone. We must see what has been possessed under the title. Nor must we forget that salmon-fishings are not a part and pertinent of lands. They are a *separatum tenementum*, and though the construction of a title may be as I have stated, possession may shew that the situation of the fishings is elsewhere. When salmon-fishings are given out by a crown grant, the possession which has followed upon it is, I think, decisive as to the locality of the fishings.

Turning then to the possession which has followed on the grant of the pur-

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suers, I find that the pursuers have possessed for time immemorial the fishings from the Clachnahagaig stone to the sea, and that they have drawn their nets on both sides of the river. So entirely does the defender admit this to be the state of possession, that he does not now claim an exclusive right to the fishings *ex adverso* of the lands of Holme, in so far as these fishings are below the Clachnahagaig stone, but only a joint right along with the defenders. The claim of the pursuers being so far admitted, it only remains to inquire whether the defender has established the joint right for which he contends.

The first question which I put is this—What are the Holme fishings? I do not find it to be suggested that these fishings are situated elsewhere than *ex adverso* of the lands of Holme. It is not said that any other fishings have been possessed as such, and in the absence of such possession as will shew that they are in another locality, I take it to be clear that the words "the salmon-fishings of the lands of Holme" must receive their ordinary legal interpretation, and that they mean nothing else and no more than the fishings *ex adverso* of that estate.

Of these fishings the defender is infeft in one-half. What has been his possession under that title?

The lands of Holme lie above and below the Clachnahagaig stone. In so far as they are above that stone, the defender and his predecessors have possessed the salmon-fishings *ex adverso* of these lands. It would appear, as I have said, that the lower portion of the lands are held under the title flowing from Lord Moray, and the higher under the title flowing from the Laird of Calder. But as salmon-fishings are a *separatum tenementum*, and not a part and pertinent of lands, I hold that the possession which the defender and his predecessors have had has identified the fishings which were granted to them by Lord Moray. The defender has no other title to these fishings than his charter from Lord Moray, and I think that it is sufficient. Nor would it benefit the defender to have any doubt thrown on that right in order to his success in the present action. For the fishings which he has possessed are very valuable, and comprise in extent fully one-half of the fishings of Holme, while the fishings below the Clachnahagaig stone, though the subject of this action, are worth very little.

But the defender says that he has also possessed jointly with the pursuers the fishings opposite that portion of Holme below the stone, so that according to his contention he has possessed the whole salmon-fishings opposite Holme—the upper portion exclusively, the lower portion jointly with the pursuers. In his defences he claims the whole fishings opposite Holme, and subject to the joint right which he now concedes to the pursuers his present claim goes as far. For if the joint right of the pursuers be allowed, such a right is an excision from the whole fishings of Holme, and not from one-half of these fishings. The claim of the defender is therefore in my opinion not supported by his title, unless it were to be held contrary to his interests, and contrary to what I take to be the fair legal inference, that the upper fishings, which he has undoubtedly possessed, are not within it.

I may, however, put that question aside, for I do not think that it is proved that he has possessed the lower fishings.

In 1843 the defender raised a process of interdict against Tait, the tacksman of the fishings of the town of Inverness, to have him interdicted from fishing from the lands of Holme so far as below Clachnahagaig stone. He obtained interim interdict. We have before us the proof which was led for the respondent.

The petitioner did not adduce any. It seems to me that that proof shews very conclusively that the town of Inverness had the exclusive possession of the whole fishings contained in the grant of 1591, and that the defender did not possess any part of the fishings which he now claims. It is unnecessary for me to examine it, for it is all one way. Both Holme and the town fishings were sometimes held by one tenant. But the boundaries of each were well known, and are very precisely described. For instance, the witness Macnaughton, who was tenant for a year of the Holme fishings under the grandfather of the defender, tells us that when he took the fishings his landlord pointed out the march between the Holme fishings and the town's fishings. The march was opposite the Clachnahagaig stone. When the fishings were in different hands I think that it is proved that this march was observed. The defender has in this action led evidence as to the state of possession prior to 1843. But before this was done nearly a half century had elapsed, and it is obvious from this consideration alone that the evidence adduced by the present pursuers in the process of interdict is much more reliable. As it is, I think that the defender has failed to shew that his predecessors possessed the fishings in question. There may have been occasional fishing on their part, but to my mind there was no possession in any reasonable sense of the word.

There can, I think, be but one inference from the proof as applicable to this date. I hold that prior to 1843 the town of Inverness had immemorial possession of the fishings within their grant. Such possession was not necessary to establish their right to these fishings except as against a competing title. But if, as the possession has I think shewn, the fishings conveyed by Lord Moray to the predecessors of the defender are the upper fishings of the lands of Holme, there is no competing title, because the title of the defender is satisfied by what was possessed under it, and because he could not claim under that title the whole fishings of Holme. But as the town had possessed the fishings which were granted to them, it seems to be completely established that they were at the date I have mentioned the exclusive proprietors of these fishings.

If this be so, the defender can only maintain that he has acquired the joint right which he now claims by subsequent possession. Salmon-fishings may undoubtedly be acquired in this way, and so be lost by a former owner. There are examples in our books. But the title must be sufficient and the possession must be very clear. I do not think the defender's title is sufficient, and I am of opinion that the necessary possession has not been proved.

The most favourable way of stating the case for the defender is that he has possessed the fishings for twenty years prior to the raising of this action, which is the shorter prescriptive period introduced by the recent statute in place of the period of forty years. The time between 1843 and 1853 may be thrown out of view, for the process of interdict, though not actively proceeded with, was still in existence, and was not taken out of Court till 1853. While the case was *sub judice* the action of either party is not material. But even if it were, I do not think that the defender has proved possession in any satisfactory way during that period, and whatever possession he had was due to the interim interdict which he had improperly obtained in 1843, and which was not recalled till 1853.

As to the alleged possession since that time we are not in doubt. The defender himself says,—"Since 1853 the fishings have been used entirely as rod fishings." He adds,—"During that time they were almost continually let." His tenants were Mr Weekes, Mr Reeve, Mr Dennison, and latterly, as regards the lower fishings, Mr Innes. The first two gentlemen held the fishings from 1853 till 1867—Mr Dennison from 1867 till 1879—and Mr Innes from that year to the present date, though it would appear that he was allowed to fish in the lower fishings a year or two earlier. It appears from the evidence that Mr Reeve and Mr Weekes only occasionally angled in the lower water, and that Mr Dennison never fished there at all. Mr Innes fished it may be said regularly, but it is important to notice that for a considerable part of his tenancy he was a part proprietor of the fishings which had belonged to the town, and had thus a right to angle independently of his lease from the defender. It is said that Mr Weekes occasionally netted the lower water. At the best, this netting was only occasional. But as it appears that he netted from the Holme fishings to the sea, his acts prove nothing. For it is clear that he either fished by tolerance, or that he held other rights than those which he derived from the defender.

In my opinion such possession as the defender has proved cannot prescribe a right to salmon fishings. It has only been occasional, and certainly not continuous. For twelve years, from 1867 till 1879, there was no possession at all. It is of no consequence that the fishings were let, possession must follow on the lease. For possession is the only mode of asserting a right, and the only means by which a right can be prescribed.

A possession so uncertain, occasional, and ambiguous, cannot in my opinion deprive the pursuers of the right which they hold under their charter. Further, it was by rod only, and I hold it to be settled in this Court, that where salmon-fishings can be fished by net and coble, mere angling cannot establish a prescriptive right—*Richmond*, 8 Macph. 530. The principle on which this rule depends is not difficult to discover. It is nothing more than this—that when a right is claimed by prescriptive possession, complete possession must be asserted and proved, and that acts which fall short of complete possession will be ascribed to tolerance, and will not be regarded as the assertion of a right on the one hand nor as the recognition of a right on the other.

I said in an early part of my opinion that there are fishings within the limits of their grant which the pursuers do not claim. The origin of these exceptions has not been well explained. The defender argued from their existence that there was reason to suppose that the fishings of Holme might be also excepted. I do not pursue the argument. At the best it lays hold on a mere presumption, and the considerations on which I found my judgment are in my opinion quite sufficient to displace it.

For these reasons I think that the judgment of the Lord Ordinary should be affirmed.

LORD JUSTICE-CLERK.—This is a perplexing case in any view, and after the opinions your Lordships have delivered it of course assumes a very important and difficult character, but I agree in the result at which Lord Young has arrived, and substantially upon the grounds which he has fully explained. I shall only add a few sentences to indicate where I think the real difference of opinion turns, and the grounds upon which it ought to be resolved.

The town of Inverness and the proprietor of the lands of Holme are the proprietors of the ground on the banks of the river Ness. They both have grants of great antiquity of salmon-fishings in that water, the lands of Holme being above and the town of Inverness below. The grant in favour of Holme goes back as far as 300 years. It was a grant by Queen Mary and her husband Darnley in 1566. I do not think there is much doubt as to the terms of the grant or as to the right which it conveyed. That is the earliest grant which we have before us in the case. It substantially gives one-half of the lands of Holme and the fishings thereof. We have no sasine upon that grant, but it was ratified in Parliament in 1592. We have no sasine on it indeed for 150 years, but in 1706 on a precept of *clare constat* we have an infeftment, and it is made to run in this way,—" half of the lands of Holme and half of the fishings." I cannot for one moment imagine that that can be construed to mean anything else than the lands intended to be conveyed by the original grant. Therefore I apprehend that the title is quite sufficient, provided it is established by the subsequent possession. The Lord Ordinary says that the title of the burgh of Inverness should prevail, or have more favour in this inquiry, because there are physical limits pointed out as the boundary of the right. There is a stone called Clachnahagaig referred to in the title, which is said to be one boundary of the town's right, but unfortunately for that view there are other boundaries described. It is said the town is to have the right from that stone to the sea, but it is quite certain that they have not the right to the whole fishings from that stone to the sea, because there are the Duke of Gordon's Fishings, and the Friar's Shot Fishings, between them and the sea. I do not think the town's fishings depend so much, however, upon the state of the subsequent possession as the Holme fishings do, and in truth, dealing as we are with titles of that antiquity, and in a matter where possession is necessary to explain the title of the assertor of the right, I imagine that the real truth of the case must be found in inquiring into the nature of the possession which has been exercised.

Now, in 1843 the Laird of Holme brought an action of interdict before the Sheriff to have it found that he had exclusive possession of this part of the water *ex adverso* of the lands of Holme. A circumstance occurred which prevented the present defender from going on with that process of interdict, but the respondent went on in his absence, and we have a body of evidence led at that time for the purpose of rebutting the averments made by the petitioner. That process, however, came to nothing. The evidence is here. It is good as far as it goes, but it is evidence which was led without a contradictor. We have only one side of the case and not the other, and although I am far from saying that the evidence is not admissible in this inquiry, I think it can only be taken in the view of the observations which I have made.

From 1851 or 1852 until now matters have remained much as they were. They have, however, always been in dispute. It is plain from the evidence taken in the 1843 inquiry that there was always a difference between the town and Holme in regard to this matter. It was never admitted on the one side or the other who had the right, and now that the question is fairly raised at last we have to determine what the limits of both these parties upon this water are.

It seems to be assumed that the evidence adduced in 1843 proved exclusive possession on the part of the town. I am very clearly of the opposite opinion. I think the evidence in 1843 proved that there was not exclusive possession, and that there could not be. I think so upon one very simple ground. That ground is, that for a great majority of years—for twenty years prior to that time—the fishings had been in the same hands—the same man was tacksman of Holme and tacksman of the town of Inverness, and the fishings were held together and worked together. This made it quite impossible that the possession under

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such a state of matters could become exclusive. The evidence is quite distinct that while Mr Stevenson, who for certainly three-quarters of the time held the fishings of Holme and the fishings of the town, was tenant no marches whatever were observed. That is proved by Mr Hutchison. He says that "Mr Stevenson still continued the tenant of the Holme fishings; that the crews below sometimes went up to the said march to fish; that Mr Stevenson got the whole fishings afterwards, and the deponent gave himself no trouble thereafter about marches." The same thing is repeated by the witness Mackenzie, who was sixty years of age when the proof was led in 1843. He says that "when Stevenson got the Holme pool he fished the river as it suited his purpose, having had the whole of it from the lower march of Lady Saltoun's fishings." There are many other passages of the same description. The real state of the matter is, that Mr Stevenson got the town fishings in 1820 and the Holme fishings in 1821, and until 1830 he substantially held and worked them all together. He got into difficulties in 1830, and there was a year or two when Mr Stevenson had no concern with the fishings at all, but in 1833 he apparently came back, and the same thing took place until 1838 or 1839. So that it is quite clear that on the evidence in the inquiry of 1843 there could not by possibility have been established an exclusive right on the part of the town. That being the state of the matter, it is admitted that the evidence in this action does not establish an exclusive right on the part of the town. It is ambiguous, and the Lord Ordinary admits that it is so. He holds mainly that a particular limit —the limit of the town's right—is established by the original grant. But I think that that was all subject to possession. On the grounds I have stated I think there has been no exclusive possession proved in favour of the town of Inverness. I do not think it necessary to go further than that.

I may say in regard to the matter of rod-fishing that I do not think it is doubtful in the slightest degree that if you have a crown grant of salmon-fishings, and find it more profitable to fish with the rod than with a coble, that is as good a possession as if you found it more profitable to fish the other way. But the difficulty that was suggested was this, that where there is no grant of salmon-fishings the mere angling for salmon will not be held sufficient to change a right *cum piscationibus*, or to enlarge it into a right of salmon-fishings.

After the full consideration your Lordships have given to the case, I do not think it is necessary to say more. The defenders will therefore be assoilzied.

LORD CRAIGHILL was absent.

THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defender.

SKENE, EDWARDS, & BILTON, W.S.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

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July 7, 1888.
Nicolson v. Macandrew & Co.

JOHN NICOLSON, Pursuer (Appellant).—*Shaw—G. W. Burnet.*
D. MACANDREW & COMPANY, Defenders (Respondents).—
J. C. Thomson—Sym.

Reparation—Damages for personal injury—Employers Liability Act, 1880 (*Act* 43 *and* 44 *Vict. cap.* 42)—*Relevancy.*—An action of damages under the Employers Liability Act, 1880, cannot be maintained unless the relation of employer and employed has subsisted between the pursuer and the person against whom the action is laid.

Reparation—Damages for personal injury—Mason using joiners' scaffolding—

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July 7, 1888.

Nicolson v. Macandrew & Co.

Relevancy.—A labourer who was employed by Messrs A & B, a firm of masons, in the erection of certain buildings, brought an action of damages for personal injury against Messrs C & D, the principal contractors for the work, alleging that, in order to perform his duty of mixing lime, he had had occasion to fetch his shovel, which he had lent to another mason who was working at some distance from the ground; that in fetching it he ascended a ladder which led on to a scaffolding belonging to the defenders; that when he was passing over the scaffolding it gave way, and he fell to the ground receiving severe injuries. *Held* that as it was not alleged that the scaffolding had been erected for the benefit of the masons, or that it had been used by them with the authority or sanction of the defenders, no relevant case was averred, and action accordingly dismissed.

1st Division.

Sheriff of Aberdeen.

M.

John Nicolson brought an action of damages for personal injury against D. Macandrew & Company in the Sheriff Court of Aberdeen. The averments were, *inter alia*, as follows:—(Cond. 1) "The pursuer is a crofter and labourer, presently residing in Skye. For about two months prior to Monday the 10th day of October 1887 he was in the employment of Messrs Gauld & M'Kenzie, masons, as a labourer at the Government Prison Works, Peterhead. The defenders were the principal contractors for the work in which the pursuer then laboured, and themselves executed part thereof. The pursuer was subject to the control of the defenders, and his labour was in their service. His wages were paid by one in the defenders' employment, who paid the wages of all the workmen in common." (Cond. 2) "In the forenoon of the said 10th day of October 1887 the pursuer, in order to perform his duty of mixing lime, had to fetch his shovel, which was the only one available for the purpose, and was then with a mason named Clark. To reach Clark, who was working at a considerable height from the ground, on the inside of a wall, forming one of the sides of a gateway, it was necessary to ascend a ladder which leant against the outside of the said wall, and which also adjoined and gave access to a joiners' scaffolding erected on that side of the wall, about 15 feet from the ground. The pursuer had formerly obtained his shovel from Clark by passing up the said ladder and along the said scaffolding. On the present occasion, with the like purpose, he was on the ladder, when a joiner, in the defenders' employment, who was returning to work on the said scaffolding, came up behind the pursuer and told him to stand aside. The pursuer accordingly stepped on to the scaffolding, where two joiners were already working, and allowed the third joiner to pass him. Immediately thereafter, when the pursuer was returning to the ladder, the said scaffolding suddenly gave way and fell to the ground, with the three joiners and the pursuer. With reference to the statement in answer, it is averred that the pursuer had a right to make use of the said ladder, and to be on said scaffolding." The action was laid both upon the Employers Liability Act, 1880, and at common law.

The defenders averred, *inter alia*, that "the ladder was placed in the position stated, by the defenders' own workmen, for their own sole and exclusive use, and that the pursuer had no right to make use of said ladder or to be on said scaffolding."

The pursuer pleaded;—(1) The pursuer having sustained loss, injury, and damage through the fault or negligence of the defenders, or of those for whom they are responsible, is entitled to damages and *solatium* from the defenders. (2) The pursuer having been injured in the defenders' service by their negligence and through the defective condition of a scaffolding in use by them, is entitled to compensation from the defenders for his said injuries, and the loss and suffering consequent thereon.

The defenders pleaded, *inter alia;*—(1) The action is irrelevant, *et*

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separatim, is irrelevant under the Employers Liability Act, in respect that, according to the pursuer's averments, the relation of master and servant, in the sense of the Employers Liability Act, 1880, did not exist between the pursuer and the defenders. (2) The pursuer not having been in the employment of the defenders, nor under the orders or instructions of them, or of anyone for whom they are responsible, is not entitled to claim compensation from them, and the action should therefore be dismissed, with expenses. (4) The accident having been caused by the pursuer's own fault in going upon said scaffolding, where he had no right to be, he is barred *personali exceptione* from insisting on any claim for compensation for the injuries alleged.

The Sheriff-substitute (Brown), on 1st June 1888, allowed a proof, and the pursuer then appealed to the First Division of the Court of Session for jury trial.

The defenders argued that the action was irrelevant. I. In order to constitute a relevant action under the Employers Liability Act, 1880, it was necessary that the parties to it should stand to one another in the relation of employer and employee. This was evident both from the title of the Act, which was to extend and regulate the liability of employers for injuries to workmen " in their service," and from the words of the first section. It appeared also from the definition of " workman" in the statute; and the cases of *Morrison* and *Robertson*,[1] though the decision in the former allowed an action to be maintained notwithstanding the fact that the relation of master and servant was not direct, were authorities for the proposition that there must be some relevant averment of service between the person injured and the person sued as liable for the injury. Such was not the nature of this action. The pursuer's employers were represented to be Messrs Gauld & M'Kenzie, and the action was not brought against them. II. There was no relevant case stated at common law. The pursuer had no occasion to go upon the scaffolding to mix his lime, which was the duty he had to perform. It was not said that he had been invited to go there, or that he had even been permitted to do so. *Brady's* case[2] was different; there the pursuer was in the *bona fide* belief that by entering the premises where he met with the accident he would get the goods he wanted, and he had been directed by one of the employees to go there.

Argued for the pursuer;—I. The pursuer really had two employers here. The defenders were the principal contractors for the work in which he was engaged, and it was they who paid the pursuer his wages. That was enough to satisfy the requirements of the Employers Liability Act, 1880, and the word employment must not be too strictly interpreted. But there was a liability here apart from the relation of master and servant. The plant had been inadequate, and there had been a duty upon the defenders to supply sufficient scaffolding, which they had neglected. II. In any case, a relevant case at common law had been set out.[3]

Lord President.—In so far as this action is laid upon the Employers Liability Act, I am of opinion that it cannot be maintained. An action under that Act must be brought by a servant or employee, and must be brought against his master or employer. Here the averment is—(Cond. 1) " The pursuer is a crofter and labourer, presently residing in Skye. For about two months prior to Monday the 10th day of October 1887 he was in the employment of Messrs Gauld & M'Kenzie, masons, as a labourer at the Government Prison Works, Peterhead. The defenders were the principal contractors for the work in which the pursuer then laboured, and themselves executed part thereof. The pursuer was subject to the control of the defenders, and his labour was in their service. His wages were paid by one in the defenders' employment, who paid the wages of all the workmen in common." As regards the latter part of the article it is not very explicit or intelligible, but I take it to mean that the defenders, who were the principal contractors, had control of the work of the subcontractors in the way of directing where the labour of the latter was to be expended, and that that labour was for the promotion of the contract on which the principal contractors were engaged, and that the wages of the employees of the subcontractors were paid by the principal contractors. These circumstances, if separately averred, would not of themselves amount to a constitution of the relation of employer and employee under the Employers Liability Act; but we are not left in this case to draw that inference, for we have it distinctly averred by the pursuer that he is in the employment of Messrs Gauld & M'Kenzie, and yet, notwithstanding that fact, he is here suing the defenders as his employers. These two things are inconsistent, and accordingly I think the action is irrelevant under the Employers Liability Act.

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[1] Morrison v. Baird & Co., Dec. 2, 1882, 10 R. 271; Robertson v. Russell, Feb. 6, 1885, 12 R. 634.

[2] Brady v. Parker, June 7, 1887, 14 R. 783.

[3] Brady v. Parker, June 7, 1887, 14 R. 783; Stephen v. Thurso Police Commissioners, March 3, 1876, 3 R. 535.

But a separate case is attempted to be made out at common law, and it seems to me to amount to this, that the pursuer had lent a shovel to a fellow-workman, who was like himself employed in the mason work of the building; that he found it necessary to get back the tool, and for that purpose proceeded to climb a ladder which was laid against one of the walls, and then to pass along a scaffolding, which was erected, according to his allegation, not for the use of the masons, but of the joiners. It is not averred that workmen other than the joiners were in the habit of walking along the scaffolding with the permission of the defenders, or that they had occasion to use it. The record simply stands upon the averment that the pursuer had once before done the same thing for the purpose of recovering possession of his shovel from the same man. I do not see that there can be any common law liability, the scaffolding not having been erected for the use of the masons. If it had been averred that although erected primarily for the joiners it was used by all the workmen with the authority and sanction of the defenders, that would have been a different case. But reading the averments as we find them, I am of opinion that the action is bad at common law also.

LORD SHAND.—I agree with your Lordship upon both branches of the case.

In the first place, I think that in order to found an action on the Employers Liability Act, 1880, the pursuer must set forth the existence of the relation of employer and servant between himself and the defender. The title of the Act is "to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service," and the whole provisions of the 1st section of the Act, which introduces the change upon the common law, on which the pursuer founds, deal with injuries which are brought about, either through defects in the plant used in the employer's business, or through the negligence of persons in the service of the employer. In the present case the pursuer avers that he was in the employment, not of the

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defenders, but of Messrs Gauld & M'Kenzie, who were doing a special work for the defenders. Accordingly, any action at the pursuer's instance under the Employers Liability Act must be directed against Messrs Gauld & M'Kenzie. The decision in the case of *Morrison* v. *Baird & Company* (10 R. 271) does not in the least derogate from that principle. There the pursuer averred that he was in the employment of the defenders. The rubric to the report of that case very properly states that the pursuer's averment was "that the working of the pit was carried on under the superintendence of a general and of an underground manager, appointed by the defenders, that the defenders were in the habit of arranging with certain of their men to excavate portions of the limestone at a certain rate per ton, and authorising them to employ the necessary workmen; that at the date of the accident one of the faces of the pit was wrought under such an arrangement by J. M.; that the pursuer's husband was engaged under J. M. as a workman; that while so employed he was killed by a fall of rock through the fault of the defenders, or of the general manager, or of the underground manager, or of J. M." No doubt the averments in that case were very loose, but they came to this, that the person who did employ the pursuer was an agent of the defenders, who were accordingly in reality the employers, and accordingly that was a case where an issue was very properly granted under the Employers Liability Act.

In the second place, I am further of opinion that, as the pursuer has not alleged that he was called upon to use the scaffolding for the purposes of any work for the defenders, he has no case at common law against them. He was in no different position from a stranger, who could not, in my opinion, have maintained an action of this kind on such averments as the pursuer makes as to the purpose with which he went on the scaffold. Where an employer erects a scaffolding for the use of particular workmen who are to come upon it, and where others, having no duty to perform there, take advantage of it, they do so at their own risk. If the pursuer had stated that he had been in the habit of using the scaffolding as an access to some part of the premises where he had duty to perform, and had done so in the knowledge and with the sanction of the defenders, a different case, as your Lordship has pointed out, would have been made. But no such case has been disclosed. The case of *Brady* v. *Parker* (14 R. 783) falls to be distinguished. It proceeded upon the law which was most forcibly stated in the English case of *Indermaur* v. *Dames* (1867, L. R., 2 C. P. 311). It was an extension of the principle of that authority to apply it to the case of a person who went to a store for the purpose of buying articles which he believed, and had reasonable grounds to believe, were sold there, but which it ultimately turned out were not so sold. That was *Brady's* case. It was decided on the view that he was invited into the premises, and went there as an intending purchaser, and having met with an accident in so doing the defender was held liable. In order to make the case of the present pursuer relevant, it was necessary for him to aver either invitation from the defender, or some act inferring sanction on his part to use the scaffolding.

LORD ADAM.—I concur upon both points.

LORD MURE was absent.

THE COURT sustained the first plea in law for the defenders, and dismissed the action.

THOMAS CARMICHAEL, S.S.C.—AULD & MACDONALD, W.S.—Agents.

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July 7, 1888.
Henderson v. Munn.

MRS HELEN STEEL STEWART OR HENDERSON, Pursuer (Appellant).—*Shaw—Steele.*

WILLIAM MUNN, Defender (Respondent).—*A. S. D. Thomson.*

Lease—House becoming uninhabitable—Liability of landlord for death in tenant's family.—In an action by the tenant of a house against her landlord, the pursuer averred that she had been tenant of the house, from year to year, since Whitsunday 1883; that in August 1887, she "experienced most disagreeable smells in the house, and it was discovered that the sanitary arrangements and drains were defective" (the particulars not being specified); that she complained to the defender, who declined to do anything; that "as the disagreeable smells still continued," she in September 1887 "lodged a complaint with the sanitary authorities, and the complaint was intimated to the defender" who "paid no, or at least insufficient, attention to" the complaint (the nature of which the pursuer did not specify on record), that "through the effects of the insanitary condition of said house the pursuer and her family suffered in health, and three of her children became ill of diphtheria, whereof two of them" died in January 1888; that she was in the habit of letting the house, but that some of the families to whom she let it in 1887 had to leave owing to its insanitary condition, and that she herself was also under the necessity of leaving from the same cause. She therefore pleaded that she was entitled to damages from the defender, and to *solatium* for the loss of her two children. *Held* that the action was irrelevant from want of specification.

Observed (*per* Lord Young) that where tenants continue to inhabit a house which they believe to be dangerous to health through the fault of the landlord they cannot hold him responsible for any evil consequence arising from the continued occupation.

2D DIVISION.
Sheriff of Renfrew and Bute.
I.

IN March 1888 Mrs Helen Steel Stewart or Henderson brought an action in the Sheriff Court at Rothesay against William Munn for decree for £1000.

After revisal of the pleadings the pursuer's averments stood as follows;—(Rev. cond. 2) "The said deceased William Dunlop Henderson and the pursuer were tenants from year to year from and after the term of Whitsunday 1883 of a house belonging to the defender, and situated at Demerara Place, 32 Ardbeg Road, Rothesay." (Rev. cond. 3) "It was a special or implied condition of the occupancy of said house by the late W. Dunlop Henderson and the pursuer that it was habitable, and that the drains and general condition of the house, as regards sanitary arrangements, were satisfactory and unobjectionable." (Rev. cond. 4) "In or about the month of August 1887 the pursuer and her family experienced most disagreeable smells in the house, and it was discovered that the sanitary arrangements and drains were defective. Intimation of this was at once made to the defender, who was several times called upon to have the matter remedied, but notwithstanding of the repeated complaints by the pursuer, defender maintained that there was nothing requiring attention, and he did nothing to remedy the defects complained of. The said deceased W. D. Henderson had occasion more than a year ago to complain to the defender of the condition of the house, and the defender pretended to the said deceased and the pursuer that he had made the drains good and sufficient, and pursuer was thereby induced to remain in possession." (Rev. cond. 5) "As the disagreeable smells still continued, and defender having refused, or at least failed, to get the same properly looked after and attended to, the pursuer, in the month of September 1887, lodged a complaint with the sanitary authorities in Rothesay, and the complaint was intimated to defender. Pursuer believes and avers that defender paid no, or at least insufficient, attention to these complaints,—suggestions of the authorities, and of other tradesmen, as to what was

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necessary to put said drains in proper condition, having been altogether disregarded." (Rev. cond. 6) "Through the effects of the insanitary condition of said house the pursuer and family suffered in health, and her three children became ill of diphtheria, whereof two of them, a daughter seven years of age, and a son aged eleven months, died, the latter on the 8th, and the former on the 10th day of January 1888. The pursuer specially took the house in question for the purpose of adding to her own income by letting out the same with attendance; but some of the families to whom pursuer had let her apartments for the summer months of 1887 had to leave the house. The pursuer has also been deprived of the use of the house, and has been under the necessity of removing from it. This was all directly caused by and attributable to the insanitary state of said house." (Rev. cond. 8) "From the effects of the insanitary condition of said house as before mentioned the pursuer has suffered loss and damage in doctor's bills, medicines, want of boarders, and expenses of removing, &c., and *solatium* for the loss of her two children, to the extent of at least £1000."

The pursuer pleaded;—(1) The defender not having fulfilled the terms of said let, and thereby committed a breach of contract, the pursuer is entitled to decree as craved, with costs. (2) The pursuer, by defender's breach of duty and negligence in failing to have and keep said house in a sanitary condition, having suffered loss and damage to the amount sued for, decree ought to be granted as craved, with interest and expenses. (3) The deaths of the pursuer's children and the losses mentioned on record having been caused by the fault of the defender, all as condescended on, the pursuer is entitled to *solatium* and reparation, and to decree as concluded for.

The defender pleaded;—(2) Defender not being responsible for the alleged loss and damage and expenses and *solatium*, or any of these, and these not being due in any part to the condition of his said house, or to his fault, he is entitled to absolvitor, with expenses.

On 3d May the Sheriff-substitute (Orr) allowed a proof.

The pursuer appealed for jury trial.

The pursuer proposed the issue quoted below.*

The defender objected that the action was irrelevant, in respect that the pursuer did not sufficiently set forth the character of the alleged defects in the sanitary arrangements of the house, or the nature and results of the alleged complaints to the local authority, and further argued that a landlord was not responsible for the death of his tenants through defective drainage, at least in the circumstances averred by the pursuer. It was her duty to have left the house and sued for damages if she thought its sanitary arrangements were defective; if she chose to stay on, knowing the risk, it was no part of her landlord's duty to insure her or her family against the consequences.[1]

Argued for the pursuer;—The record was sufficiently specific to entitle the pursuer to an issue. The pursuer had been induced to remain in the house through the representations of the defender that the defects would be cured. He was therefore responsible for the death of the children, and liable to the pursuer in *solatium* in consequence.

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* "Whether the defender, in breach or wrongful neglect of his obligations as landlord of a house in Demerara Place, 32 Ardbeg Road, Rothesay, for the year from Whitsunday 1887 to Whitsunday 1888, failed to keep the sanitary arrangements and drains of said house in proper order and repair, to the loss, injury, and damage of the pursuer? Damages laid at £1000."

[1] Scottish Heritable Security Co., Limited, v. Granger, Jan. 28, 1881, 8 R. 459; Fraser v. Hood, Dec. 16, 1887, 15 R. 178.

At advising,—

LORD JUSTICE-CLERK.—I am of opinion that the statements of the pursuer on this record are not relevant. I think that no inquiry should be allowed, and that the defender should be assoilzied.

The substance of the case is this,—The pursuer is the widow of the tenant of the house belonging to the defender to which the complaint applies. The house had been held by the pursuer and her husband from year to year since 1883, and her statement is that in August 1887 the drains of the house went wrong, and "that the pursuer and her family experienced most disagreeable smells in the house," and then the complaint ends with the statement that two of her children have died of diphtheria, and a demand for £1000 as damages for her losses.

I am of opinion that this statement is entirely and absolutely defective. It is not said in what respect the drains were defective, nor indeed that any fault in them produced the disagreeable odours and the other results complained of. It is said that a complaint was made to the local authority, but it is not said what the local authority did, or whether they thought it necessary to do anything in answer to this complaint, and it is assumed because these children died of diphtheria that their death was caused by defects in the drainage. The whole complaint is plainly defective as ground on which to claim damage, and the last item of damage, the death of the children through the alleged defective sanitary arrangements, clearly cannot be allowed to go to proof.

LORD YOUNG.—I am of the same opinion, and I confess that from the first I have thought that this record was entirely defective in its statements, and proceeded on a radically erroneous idea. The house here is a small flat of the value, we were told, of £300, and the tenant of this flat is holding over the head of her landlord an action of damages for £1000—more than three times the fee-simple value of the property. She says that there was a bad smell in the house, and that something was wrong with the drains. She goes to complain to the landlord, and in the meanwhile two of the children die of diphtheria. She then brings this action against the landlord, apparently on the principle that a landlord insures the lives of his tenants and their whole family against the evil consequences of continuing to live in the house after they believe it to be in an insanitary condition. I know of no principle for such proceeding, nor of any precedent, and I am not inclined to make a precedent. I am clearly of opinion that neither *ex contractu*, nor *ex delicto*, nor *quasi ex delicto*, nor on any other ground, can this action be sustained.

LORD RUTHERFURD CLARK.—I am also of opinion that this action is not relevant.

LORD CRAIGHILL was absent.

THE COURT pronounced this interlocutor:—"Having heard counsel for the parties on the appeal, sustain the same: Recall the interlocutor of the Sheriff-substitute appealed against: Sustain the defences: Assoilzie the defender from the conclusions of the action: Find the defender entitled to expenses in the inferior Court, and in this Court," &c.

A. B. CARTWRIGHT WOOD, W.S.—JOHN LATTA, S.S.C.—Agents.

No. 158.

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July 7, 1888.
Fletcher's Trustees v. Fletcher.

JAMES SWAN THOMSON AND ANOTHER (Joseph Fletcher's Trustees), Pursuers and Real Raisers (Respondents).—*Sir Charles Pearson.*
JOHN FLETCHER, Defender and Claimant (Reclaimer).—*D.-F. Mackintosh —G. R. Gillespie.*
MRS MARION FLETCHER, Defender and Claimant (Respondent).— *R. Johnston—Goudy.*

Expenses—Process—Interlocutor.—An interlocutor awarding expenses without qualification gives expenses as between party and party, and after the Court has pronounced such an interlocutor it is too late to move for expenses as between agent and client.

2D DIVISION.
I.

IN an action of multiplepoinding, exoneration, and discharge, brought by the trustees under the trust-disposition and settlement of the late Mr Joseph Fletcher of Kelton House, Dumfriesshire, the Court, on a reclaiming note from the judgment of Lord M'Laren, pronounced, on 9th March 1888, an interlocutor disposing of the questions raised on the construction of Mr Fletcher's trust-settlement, and containing this finding of expenses—" Find all parties entitled to expenses out of the trust-estate; allow the accounts thereof to be given in, and remit to the Auditor to tax the same and to report."

On 5th July 1888 the Auditor issued this interim report—" With the view of carrying out the remit contained in the interlocutor of Court of 9th March last, the Auditor has examined the accounts of expenses incurred by the parties in this case, and met the agents and received explanations from them, but before reporting he humbly requests the direction of the Court as to the principle of taxation. Reference is made to the subjoined note." *

At the hearing on the report Mr John Fletcher, one of the claimants (with whom, on this point, Mrs Fletcher, the widow of the truster, concurred), argued;—The intention of the Court when they decided the case was to give expenses as between agent and client. In any event, it was equitable that that should be done, and it was still within the power of the Court so to direct.

The trustees (acting in the interest of the children, *nati et nascituri*, of Mr John Fletcher) objected that the interlocutor could not be construed to mean an award of expenses as between agent and client, and that it was final.

LORD YOUNG.—I have no doubt about the matter; we have determined the matter by our interlocutor. The question whether a party should have expenses

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* " NOTE.—At the meeting held this day for audit of the accounts it was maintained by the agent for Mr John Fletcher and others that the intention of the Court was that I should tax them as between agent and client. The finding for expenses is in these terms—' Find all parties entitled to expenses out of the trust-estate; allow accounts thereof to be given in, and remit to the Auditor to tax the same and to report.' An examination of the record and of the judgment of the Lord Ordinary and shorthand notes of the advising in the Inner-House leads me to think that it may have been the intention of the Court to give the parties their expenses as between agent and client, but to prevent mistake on my part, and trouble to the Court and parties, I think it well to ask the Court to favour me with a direction on the subject. At the close of the advising counsel for the claimants said—' Your Lordships will allow the expenses of the parties to come out of the trust-estate'; and Lord Rutherfurd Clark (who had delivered the judgment of the Court) replied—' I think that is most reasonable. You can arrange what interlocutor should be pronounced giving effect to these views.' "

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in the ordinary way as between party and party, or should have expenses as between agent and client, is a question for the determination of the Court at the time the case is decided. In the one case the Court simply allows expenses; in the other case the interlocutor expressly bears that expenses are to be taxed as between agent and client. Here our interlocutor does not expressly bear that expenses are to be taxed as between agent and client. We are really asked therefore to alter our interlocutor, and I am not inclined to do that.

Lord Rutherfurd Clark.—I entirely agree. It never occurred to me that in pronouncing our interlocutor as we did we were allowing expenses as between agent and client.

The **Lord Justice-Clerk** concurred.

Lord Craighill was absent.

The Court pronounced no interlocutor.

Knight Watson, S.S.C.—Mitchell & Baxter, W.S.—
Scott & Glover, W.S.—Agents.

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July 7, 1888.
M'Allan v. Alexander.

Ann M'Allan, Pursuer (Appellant).—*J. P. Grant.*
William Alexander, Defender (Respondent).—*Craigie.*

Aliment—Liability to support wife's mother—Married Women's Property Act, 1877 (40 *and* 41 *Vict. c.* 29), *sec.* 4.—*Held* that a man who was married subsequent to the passing of the Married Women's Property Act, 1877, and who was not *lucratus* by the marriage, was not liable to aliment his wife's mother, in respect that the wife's obligation to aliment her mother was a subsisting obligation at the date of the marriage, and was an antenuptial debt in the sense of the Act.

1st Division.
Sheriff of Aberdeenshire.
M.

Mrs Ann M'Allan raised an action in the Sheriff Court of Aberdeenshire against William Alexander, a railway servant, her son-in-law, for payment of two shillings per week as aliment, she being, as she alleged, in indigent circumstances.

The defender was married to the pursuer's daughter in December 1882. It was admitted by the pursuer that the defender was not *lucratus* by his marriage. He had a wife and three children to support.

The defender pleaded;—(1) The defender having been married to the pursuer's daughter subsequent to the passing of the Married Women's Property Acts of 1877 and 1881, and in respect he was not *lucratus* by the marriage, he is not bound to aliment his mother-in-law, and he should be assoilzied from the conclusions of the action, with expenses.*

The Sheriff-substitute (W. A. Brown) sustained the defender's first plea in law, and assoilzied the defender.

On appeal the Sheriff (Guthrie Smith) adhered.

The pursuer appealed to the Court of Session.

Argued for the pursuer;—The obligation to support a parent, when

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* The Married Women's Property Act, 1877 (40 and 41 Vict. c. 29), sec. 4, provides,—"In any marriage which takes place after the commencement of this Act, the liability of the husband for the antenuptial debts of his wife shall be limited to the value of any property which he shall have received from, through, or in right of his wife, at, or before, or subsequent to the marriage. . . ."

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indigent, was not a "debt" in the sense of the Act of 1877. It was an obediential obligation, which did not arise till the mother became indigent. The Act contemplated that the husband might receive "property" by the marriage, to the extent of which he might be liable for his wife's "debts." It did not use the expressions "rights" and "obligations," but "property" and "debts." That shewed that the meaning was contract debt, not debt in a wider meaning in which it would include an obligation *ex debito naturali.* That a husband was liable at common law to support his wife's indigent parent appeared from the case of *Reid* v. *Moir*,[1] and that of *Foulis.*[2]

The respondent was not called on.

Lord President.—I entirely agree with the Sheriff and Sheriff-substitute. I think the clause of the statute is explicit and conclusive. By the judgments of the Court in the cases of *Reid* v. *Moir* and *Foulis* it was held that the husband of a woman is liable to support her indigent parent; he becomes liable to do so by reason of being the woman's husband, and therefore liable for her debts of all kinds without exception. Among these the obligation to support her parents is one. No doubt it is not an obligation of contract but a natural obligation, but it is not the less on that account an antenuptial debt of the wife. It existed though it was not prestable. Though circumstances had not occurred to make it necessary for the woman to perform the obligation, it was an obligation all the same. It is like the case put by one of your Lordships during the debate—that of a woman being a cautioner, but not being distressed for payment of the debt till after her marriage.

In another case decided not many years ago,—I mean that of *Wishart*, 8 R. 74,—we decided that where a man held shares in a joint stock company, but died before calls were made upon the shares, he was liable through his executors to pay these calls when the time arrived at which calls were payable. The obligation was undertaken when he took the shares, although it was not prestable until a future time. The clause of the Married Women's Property Act, 1877, which applies to the case, is this,—"In any marriage which takes place after the commencement of this Act the liability of the husband for the antenuptial debts of his wife shall be limited to the value of any property which he shall have received from, through, or in right of his wife at, or before, or subsequent to the marriage . . ." For the reasons I have stated I think that this was clearly an antenuptial debt, and it being admitted that the defender got nothing by the marriage, in any way, either at the time of it or subsequently, I think the judgment must be affirmed.

Lord Shand.—I am of the same opinion. If the terms used in the statute had been "obligations" instead of "debts" there could have been no question, but it appears to me that if there exists an obligation at the time of the marriage either from contract or delict, and a debt arises afterwards in consequence of that obligation, that is truly a debt in the sense of the statute. I therefore concur in thinking that this liability is practically a debt at the date of the marriage, and as it appears that this husband did not get estate to meet that debt through the marriage, there is, in my opinion, no liability upon him for the debt now sued for.

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[1] July 13, 1866, 4 Macph. 1060, 38 Scot. Jur. 551.

[2] July 20, 1887, 14 R. 1088.

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Lord Adam.—I think the obligation of a daughter to support her indigent mother is an obligation existing before the marriage, and I do not think it is of the least consequence upon what ground that obligation is founded, whether upon contract or otherwise, and as the husband is in this case not *lucratus* by the marriage he is not, in my opinion, liable for this antenuptial debt of his wife.

Lord Mure was absent.

The Court affirmed the interlocutors of the Sheriff-substitute, and refused the appeal.

J. D. Turnbull, S.S.C.—Lyle & Wallace, Solicitors—Agents.

No. 160.
July 11, 1888.
Shaw v. Morgan.

John Shaw, Pursuer (Respondent).—*Salvesen.*
Arthur Morgan, Defender (Appellant).—*C. S. Dickson—Hay.*

Reparation—Slander—Privilege—Malice—Words prima facie slanderous spoken by member of public body pertinently to subject before it.—At a meeting of police commissioners of a burgh a member, who had heard complaints regarding the conduct of a sheriff-officer who had charge of collecting arrears of water-rates, said in supporting a motion which he made as to employing a different system for the collection of police-rates,—"What could be more repulsive than to demand rates of a dying woman. . . . . Sheriff-officers are not always worshippers of the sober deity." On another member expressing his opinion that the sheriff-officer was a competent man, he said,—"A man who is drunk cannot be competent. . . . I would rather let loose a wild beast upon the community than a drunk man."

In an action of damages against him by the sheriff-officer for slander the Court found that the defender used the language complained of in the course of his duty as a member of the police commission, and that it was not proved that he wittingly spoke falsely or that he was actuated by malice; and *held* that he was privileged in expressing himself as he did, in respect that he was *versans in officio*, and that he was entitled to absolvitor.

2d Division.
Sheriff of Ayrshire.
I.

John Shaw, sheriff-officer, Ayr, raised an action in the Sheriff Court of Ayrshire against Arthur Morgan, bookseller there, to recover damages in respect of alleged slander by him.

The pursuer had been appointed collector of water-rates in the burgh in December 1886, and a summary warrant against ratepayers in arrear had been handed to him that he might collect the arrears. The defender was a town-councillor and police commissioner of Ayr and a member of a committee of council usually known as the Arrears of Rates Committee.

At a meeting of Ayr Police Commissioners in the Council Chambers on 14th February 1887 the defender made the following motion with reference to the police assessments payable on 14th February 1887:—"In the middle of March, to appoint a collector to call for all unpaid rates, without costs, and that this collector be authorised to receive instalments from those out of employment, and that all rates unpaid at the end of the statutory period be recovered according to law." In the course of a speech in support of the motion, in which he said it was undesirable to employ a sheriff-officer if they could get a collector to do the work satisfactorily, the defender used the following expressions:—"What could be more repulsive than to demand rates of a dying woman. . . . Sheriff-officers were not always worshippers of the sober deity." Provost Kilpatrick, who presided at the meeting, interrupting, said,—"For myself, I think that Shaw is quite a competent man." The defender replied,—"A man who is drunk cannot be competent, and Bailie Shankland knows that. I would rather let loose a wild beast upon the community than a drunk man."

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The pursuer stated that these words were intended to apply to him, and were so understood by those who heard and read them, and that the defender's object was "to represent the pursuer as inhuman, drunk on duty, and an incompetent and unworthy man to act as collector, and thereby to obtain the dismissal of the pursuer, or to prevent the further employment of the pursuer in the collection of burgh rates. . . . . . The said statements made by the defender were not pertinent to the subject-matter then before the police commissioners, which was a motion by the defender himself relative to the collection of police-rates, and were made ultroneously by the defender."

The pursuer further stated,—"The defender took advantage of his public position to comment unfairly, falsely, maliciously, calumniously, and without probable cause, upon the pursuer's conduct at the said meeting of police commissioners, without notice to the pursuer, and where the pursuer had no privilege of reply, to the prejudice of the pursuer, and to his loss, injury, and damage to his feelings, character, reputation, and business." (Cond. 17) "The said false and calumnious statements by the defender against the pursuer . . . were without probable cause, and, if not made maliciously, were made recklessly, culpably, and calumniously, without due inquiry into the whole facts and circumstances connected with the pursuer's proceedings and conduct as collector."

The defender denied these averments. He stated that the pursuer was paid by a commission on the sum collected, with a higher commission upon arrears; and that, with a view to the recovery of the police-rates payable on 14th February 1887, he (the defender) had at a regular meeting of the police commission in February 1887, after due notice, proposed a motion to the effect that a different system for collecting rates should be adopted. He further stated that in speaking to that motion he had said,—"What could be more repulsive than to demand rates of a dying woman, and to drag to a police-office on a charge of theft a poor creature who held on by a chair which was being removed. Sheriff-officers, too, were not always worshippers of the sober deity. What a contrast to the care that was taken in looking after lame sheep and broken-shouldered horses, and punishing those who abused the dumb animals. Their taxes were heavy, but he believed the people of Ayr would bear a halfpenny more rather than expose their poor fellow-townsmen to the relentless fury of a summary distraining warrant." He further stated that the pursuer's name had been introduced into the discussion by one of the magistrates, Bailie Shankland, who said that in appointing Mr Shaw to collect the arrears of water-rates they thought they were making as good an appointment as they could; that in the subsequent discussion the pursuer's name was referred to, and his conduct as collector of water-rates remarked upon, and pertinently used as an argument against the defender's motion, and that he (defender) in his reply was again referring to recovery of rates by poinding by a sheriff-officer, and had complained of it as being a measure like putting a pistol to a man's head, when the provost interrupting him said,—"For myself I think that Shaw is quite a competent man," whereupon he, defender, proceeding with his reply, said,—"A man that is drunk cannot be competent, and Baillie Shankland knows that. I would rather let loose a wild beast upon the community than a drunk man." He admitted that he intended to convey the meaning that the pursuer was sometimes drunk, but averred that his statements were true in fact, and privileged as being made in the exercise of his public duty as a member of the police commission.

He set forth a number of occasions upon which he averred the pursuer had been drunk, or behaved in a drunken manner when engaged in his duty of collecting arrears of water-rates.

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The pursuer pleaded;—(2) The said false and calumnious statements being made by the defender in reference to the pursuer, and meant by the defender to apply to the pursuer, as libelled, to the pursuer's loss, injury, and damage to his feelings, character, reputation, and business, the pursuer is entitled to *solatium* and damages therefor. (3) The defender's statements at the meeting of police commissioners, not having been pertinent to the subject-matter before the meeting at the time, were not privileged. (4) The statements complained of in the condescendence were made by the defender maliciously, and without probable cause, to the loss, injury, and damage to the feelings, character, reputation, and business of the pursuer, for which the pursuer is entitled to *solatium* and damages.

The defender pleaded;—(4) The statements "having been made by the defender in his capacity of a Police Commissioner of the burgh of Ayr, at and to a regular meeting of the Town-Council or Police Commission of Ayr, and having been made by the defender in *bona fides*, and with probable cause, he is entitled to be assoilzied from the conclusions of the action in respect of such statements, with expenses." (8) The whole statements made by the defender being true in fact, or warranted by the pursuer's acts and behaviour, the defender is entitled to be assoilzied, with expenses.

A proof was allowed. The defender's allegations as to the pursuer being drunk when engaged in his duty, and as to his harshness in the discharge of it, were not proved. It was proved, however, that accusations to that effect had been made to the defender by various persons in Ayr.

The acting Sheriff-substitute (Watson) found in law that in making the accusations against the pursuer the defender was not in the circumstances protected by privilege; in fact that the defender had failed to prove that his accusations were well founded; therefore found in law that the accusations being false and calumnious the defender was liable in damages, and assessed the damages at £10.

On appeal the Sheriff (Brand) adhered.

The defender appealed, and argued;—The occasion was privileged. It was a meeting of a public municipal body at which the defender was entitled, and indeed bound, to lay before the meeting his views, and the reasons for them. No doubt he was not entitled to say what was not pertinent to the issue. But in discussing whether legal distress at the hands of a sheriff-officer was a judicious way of collecting the police-rates, it was pertinent to argue that it had been found a bad and harsh way of collecting water-rates. Besides, the strongest language applied by the pursuer was applied to the system, and not to the pursuer. It was the system he described, for example, as inhuman. A town-councillor to whom allegations were made by his constituents that a public servant was drunk on duty, and discharged his duty harshly, was well entitled to refer to these charges at a meeting of council in which he was advocating a new system of discharging a similar duty. The case of *Craig* v. *Jex Blake*[1] did not apply, because the body at the meeting of which the words there complained of were used was (though a statutory body of contributors to a charity) not in the same position as a town-council, and because the reference to an individual was in this case pertinent to the matter in hand, whereas in that case it was held to have been impertinent to the subject to discuss the character and actions of an individual.

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[1] July 7, 1871, 9 Macph. 973, 43 Scot. Jur. 363.

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Argued for the pursuer;—The defender had used the discussion on another subject to make an attack on the character of the pursuer. He could have gone to the Arrears Committee, placed his complaint and the charges he had heard before them, and asked for inquiry. That would have been a case of privilege. But he had preferred, without personal inquiry, to publish at a public meeting of a public body these allegations, which it was not now said could be substantiated. He had no privilege in doing that. Where in discussing any subject it was not necessary for the performance of the duty of discussing it to single out an individual, then that individual had a right of action if singled out and slandered.[1] That was established, not by the case of *Jex Blake* alone, but by earlier cases.[2] If, then, it was impertinent to the business of the meeting, which was the mode of future collection of police-rates, to utter calumnies against the pursuer, the collector of water-rates, the pursuer must prevail. If malice needed to be proved, the defender, by giving utterance publicly without due inquiry to slanders reported to him by others whom he did not name, had acted so recklessly that the law would imply malice. The proof shewed that he had misrepresented even what he had been told, so far as the charges he professed to have received from others could be traced. His failure to go first of all to the Arrears Committee and make his charges there was the best possible evidence of legal malice.

At advising,—

Lord Justice-Clerk.—The only question on which I mean to say anything in this case is the question of privilege, for I think the Sheriffs are right in holding that the words are calumnious, and also in holding that the plea of *veritas* has not been established. There remains then only the defence of privilege. On it I shall make a few observations. I cannot help regretting that such a case should be in Court. The defender is a town-councillor of Ayr, and the pursuer a sheriff-officer there. It appears that in the town-council a discussion took place as to the mode of collecting the police and other rates within the burgh. The pursuer was the person who had been appointed to collect water-rates which were in arrear. Some feeling had arisen in the burgh that these rates were oppressively collected, and the discussion took place to which I have alluded. The defender moved that a man not a sheriff-officer be appointed as collector of arrears of police-rates. Apparently that was objected to by the provost, and in the course of the discussion observations were made with regard to the pursuer. It appears that Bailie Shankland, who was convener of the Committee on arrears of water-rates, said that he was not aware of anything that had taken place in the collection that could be considered in the least repugnant to the feelings of the members of council, and that in appointing the pursuer to collect the arrears he thought they had made as suitable an appointment as they could. Then the provost interposed, and said,—"For myself, I consider that Shaw is quite a competent man," and the defender proceeded to reply, in these words,—"A man that is drunk cannot be competent, and Bailie Shankland knows that. I would rather let loose a wild beast on the community than a drunk man." Now, unquestionably, this language was not well chosen, and it is not wonderful that the pursuer felt himself injured by the defender's remarks. For it is quite certain that this language was intended to apply to him. But

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[1] Craig v. Jex Blake, 9 Macph. 973 (Lord President, at p. 978).

[2] Rae v. M'Lay, July 8, 1852, 14 D. 988; M'Kellar v. Duke of Sutherland, Jan. 14, 1859, 21 D. 223, 31 Scot. Jur. 139, and June 18, 1862, 24 D. 1124.

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the defender pleads that the occasion was privileged, and I am of opinion that in that plea he is right, that the occasion was a privileged occasion, and that the judgment of the Sheriff is in that respect not sound. I think the general rule applicable to the case is that if in the conduct of public business any member of a public body which is considering and deliberating for the public benefit thinks right in the public interest to make use of expressions which are pertinent to the matter in hand, though they may bear hardly on individuals, that occasion is nevertheless privileged, unless malice be averred and proved. It is an important, and I think salutary principle, that in such a case malice must be proved, and if it can be shewn that a member of a public body has been guilty of abusing his position for the purpose of calumniating his neighbour, then that is another case, privilege is avoided, and the speaker will be responsible. But I think that is not the case here. I think a town-council is a typical instance of a public body, the members of which enjoy a privilege in the language they use in dealing with the public affairs of the burgh. Such a body, as part of the municipal government of the county, is one of importance, and statements made in it are of importance and weight, and the principle which has been extended to such bodies as kirk-sessions, a senatus academicus of a university, and the like, will apply even more strongly to the town-council of a burgh. Language used in it in the course of the conduct of public business will enjoy a privilege.

Reference has been made both by the Sheriffs and at the debate to the case of *Craig* v. *Jex Blake*. But I think that case affords a contrast rather than an analogy to the case before us. It was decided upon this principle, that there may be privilege in regard to words spoken with regard to the subject-matter which is under deliberation, but that that privilege shall not protect the speaker if he travel beyond that subject to refer to and reflect upon an individual. The same principle has received effect in other cases than that. It was there applied to a case where the body deliberating was certainly of less importance than a town-council. It was a body the meetings of which were substantially private—a charitable body. It was a meeting of contributors to the Edinburgh Infirmary, and the matter under discussion was how far women should be admitted to the Infirmary to practise their studies with a view to becoming medical practitioners. In the course of the meeting a lady made some observations with regard to a riot said to have been taken part in by students, and alluded to one of them by name in pretty strong language. Now, that was an entirely different case. It presented the element of criticism of an individual which was not pertinent to the subject-matter at issue. I think, therefore, that the distinction between that case and the present is manifest.

On the whole matter I think that this town-council was a privileged body, and that the words complained of were used in the ordinary course of municipal business, and were privileged, and that malice has not been established. I am therefore for altering the judgment, and for holding that the defender should be assoilzied.

LORD YOUNG.—I am of the same opinion. The word "privilege," as has been often remarked, is an unfortunate and misleading word. But the idea it is meant to express is simple, and may be easily stated. The word "privilege" is misleading, because it is apt to convey to the uninstructed mind the idea that there may be circumstances in which slander is privileged. That is not so.

The doctrine stands on the proposition that there is no such thing as slander without malice. Slander is a defamatory statement maliciously made to the injury of another. If the statement, however defamatory, is not malicious, it is not slander. That law is stated both in the English text-books and by our own Judges. But when a man says or writes anything defamatory of another, he is assumed to do so maliciously. The law presumes malice from the defamatory character of the statement unless the occasion on which it is made is what is termed a privileged occasion, so that the presumption of malice is displaced by the occasion. If a man in mere gossip utter a slander, the law assumes that he did so maliciously, and he must answer accordingly far it. Malice is imputed to him without any evidence but the making of the statement, and the untruth of the statement, it being defamatory, will in like manner be presumed unless he proves its truth. But if the occasion be privileged, if the statement be made in the discharge of a duty or in the reasonable attention to a man's own business and affairs, which gives him legitimate cause to write or speak of his neighbour, the occasion displaces the presumption of malice and the presumption of falsehood, and he is only answerable if malice be shewn to have existed in fact, and if the statement be untrue. Now, what was the occasion here?—a meeting of town-council, at which a member made a motion—whether a sensible one or not is not for me to judge—but a perfectly legitimate motion. The substance of it was to put the collection of arrears of police-rates in the hands, not of a sheriff-officer for collection under a distress warrant, but of a collector to be appointed, and to be paid by salary or percentage on what he collected. In supporting the motion he made a speech pressing it upon the favourable consideration of the body whom he was addressing, and illustrated the importance of the subject and the advantages of the course his motion recommended by the evil of the other system according to what he observed, or what he heard, or, it may be, even by fanciful cases just by way of illustration. Well, I daresay the speech was not all relevant to the matter in hand. That may be said of many speeches we are accustomed to hear. But it was a speech pertinent to the matter in hand, and the speaker was, according to his lights and abilities, speaking to that and pressing his views upon the favourable attention of his audience, and answering, it may be, anticipated objections. Well, if a member of a town-council in a meeting of council or of committee for a special purpose addresses the meeting in the discharge of his public duty as a member, I think he is *prima facie* privileged, and what he said on the matter being pertinent in the general and comprehensive sense I have explained, then it should not be assumed that he was actuated by malice and speaking untruthfully merely because he said something defamatory of another. What the defender said I take to be defamatory. It imputes reckless conduct in executing a warrant, and also intoxication. But the suggestion was made in the course of supporting what I assume to be a very legitimate motion, and one of great importance in his view, that rather than put summary warrants into the hands of a sheriff-officer, who might be very oppressive to poor people who were in arrears with their rates, it would be more humane to those in arrears, and likely on the whole to be more profitable too, if a collector were appointed at a percentage as he proposed. I cannot say that the occasion was such that I must assume that the defender was actuated by malice towards the pursuer, and that there was no ground for the statement, merely because the defender made it. It might be shewn that he made it through malice, and an important step to that consisted in shewing that it was not true, and that the defender had no reasonable ground for believing it to be so. If a man makes a defamatory statement which is untrue in fact, and does not shew that he had any reasonable ground for making it, that is some evidence that he was actuated by malice, and that being affirmed, he will be held guilty of an actionable wrong. But on the evidence I think the occasion was privileged, and that the defender is not proved to have acted maliciously. I do not hold it to be established by any means that the pursuer acted oppressively, or was in the habit of getting tipsy, but I think the defender at the time he used that language was entitled to use it, unless it appears that he did so maliciously, and there is abundant evidence to shew that it was a matter of common rumour that the pursuer acted oppressively, and sometimes took too much drink, and I do not think that the defender's rhetorical reference to the rumour can found the action without proof of ill-will, or that the statement was such that it must be characterised as malicious, proceeding from *malus animus*.

These are my grounds of judgment. The case of *Craig* v. *Jex Blake* was referred to. I think this case is distinguishable from it. There was not there such a body as a town-council, which is a constitutional body. It was a meeting of subscribers to the Royal Infirmary. No doubt that is a statutory body; but I think the occasion was one different from a meeting of a town-council, which is a constitutional body with lawful authority in the country, and different from a body of subscribers, even although under a private Act of Parliament. I am not desirous to dwell upon the case of *Jex Blake*, but I may say, and I do so without hesitation, that it requires reconsideration. There has been considerable variety of decision in this branch of the law, and if we go back a few years before that case, I think we find that the tendency was to abolish the defence of privilege altogether, unless the man was speaking in the necessary discharge of a duty incumbent on him, and would be failing in his duty if he did not make it. I think there had been an advance before 1871, when the *Jex Blake* case was decided, and so also since 1871, in the direction I have indicated. I should have thought—I confess it is my opinion now—that the occasion in that case was privileged, and that when the lady was speaking of a professor's assistant as having taken part in a students' riot, and of having done so in such a way that the best apology for him must be that he was tipsy, the occasion was privileged. And the mere fact of imputing intoxication and the taking part in a students' riot to the assistant to one of the professors was not sufficient to infer malice. I think it was *prima facie* a kind of statement which did not imply malice. I was counsel in the case on the side which was unsuccessful, and may therefore probably be apt to take a stronger view against the judgment than I might otherwise have done.

But there was another fact in that case which appears on the face of the report. The pursuer was called as a witness for the defender and asked by her counsel this question,—Did you take any part in the riot? His own counsel objected, and the question was disallowed. It is true there was no issue of *veritas*, but if there is anything established in this class of cases, it is that without an issue of *veritas* the defender may ask the pursuer about his own conduct in the affair, and take his own account of it in mitigation of his claim of damages for the injury which he alleges that he has sustained. In my judgment then that case requires reconsideration. At all events, I am not now, seventeen years afterwards, going to apply it to a member of a town-council making a speech in the

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council on the occasion of making a legitimate motion. I hold that the defender made the statement while in the discharge of his duty as a town-councillor, that it was pertinent to the subject on which he was speaking, and that falsehood and malice are not proved.

Lord Rutherfurd Clark.—I have great difficulty in distinguishing between this case and that of *Craig* v. *Jex Blake*. As to that case, I wish to say that I see nothing against the judgment that was there pronounced. But as your Lordships are both of opinion that a distinction may be drawn, I accept it and agree.

Lord Justice-Clerk.—I intended to have said that I think the difference between this case and that of *Jex Blake* is that here the individual conduct of the pursuer was the question in hand, while in that case the conduct of an individual was not. I think that what we are doing now is what was done in the case of *Auld* v. *Shairp* in 1874.[1]

Lord Craighill was absent.

> This interlocutor was pronounced:—"The Lords having heard counsel for the parties on the appeal, find in fact that on the occasion libelled the defender used the language complained of by the pursuer; that he did so in course of his duty as a member of a committee of the town-council; and that it is not proved that he wittingly spoke falsely, or that he was actuated by malice: Find in law that he was privileged in expressing himself as he did, in respect that he was *versans in officio*: Therefore sustain the appeal: Recall the judgments of the Sheriff and Sheriff-substitute appealed against: Assoilzie the defender from the conclusions of the action: Find him entitled to expenses in the inferior Courts, and in this Court: Remit," &c.

Sturrock & Graham, W.S.—D. W. Paterson, S.S.C.—Agents.

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Smiles v.
Australasian
Mortgage and
Agency Co.
Limited.

James S. Smiles (Surveyor of Taxes), Appellant.—*Darling*—*A. J. Young.*
The Australasian Mortgage and Agency Company, Limited, Respondents.—*D.-F. Mackintosh*—*J. C. Lorimer.*

Revenue—Income-tax—Property and Income-Tax Act, 1842 (*Act* 5 *and* 6 *Vict. cap.* 35), *Schedule D, First and Fourth Cases—Profits of trade—Interest on colonial securities.*—A Scottish limited company carried on the business of woolbrokers in Australia, and made advances of money, which were secured partly upon real property and partly by liens or charges upon wool and other produce in that colony, the advances and interest thence accruing being of fluctuating amounts. *Held* (distinguishing the case from those of the *Scottish Mortgage and Land Investment Company of New Mexico, Limited*, 14 R. 98, and the *Northern Investment Company of New Zealand, Limited*, 14 R. 734), that the company fell to be assessed for income-tax only in respect of its whole profits and gains, including the interest received from its investments in foreign and colonial securities, according to the rule contained in the first case of schedule D of the Property and Income-Tax Act, 1842, and was not chargeable for its income arising from interest on its foreign and colonial securities under the rule contained in the fourth case of schedule D, and for its profits and gains from transactions in the nature of trade under the first case of that schedule.*

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[1] Dec. 16, 1874, 2 R. 191.

* The Property and Income-Tax Act, 1842, Schedule D, provided,—"First

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The Australasian Mortgage and Agency Company, Limited, was formed in 1880, with a registered office in Edinburgh, for the objects, as set forth in the memorandum of association, of, *inter alia*, taking over the business of a firm of woolbrokers in Melbourne, and selling wool and other produce on commission, or making shipments of the same for sale on commission, of purchasing or acquiring any real or personal property, and of borrowing money and negotiating loans upon the security of any description of property, including stock and stations and liens on wool, &c.

In each year after its formation, including 1885-86, the company returned its profits and gains, and was assessed and paid duty thereon in terms of the first case of schedule D of the Income-Tax Act, 1842.

In August 1886 an additional assessment of £669, 6s. 8d. was made by the surveyor of taxes upon the sum of £20,080, being the difference between the sum on which the company was assessed for the year 1885-86, in terms of the first case, and the amount of the interest on the company's colonial securities for the year of assessment under the fourth case of schedule D, and of the company's profits and gains from transactions in the nature of trade chargeable under the first case of schedule D.

The company appealed to the Commissioners for General Purposes for the county of Edinburgh, who sustained the appeal and discharged the additional assessment, being of opinion that the profits of the company's business were chargeable with income-tax under the rules applicable to the first case of schedule D only.

The surveyor required a case to be stated for the opinion of the Court in which the question of law, as amended after a remit by the Court for that purpose, was,—"(1) Whether the company ought to be assessed to income-tax only in respect of its whole profits and gains, including the interest received from its investments in foreign and colonial securities, according to the rule contained in the first case of schedule D, section 100, 5 and 6 Vict. cap. 35, or whether the company is chargeable for its income arising from interest on its foreign and colonial securities under the rule contained in the fourth case of schedule D, and for its profits and gains from transactions in the nature of trade under the first case of schedule D of the said Act?" There were other questions which, in view of the decision of the Court, it is unnecessary to set forth.

Case.—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act.

"Rule First.—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the fifth day of April preceding the year of assessment, and shall be assessed, charged, and paid, without other deduction than is hereinafter allowed." The remainder of the rule related to trades, manufactures, adventures, or concerns, set up and commenced within the said period of three years, or within the year of assessment.

"Fourth Case.—The duty to be charged in respect of interest arising from securities in the British Plantations in America, or in any other of Her Majesty's Dominions out of the United Kingdom and foreign securities, except such annuities, dividends and shares as are directed to be charged under schedule C of this Act.

"Rule.—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in the United Kingdom, in the current year, without any deduction or abatement."

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From the case it appeared, *inter alia*, that the amount of the company's transactions in the nature of trade were not separately distinguished in the company's accounts from the amount of the interest on their colonial securities. It further bore:—"9. The advances or loans made by the company are on securities almost without exception postponed to fixed loans by third parties upon the properties of their customers, and are in part secured by their second mortgages over real property in the colony, and in part by liens or charges upon stock, wool, and other produce. Another part of the company's funds is lent on the security of shipments of wool and other produce, some of which may be in warehouse in Australia, some in course of transit to this country, and some in warehouse in London. The advances, with one or two trifling exceptions, are not of fixed amount, but are of the nature of banker's advances or loans, the amounts of which fluctuate from time to time, according as produce is realised, or other payments are made. The 'advances secured upon mortgages, stock, and liens over wool and other produce' are stated in the balance-sheet of the company, for the year ended 30th September 1885, to amount to the sum of

1885, to amount to the sum of	£874,181	12	0
and the 'advances on shipments of wool and other produce and sundry open accounts outstanding,' to amount to the sum of	483,209	5	0
Total,	£1,357,390	17	0

. . . . 11. Before the commissioners it was maintained, on behalf of the company, that the company was 'an adventure or concern in the nature of trade,' and that, for the purposes of assessment to income-tax, the profits of the company for the year of assessment should be estimated according to the rule contained in the first case above quoted on the average of the three preceding years, in the same manner as it had been hitherto assessed; and that the company's profits should not be charged part under one rule and part under another. It was further maintained that under the fourth case of schedule D of the Act no allowance or deduction is made for the following contingencies, to all of which it is admitted the company is liable, and which would fall to be allowed as deductions in conformity with rule 3 of the first case, viz.:—(1) For bad debts. (2) For rent of premises in which their trade of woolbrokers is carried on. (3) For insurance. (4) For possible losses at sea, not covered by insurance. (5) For cablegrams, which, in a business of this description, forms a serious element of expenditure. (6) For depreciation in warehousing plant. (7) For salaries to servants conducting the warehousing business; and (8) For claims in respect of guarantees which the company gives.

"12. It was likewise maintained that the amount of profit appearing in the balance-sheet for the year ending 30th September 1885 includes interest on real and personal securities in the colony of the description mentioned under head 9, on advances on wool and other produce in course of transit to this country, profits on guarantees granted by the company, commission on sales, warehouse rents, interest on moneys in bank in this country, interests on consols, and trade profits generally, that many of these items are incapable of exact segregation, the company's lending business being almost wholly regarded as a feeder to their commission business, making it impossible to say how much of the profit is derived from interest on advances and how much from commission upon the produce dealt with, and that the nature of these securities fluctuates from day to day and from hour to hour. . . . 13. It was likewise

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maintained, that the company was different in its constitution from either the Scottish Mortgage and Land Investment Company of New Mexico, Limited (14 R. 98), or the Northern Investment Company of New Zealand, Limited (14 R. 734), inasmuch as it is not merely an investment company, but a material part of its business is the warehousing, and the purchase and sale on commission, of wool and other produce and property, both in this country and in Australia, which is entirely in the nature of trade. 14. It was further maintained for the company, that even although case 4, schedule D, did apply, the assessment thereunder must be subject to abatement to the extent to which the interest accrued in the colony was divided among shareholders there. 15. It was further maintained for the company that the surveyor, having adopted the three years' average with this company, was not at liberty to alter it so as to prejudice the company assessed. . . . 17. The surveyor, on the other hand, maintained, on behalf of the Crown, that the interest accruing to the company on their mortgage loans and advances in the colony was profit of the nature described or comprised in the third paragraph, schedule D, section 2, of the Act 16 and 17 Vict. cap. 34, viz.—'for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act,' and that the company was liable to be assessed on the total amount of the interest which had been or would be received in the United Kingdom in the year of assessment, according to the rule contained in the fourth case of schedule D, section 100, of 5 and 6 Vict. cap. 35. 18. The surveyor further contended that a species of profit or gain appropriately set forth in the statute by its true specific denomination as chargeable in a particular way, under a particular rule, could not properly be classed under another and more general designation, in order to bring it under the operation of another rule regulating the assessment of a different description of profit. 19. In support of his contention, the surveyor referred to the decisions of the Court in the cases of the *Scottish Mortgage and Land Investment Company of New Mexico, Limited* (14 R. p. 98), and the *Northern Investment Company of New Zealand, Limited* (14 R. p. 734.)"

Argued for the Surveyor of Taxes;—To infer liability under the fourth case all that was required was to shew (1) that the interest to be assessed had been obtained from securities in the colonies; and (2) that it had been received in this country. If these two conditions were present—and they were in this case—it was immaterial whether the securities were real or personal, and whether the interest was of a fluctuating character or not.[1] There was no authority for the construction put by the company upon the words "interest arising from securities." The application of the fourth case was not prevented by the fact that the company had other profits chargeable to assessment under the first case, or that the company might be said to be a banking or trading concern. The majority of the many mortgage companies which now carried on business abroad had powers to act as agents for the investment of moneys, just as this company did. And none of them restricted themselves to pure mortgage loans. But further, it was not *hujus loci* to inquire into the nature of the loans in question, nor into the question whether the same rule would apply to the case of banks and insurance companies investing their funds abroad.

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[1] The Inland Revenue v. The Scottish Mortgage and Land Investment Company of New Mexico, Nov. 19, 1886, 14 R. 98; The Inland Revenue v. The Northern Investment Company of New Zealand, May 31, 1887, 14 R. 734.

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Argued for the company;—I. The real interest involved in the question in the case was whether the company were to be assessed upon an average of three years' profits under the first case, or upon the amount of one year's interest, without any deductions under the fourth case. The *New Mexico* and *Northern Investment Company's* cases were distinguishable from the present, because they were investing companies only. They did not deal, as this company did, in ordinary mercantile securities, nor did they make advances of the nature of cash-credits on wool and such like produce, nor did they do commission-agent's and banker's business. Such transactions were not the kind of investments in securities which fell within the fourth case; nor was the interest or income derived from them periodically paid, as was also necessary under the fourth case. The interest was of a fluctuating nature, as stated in the case, and was like the discount on a bill. II. Besides, for the purposes of assessment the company must be treated as a *unum quid.* The Inland Revenue must assess it either under the first or the fourth case. But confessedly the company was to some extent a trading one, and fell to be assessed accordingly under the first case. It would be a great hardship if it were held that the Revenue might assess the income embraced in this case under the fourth case, in which event it would not be open to the company to deduct any losses they might have sustained upon their trading transactions which fell for assessment purposes under the first case.

At advising,—

Lord President.—The company called the Australasian Mortgage and Agency Company carries on a very extensive business in connection with the Australian Colonies, and that business is of a somewhat miscellaneous character. They are woolbrokers to begin with, and they both buy and sell wool, and, of course, like all other produce brokers, they advance money on the security of the goods in which they deal, and receive a commission for their agency. It appears to me that the sort of trade in which they are engaged is partly the trade of a broker and partly the trade of a banker. They do not call themselves bankers, but the description which is given in the case before us makes it pretty plain, I think, that they are at least as much bankers as brokers in so far as the nature of their business is concerned.

Now, the proposal on the part of the Surveyor of Income-Tax is to charge the profits of a part of their business under the fourth case of schedule D,—that is to say, he proposes to deal with that part of the profits of the business as being interest arising from securities in the colony, so far as that interest is received in this country. And the surveyor seeks to justify that proposal by a reference to the two cases which we formerly decided upon that fourth case of schedule D. But it appears to me that the present case is very clearly distinguishable from the former cases, and distinguishable in all its essential particulars. No doubt, in the two former cases the companies were trading companies, but in the first of the cases the trade consisted of one thing only, and in the later case it was really assumed that there also the trade was of one description only, although it appears that there were some trifling additional profits arising in some other way. But the trade in both cases consisted in this,—the company employed their capital, so far as paid up, and the money borrowed in this country, to make investments in foreign or colonial securities. In the case of the borrowed money they were enabled to borrow it in this country at a considerably lower rate of interest than they got for it after placing it in colonial investments; and therefore their profits consisted in the first place in getting a larger return per cent upon their paid-up capital, and also a very considerable gain as between the interest which they paid upon their debentures here and that which they received upon investments abroad. We held that although these were trading companies, and might have been assessed under the first case of schedule D upon profits of trade, they were equally within the meaning of the fourth case, because their profits consisted distinctly of interest upon foreign or colonial securities received in this country.

Now, in the present case, the business carried on by the company is of a very different description, and, in my opinion, it is quite unnecessary to go farther than the 9th article of this case to shew what is in the admitted state of the facts the real business carried on. "The advances or loans made by the company" (that article states) "are on securities almost without exception postponed to fixed loans by third parties upon the properties of their customers, and are in part secured by their second mortgages over real property in the colony, and in part by liens or charges upon stock, wool, and other produce. Another part of the company's funds is lent on the security of shipments of wool and other produce, some of which may be in warehouse in Australia, some in course of transit to this country, and some in warehouse in London." Now, as regards the second part or branch of the business, it is not said that it can be charged under the fourth case, and it is proposed to charge that under the first case. But we are chiefly concerned with what is stated in the first sentence of this article, that the advances or loans are made partly upon real property, and are partly secured "by liens or charges upon stock, wool, and other produce." But the statement does not stop there. "The advances"—this embraces the whole advances—"the advances, with one or two trifling exceptions, are not of fixed amount, but are of the nature of banker's advances or loans, the amounts of which fluctuate from time to time according as produce is realised or other payments are made."

Now, it will be observed that that statement is not confined to the advances upon shipments only, but applies to the whole advances, whether made upon real securities or by liens or charges upon stock, wool, and other produce. In short, it appears to me that the account between the company and its customers is just of the nature of a current account as between banker and customer, for the advances are made according to the amount of security held for the time. It may also be described as of the nature of a commission-agent's account. But it is the one or the other; and it seems to me to be not at all of the nature of investments of money. On the contrary, the advances are of the most irregular and fluctuating description,—just such advances as a commission-agent makes upon the security of the goods in his hands in this country, or that a banker makes according to the state of the securities which he holds for the time.

Now, the question is whether that is a case within the meaning of the fourth case in the Act; and I think it is not. I think this is proper trading and nothing else, and not investment of money upon securities. The result of holding it to be otherwise would be I think most unjust, and to such a company as this utterly disastrous. Supposing that they had a very large amount of advances upon such fluctuating securities as these, and that they are held to have received interests upon these in this country within the meaning of the fourth case, and that upon the other branch of their business they have sustained very heavy losses,—losses which it would require all the returns from these advances to compensate and wipe off, the result would be that instead of setting one part of

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the business against the other,—the profit upon these advances against the losses upon other transactions,—they would be compelled to pay income-tax upon that part which consists of advances upon securities of wool, and discount of bills, and everything of that kind, instead of being allowed to take the profit on the one part of their business and set it against the loss upon the other part.

It is not, to be sure, of much consequence how cruel may be the effect of a revenue statute, as we are not entitled to take that into account if the statute is perfectly clear. But it certainly helps one very much to the conclusion at which I have arrived when we see what an unjust and anomalous result might flow from sustaining this proposal upon the part of the surveyor of income-tax. I think the whole of this tax must be levied according to the first case of schedule D, and that it is impossible to distinguish one part of the business from another, and to hold that one part falls under the fourth case and the other part under the first.

The other queries of course we do not require to answer at all.

Lord Mure.—I agree with your Lordship that this case is quite distinct from that of the *New Mexico Company* which we had to deal with some time ago. It is plain from the articles which are quoted in the statement of the case that the objects of this company embraced very many kinds of trade. The 5th article of the case mentions the different kinds of business which the company was established to carry on as a trading company. It enumerates seventeen different objects; and it is stated at the end of the article that "the company carries on all the branches specified in the said objects." Now, that being its position, and reading statement 9 as to what actually takes place in regard to the particular matter here in question, and especially that passage of it which your Lordship has referred to, to the effect that the advances, with one or two trifling exceptions, are not of fixed amount, but are of the nature of banker's advances or loans, I can come to no other conclusion than that this is a case that ought to be dealt with under the first and not under the fourth case of schedule D.

Lord Shand.—I am of the same opinion, namely, that, as I understand it, the judgment of the Commissioners, which is practically here appealed from, should be affirmed. It appears to me, after a full argument on the effect of the previous cases, and on the provisions of the statute, that the fourth case in the statute is meant to cover the case in which money is invested upon "securities in the British Plantations in America, or in any other of Her Majesty's Dominions out of the United Kingdom,"—I say invested, meaning by that something quite distinct from the use of money in the ordinary trading transactions of a company. It appears to me that if we are dealing with a company making profits by the use of its capital in mercantile transactions, that should fall under the first case, but if a company which has a large rest or fund laid aside for the purpose of investment makes investments in foreign stock or other foreign securities, including securities over moveable property in the Colonies, that is a case in which the charge is to be made under the fourth case. And in so holding I do not think that we run counter in the least degree to anything that occurred either in the case of the *Scottish Mortgage Company of New Mexico*, or in the case of the *Northern Investment Company of New Zealand*. In both of these cases the Court went upon the view that, as matter of fact, the companies carried on as their sole business the business of investing their funds in foreign or colonial securities. They obtained their capital partly by subscription and partly by persons lending them large sums of money to increase the working capital. Having thus got the capital, the avowed business of these companies was to invest the money abroad for a return larger than can be got in this country, upon securities which were not of a fluctuating character, such as occur in a banker's business, but which were permanent, and intended to produce interest periodically and regularly,—securities which were to have a currency usually of a number of years. That was just the case of a company doing as matter of business what an individual investor might do with his own funds; and the view which the Court there sustained was that it made no difference whether it was an individual who was investing his money abroad or a company which was investing its capital abroad. The course followed was the same, viz., the investment of funds, and in such a case the fourth case of the statute applied.

But in the present case I think we are in a totally different category. This company are really themselves woolbrokers. They purchased a woolbroking business and took it up. They undertook a large agency business in connection with the purchase and sale of wool. In connection with their commission business they find it necessary to make large advances, taking for these advances certain securities. Part of such securities appears to be mortgages; but the larger part consists of moveable property, such as wool, hides, and other articles of that kind. The interest which they receive is, as your Lordship has observed, practically the same as is drawn by a banker upon a current account. They advance so much money, and, as the proceeds of goods received in security come in, they credit the sums received. They charge interest for the use of the money until it is repaid, just as an ordinary commission-agent or a banker who has made advances does. It is quite unlike a case of investment. The interest fluctuates; it is for no fixed period; the transaction may be closed at any time; in short, it is the case of a woolbroker combining with his business that of a banker. Now, I should say it is very clear that if this had been the case of a banking company carrying on the business of a bank here, with a branch in one of the colonies, and thus receiving abroad interests and discounts as profits of their business in the ordinary way in which banking business is transacted, that would not be a case which would fall under the fourth case, which appears to me to be the case applying to investments. If such a banking company or insurance company made investments of their realised funds in stocks in the colonies which were paying them interest periodically, that would, so far as these investments were concerned, be a very different matter. But just as it appears to me that you could not under the fourth case include a banking company carrying on the ordinary business of bankers, so as little do I think you could include under the fourth case this woolbroking company, which makes advances as part of its woolbroking business and ancillary to it, and gets interest on current accounts as part of its profits in the same way as commissions received. It appears to me plainly to fall under the first case, and that under that case alone can this charge be made.

LORD ADAM.—In my opinion the money here which is said to yield interest so as to bring it under case four of schedule D is simply neither more nor less than money used by the company in the ordinary carrying on of its business

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and trade. That being so, I think the return from such money is neither more nor less than trade profit, and, being so, that it falls under the first case in schedule D and not under the fourth case. I am therefore of opinion that the decision of the Commissioners ought to be affirmed.

The Court accordingly answered the first branch of the question in the affirmative, and the second in the negative.

The Solicitor of Inland Revenue—Menzies, Coventry, & Black, W.S.—Agents.

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Henry Thomson & Company, Pursuers (Reclaimers).—
Sir Charles Pearson—Ure.
James Robertson, Defender (Respondent).—*Asher—Shaw.*

Trade name—Interdict.—In order to entitle a wholesale dealer to interdict against a retail dealer selling over his counter goods on the representation that they are of the pursuer's manufacture, when in point of fact they are not, it is not sufficient to prove that in a few instances, when goods of the pursuer's manufacture were asked for, other goods were supplied.

2d Division.
Lord M'Laren.
M.

In January 1888, Henry Thomson & Company, wholesale whisky merchants, Newry, Ireland, brought an action against James Robertson, spirit merchant, 157 Seagate, Dundee, concluding for declarator, "that the defender is not entitled to sell or offer for sale by himself, or others acting under or for him, as whisky manufactured or blended by the pursuers, whisky not manufactured or blended by or for the pursuers, or to supply in implement of orders or requests for Henry Thomson's whisky, or Henry Thomson & Company's whisky, or of similar orders or requests, whisky not manufactured or blended by or for the pursuers," for interdict against the defender, by himself or others, so selling, offering for sale, or supplying whisky, and for £100 of damages.

The pursuers stated that they were blenders of whisky at Newry, Ireland, and had carried on business as blenders and exporters of whisky for a period of upwards of twenty-five years; that during that time the whisky manufactured and blended by them, which was known as "Henry Thomson & Company's old Irish whisky," had acquired a great reputation both at home and abroad; that they had recently become aware that the defender "has been in the habit of wilfully and fraudulently in his said shop selling as the pursuers' whisky, in reply to orders or requests for that whisky, whisky or other liquor not manufactured or blended by them, and known by the defender not to be manufactured or blended by or for the pursuers, on the false pretence, made by the defender or by his shopmen and servants, that such whisky or other liquor was whisky manufactured or blended by the pursuers. The whisky or other liquor sold by the defender was of a quality inferior to the whisky manufactured and blended by the pursuers"; and that in particular the defender had habitually so offered for sale and sold whisky during 1886 and 1887, and particularly during July, August, September, and October 1887. Then followed a specification of such sales to Annie Fee and Janet Ross "on several occasions" in July and August 1887, and on about a dozen occasions specified during the above four months to Robert M'Gregor and John M'Naughton usually when together, and occasionally when one or other of them was in company with other men named.

The pursuers pleaded, *inter alia*;—(1) The defender having wilfully and fraudulently offered for sale, and sold as whisky manufactured or blended by the pursuers, whisky which was not so manufactured or blended, the pursuers are entitled to decree of declarator and to interdict as craved.

The defender stated that he did not keep the pursuers' whisky, and that neither he nor his assistants had ever sold or offered for sale whisky on the representation that it was the pursuers'.

The defender pleaded, *inter alia*;—(1) No relevant case. (2) The defender not having sold whisky on the representations averred by the pursuers, and not having done or proposed to do anything in infringement of the pursuers' legal rights, the action is unnecessary, and should be dismissed.

A proof was allowed.

David Brown, traveller to the pursuers, deponed,—"I live in Dundee. I was informed last year that defender was selling whisky as Henry Thomson & Company's, which was not theirs. I received the information from the late William Fee, who lived in Queen Street, Dundee. He chaffed me on the subject, and said, 'Some of our folks in Dundee are selling other whisky for Henry Thomson's.' He told me he had got it himself. He gave me to understand that he used Henry Thomson & Company's whisky for the sake of his health. . . . I was instructed by the pursuers to look into the case and find out if what Fee had stated was true. I employed for the purpose a man named Robert M'Gregor. He was in my employment, and I thought he would be a suitable man. He has been in my employment for some time doing all sorts of work, such as delivering goods, and so on. I consulted with him as to whom he should have with him, and it was arranged that he should take a man M'Naughton. I knew him before. So far as I knew he was a trustworthy man also." Witness then deponed that these men, and subsequently two others, went to the defender's shop and bought whisky there, which they brought to witness.

The girl Fee, aged thirteen, gave this evidence;—"When my father sent me for whisky he told me to ask for Henry Thomson's, and that was always what I asked for. I went to defender's for whisky last year." Witness deponed that she generally went to a grocer's shop for whisky, but when that was shut she went to defender's shop. "(Q.) When you went into defender's what did you ask for? (A.) Henry Thomson. I wanted the whisky my father had sent me for. I know defender. It was generally the waiter that I saw when I went to the shop . . . When he handed it to me I said 'Is that the right thing?' and he said 'Yes.' I only told my father sometimes where I had got the whisky. He said sometimes it was not the right thing I had got. My father was particular about getting Henry Thomson's whisky. He found it did him more good than other whisky; if he took any other kind it made him ill. He was sometimes ill after he had taken what I brought him from defender's, and complained that it was not Henry Thomson's because it made him ill. . . . I have known him taste what I brought from defender's and say it was not Henry Thomson's whisky. I went to defender's for whisky several times. I was once or twice served by defender himself. I always asked for Henry Thomson's whisky."

The evidence of Janet Ross, aged twelve, a step-daughter of Fee, was to the same general effect as regards occasions on which she had gone for whisky for her father. And his evidence, which was taken on commission, before his death, corroborated his daughter's generally.

Robert M'Gregor who had been employed by the pursuers' traveller Brown, deponed,—"We went to defender's shop for the first time on 31st August, between nine and ten o'clock in the morning. We had some sundries, and then we asked for half-a-mutchkin of Henry Thomson's

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Newry Irish whisky. Henry Thomson's whisky is well known in Dundee. It is commonly called Henry Thomson & Company's whisky. The shopman served me. He took the whisky from the crane next the Seagate, behind the bar. I don't remember whether it was M'Naughton or I who gave the order on this occasion, but I remember it being given. I gave M'Naughton 2s. 6d. before we went in, to pay for the purchases. After we had got the whisky we left the shop" and took the whisky to Brown. "I was thirteen times in defender's shop altogether between 31st August and the beginning of October," either with M'Naughton or one of the other men, and on these occasions they were served either by the defender or by a shopman. M'Gregor's evidence regarding the other occasions was to the same effect, and it was corroborated generally by that of M'Naughton and the other men. Witness stated that he always asked for "Henry Thomson & Company's Newry Irish whisky."

The defender and his assistant deponed, generally, that they did not keep and never had kept the pursuers' whisky, that the Irish whisky they kept was Kirker, Green, & Company's, that the defender's own practice and his instructions to his assistants were to tell customers who asked for a special maker's whisky which the defender had not got, that they had not got it, but that they had a good Irish or Scotch whisky, as the case might be, which the customers were usually content to take, and that this applied to the girl Fee and her sister, and to M'Gregor and the other men—that they were content to take "Irish."

Several other witnesses for the defender deponed that they themselves had been told that the defender did not sell pursuers' whisky, or had heard the defender or his assistant tell other people so.

On 13th March 1888, the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds it not proved that the defender has fraudulently or wrongfully represented that he is a seller of Henry Thomson & Company's old Irish whisky: Therefore assoilzies the defender from the conclusion of the action, and decerns: Finds the defender entitled to expenses," &c.*

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* "OPINION.—I am of opinion that the pursuers have failed to establish their case, and I shall state in a few words what I think is necessary to be proved in a case of this description.

"Every manufacturer, and I think every wholesale dealer, or dealer of any kind, is entitled to be protected against the use of his firm name without his authority, even if the right is rested on no other or higher ground than the annoyance which may result from being supposed to be responsible for transactions with which you have nothing to do. That is a legitimate interest; and, besides, it is very obvious that if one trader passes off goods under the name of another trader, it is because he wishes to take the benefit of the reputation which that other trader has acquired. Such reputation does not necessarily follow from his being the manufacturer of the goods which he sells. It may be due to his commercial skill, as being a good judge of goods, and the care which he uses in selecting them. Against any fraudulent use of their name I do not doubt that Messrs Henry Thomson & Company are entitled to be protected. If there were evidence that the defender had either advertised that he sold the pursuers' whisky, or had exhibited their show-cards in his shop, or put the pursuers' name upon handbills, or had voluntarily stated to any customer that he sold Henry Thomson & Company's whisky, that would have been a case for interdict, without proof either of deception or resulting damage. It would be a clear case of the illegal use of another person's trade name. But the case is more delicate when it depends mainly upon the circumstance that goods of a particular firm have been asked for, and goods not coming from that firm supplied. In such a case everything, I think, ought to be presumed in favour of the dealer; especially if he gives instructions to his assistants that when goods

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The pursuers appealed, and argued;—The case was distinguishable from *Bass & Co.'s*[1] case, for here there were independent witnesses, not

which he does not keep are asked for they are to explain to the customer that they are not kept, but that goods of an equivalent quality are kept, and will be supplied. I should not be prepared to grant interdict in a case of this kind upon proof that in one or two instances some customer had asked for Henry Thomson & Company's whisky and had got the nearest whisky to that which was in the shop. I think it would be ridiculous to hold that a few instances of that kind amounted to an invasion of right. The thing is casual; there is no evidence of design or intention to injure; and probably it is in such a case the result of inadvertence. Now, in the present case there is not even evidence to this extent, if we except the supply of whisky on three or four occasions to an old infirm man of the name of Fee, who occasionally sent members of his family to purchase a glass of whisky for him. He had a fancy for Henry Thomson & Company's whisky, and his daughters knew of this preference, and asked for the pursuers' whisky when they were sent for it. They say that they were not told that the whisky given to them was of a different mark. The defender's shopman, on the other hand, says that he did tell them, and he is confirmed in regard to one of the occasions by the evidence of a customer who happened to be in the shop at the time. It must therefore be regarded as at least a very doubtful question whether the whisky was in fact supplied in answer to a demand for Henry Thomson & Company's. I have great doubts whether the whisky was supplied without the necessary explanation being made. Even if the facts were as the pursuers allege, in the circumstances I should not hold this to be sufficient evidence to support an application for interdict.

"The other cases founded on rest on the evidence of four witnesses who were sent by the pursuers' firm to make purchases with the view of finding out whether the defender was in the habit of supplying whisky in answer to a demand for theirs. I must say I was not favourably impressed with the evidence of the first and principal witness, M'Gregor. He began by stating what it was he asked for—that he asked for Henry Thomson & Company's old Newry Irish whisky; and he insisted that on every one of the ten or twelve occasions that he went there he asked for the whisky in these precise terms. That seems to me a very unlikely thing. If he did so, I think it must have come to be looked upon as a joke between him and the shopman—not meaning anything. But that was his statement; and then he added that he was always supplied with whisky. But he was not very communicative as to any other facts that transpired on his visits, or as to conversations which may have taken place. And I think, without being hard upon this witness, that it may reasonably be supposed that he was at least once or twice told that Henry Thomson & Company's whisky was not kept on the premises, especially as he does not expressly negative this supposition. But the evidence of the defender and his shopman is quite clear, the one as to the instructions given, and the other that he perfectly remembered telling M'Gregor on more than one occasion that he did not keep Henry Thomson's whisky, but that he would supply him with something equally good. If that were done once for all, and M'Gregor made aware of the fact, I cannot for a moment entertain the idea that injury was done to Henry Thomson & Company by reason of this statement not being repeated every time that M'Gregor asked for their whisky. The shopman knew that M'Gregor was aware that this was not Henry Thomson's whisky. To take a parallel case, it is a matter of common experience that many people, or say a thirsty traveller entering a hotel, will call for a glass of 'Bass' beer,' without caring in the least whether the beer supplied to them is made by Lord Burton's firm or not. It is understood by both parties that what is wanted is simply a good quality of bitter beer. If the customer makes it plain that he really wants the beer of a particular maker, and something different is supplied to him coming from a different maker, that is a fraud for which the law will give redress. In the

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[1] Bass, Ratcliffe, & Gretton, Limited, v. Laidlaw, May 22, 1886, 13 R. 898.

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employed by the pursuers, who spoke to the sale of whisky as the pursuers', when it was not.

The defender argued;—It had not been proved that the defender had ever sold whisky on the representation that it was the pursuers'. Even if on one or two occasions he or his assistant had given whisky in return for a request for the pursuers' without intimating that it was not the pursuers', that was due to a blunder on their part, and was not sufficient to justify an interdict.

LORD JUSTICE-CLERK.—I think that there is here a very slender ground of action, viewed even at its best. It is an action against a retail dealer in whisky in Dundee by a blender of whisky in Ireland, and the pursuers' complaint is that the defender has sold whisky over his counter on the false statement that it had been blended by the pursuers. That is not a very large-hearted ground of action. Dealers in such articles often give their articles names which they do not altogether deserve, and their customers probably do not much rely on the existence of the qualities which the names may imply. I am very clear that only a strong and flagrant case would induce the Court to interfere in such an action as this.

Apparently the case is of this nature: It is said that the defender, on various occasions between the months of July and October 1887—for the complaint and the evidence are limited to that period,—sold over the counter whisky which he represented as being Henry Thomson & Company's Irish whisky, when in reality it was the whisky of someone else; and there are witnesses who come forward and say that on these occasions they asked for Henry Thomson & Company's Irish whisky, but were supplied by the defender or his shopman with something else. Now, even if all that these witnesses say is to be taken as accurate, it would not, I think, lead to the conclusion which the pursuers seek to deduce from it. But I am not sure that this evidence is to be credited in all its details. The Lord Ordinary does not appear altogether to believe it. At all events he is of opinion that the pursuers have failed to make out a case of systematic fraud on the part of the defender. I am disposed to adopt the view of the Lord Ordinary, and to affirm his judgment.

LORD YOUNG.—I am entirely of the same opinion. I agree with the Lord Ordinary, and with what I understand to be your Lordship's opinion, that the

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present case I am quite clear that, after the first or second time, both parties perfectly understood that Henry Thomson & Company's whisky was not kept and was not wanted, although the form may have been gone through of asking for a glass of 'Henry Thomson.' In that case no injury was done. Of course the use of this kind of evidence is to furnish reasonable grounds for the belief that other customers are treated in the same way, and that a system of deception is practised upon the public. Now, no evidence has been adduced by the pursuers to shew that there is any considerable demand for Henry Thomson & Company's whisky which has been interfered with by the defender. And in the second place, not one single instance—or at least only the one instance that I have mentioned—can be found of any customer from the public asking for Henry Thomson & Company's whisky and being deceived. And therefore I think the absence of all confirmation by outside testimony entirely displaces the inference that might, under other circumstances, be drawn from what M'Gregor and his companions have repeated.

"I shall find that no fraudulent representation has been proved on the part of the defender, and that he is entitled to absolvitor, with expenses."

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pursuers have failed to prove in point of fact that the defender held himself out to the public as a dealer in Henry Thomson & Company's Irish whisky. I think that no fraudulent conduct has been proved against the defender. It may be quite true that on one or two occasions people entering the defender's shop and asking for Henry Thomson & Company's Irish whisky may through some mistake have been supplied with Kirker, Green, & Company's—which it appears was the Irish whisky that the defender did keep—without being told that such was the fact. That is quite possible, but I doubt whether even that has been proved. Taking it to be proved, however, I am of opinion that it is not sufficient to warrant us in granting this interdict against the defender. A case of this kind is not to be established by evidence of a few petty instances of the wrong use of a dealer's name, but upon proof of a continued and systematic course of fraudulent misrepresentation and dealing. The Lord Ordinary is of opinion that such proof is here wanting. I think he has dealt with the case with great propriety, and I entirely agree with him and with your Lordship.

LORD RUTHERFURD CLARK.—I also concur. I think that the pursuers have entirely failed to prove their case.

LORD CRAIGHILL was absent.

THE COURT adhered.

J. W. & J. MACKENZIE, W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.

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North British Property Investment Co., Limited, v. Paterson.

NORTH BRITISH PROPERTY INVESTMENT COMPANY, LIMITED, Pursuers (Respondents).—*H. J. Moncreiff—C. J. Guthrie.*
JAMES PATERSON (Collector of Poor and School-Rates for St Cuthbert's Combination), Defender (Appellant).—*J. G. Smith—C. S. Dickson.*

Poinding of the ground—Right in security—Assessments—Taxes Management Act, 1880, 43 *and* 44 *Vict. cap.* 19, *sec.* 88—*Poor-Law Act*, 1845, 8 *and* 9 *Vict. cap.* 83, *sec.* 88.—*Held* that a collector of poor-rates had, under sec. 88 of the Poor-Law Act, 1845,* and sec. 88 of the Taxes Management Act, 1880,† a preference over a heritable creditor who had obtained decree in an action of poinding of the ground.

Observations by Lord Young on *Athole Hydropathic Co.* v. *Scottish Provincial Assurance Co.*, March 19, 1886, 13 R. 818.

2D DIVISION.
Sheriff of the Lothians and Peebles.
I.

THE MORNINGSIDE COLLEGE COMPANY was the owner of a piece of ground, with buildings thereon, at Morningside, Edinburgh. The company were assessed for the relief of the poor for the year from Whitsunday 1887 to Whitsunday 1888 by notice issued on 1st October 1887; the assessment became due from the date of the notice, the last day for payment being 28th January 1888.

On 12th January 1888 the North British Property Investment Company, Limited, creditors in certain sums contained in bonds and dispositions in security granted by the Morningside College Company, presented a petition of poinding of the ground in the Sheriff Court of the Lothians and Peebles in order to attach the moveables thereon in satisfaction of the principal sums and interest due under the bonds.

On 13th January 1888, after service of the petition, the Morningside College Company, being unable by reason of its liabilities to continue its business, resolved on voluntary liquidation, and appointed a liquidator. At that date the poor-rates were still unpaid.

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* *Infra*, p. 888, note.

† *Infra*, p. 887, note.

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On 27th January 1888 decree was obtained in absence in the action of poinding of the ground.

On 5th April 1888 the liquidator having declined to pay the poor-rates until it should be seen whether the expenses of winding up would not exhaust all the funds in his hands, the collector obtained warrant to poind and distrain the goods and effects of the Morningside College Company for payment of the assessment, and on 14th April an officer executed a poinding under his instructions.

The North British Property Investment Company, Limited, thereupon presented in the Sheriff Court an application for interdict against the collector carrying away and selling the subjects contained in their poinding.

They pleaded;—(1) By the service of the petition in the said action of poinding the ground, and decree following thereon, the pursuers have acquired a real and preferable right to the articles of furniture condescended on, and interdict should be granted as prayed for. (2) The said articles not being poindable or distrainable by the defenders, in respect of the execution of the petition in the action of poinding the ground, interdict should be granted, with expenses. (4) The Morningside College Company, Limited, being insolvent, and the assessment claimed by the defender Paterson being thus payable only out of the first proceeds of the estate, the diligence executed by him was incompetent.

The defender stated "that any debt due to the pursuers is of a private nature, and the Morningside College Company, Limited, is bankrupt or insolvent, and has been so since at least 1st January last."

They pleaded;—(1) The pursuers' statements are irrelevant. (3) The poor-rates sought to be recovered by the defender Paterson being preferable to the debt alleged to be due to the pursuers, and his diligence for the recovery thereof being orderly proceeded, he is entitled to have the interdict refused, with expenses.

The Sheriff-substitute (Hamilton) sustained the defender's first plea in law, and dismissed the action.

The pursuers appealed to the Sheriff (Crichton), who pronounced this interlocutor:—After findings in fact to the effect above set forth—" Finds in point of law that by the service of the action of poinding of the ground the pursuers acquired a legal and preferable right to the articles of furniture mentioned in the prayer of the petition in this action: Therefore grants interdict as craved." *

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* " NOTE.—The pursuers, who are heritable creditors of the Morningside College Company, obtained decree against the company in an action of poinding of the ground on 27th January 1888. On 5th April 1888 the defender James Paterson, who is collector of poor and school-rates for the Combination of St Cuthbert's, obtained warrant to poind the goods and effects of the College Company in payment of the poor and school-rates then due, and proceeded to carry out the said warrant by poinding the articles mentioned in the prayer of the petition. The pursuers now ask that the defender be interdicted from carrying away the said articles or advertising them for sale.

" The defender contended that the pursuers were not entitled to interdict, because, under section 88 of the Poor-Law Act (8 and 9 Vict. cap. 83) and section 33 of 43 George III. cap. 150, his right to the moveable goods and effects belonging to the College Company was preferable to that of the pursuers. The 88th section of the Poor-Law Act provides that 'all remedies and provisions enacted for collecting, levying, and recovering the land-tax and assessed taxes, or either of them, and other public taxes, shall be held to be applicable to assessments imposed for relief of the poor.' The 44th section of the Education Act (35 and 36 Vict. cap. 62) provides that 'the school-rate shall in all cases

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The Collector of Poor-rates appealed, and argued;—The Sheriff had proceeded upon the Act 43 Geo. III. c. 150, which was repealed by the Taxes Management Act, 1880 (43 and 44 Vict. c. 19, section 4, schedule 3). That statute, however, contained a provision practically identical with that founded on by the Sheriff, and the error could have made no difference to his judgment. The question therefore was, whether a heritable creditor who had served a summons of poinding of the ground and got decree upon it, was preferable to the collector of public rates and taxes. That question fell to be decided favourably to the latter (1) in respect of the Taxes Management Act, 1880*; and (2) in respect of the 88th section of the Poor-Law

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be levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor assessment shall be applicable to the school-rates.' The provision with regard to the recovery of taxes is contained in section 33 of 43 George III. cap. 150, which enacts 'that no moveable goods or effects whatever belonging to any person or persons, at the time any of the said duties assessed under the regulations of this Act become in arrear, shall be liable to be taken by virtue of any arrestment, poinding, sequestration, or diligence whatever, or by virtue of any assignation, on any account or pretence whatever, unless the party at whose instance the said diligence shall be used, . . . shall, before the sale or removal of such goods or effects, pay or cause to be paid to the collector or collectors of the said duties so due all arrears of the said duties which shall be due at the time of arresting, poinding, or seizing such goods or effects, or which shall be payable for the year in which such diligence shall be used, provided the duties shall not be claimed for more than one year.' It is clear from these enactments that any creditor of the College Company is precluded from taking the moveable goods or effects belonging to the company by 'arrestment, poinding, or sequestration,' except on payment of the arrears of the poor and school-rates, not exceeding one year. It appears to the Sheriff, however, that the poinding mentioned in the statute means a personal poinding. No doubt the words 'or diligence whatever' are used, but this, it is thought, refers to diligence of the same kind as 'arrestment, poinding (that is, personal poinding), or sequestration,' and does not include poinding of the ground. It has been said that there are few things which have the same descriptive name, and yet are so essentially different in their nature as the process of poinding the ground, and that of poinding for a personal debt; with regard to the effect of a poinding of the ground, the observations by the Lord President in the recent case of *Athole Hydropathic Company, Limited, in Liquidation*, against *Scottish Provincial Assurance Company*, 19th March 1886, 13 R. 818, are of importance. In that case his Lordship said,—'The security which a heritable creditor holds over moveables is of exactly the same nature, and has the same effect as that which he holds over the *fundus* itself. In extent, of course, it varies with the amount of moveables on the ground, but his right to them is secured by his infeftment, not by his action of poinding of the ground. A heritable creditor therefore in raising his action is not seeking to obtain a preference, but to give effect to a preference which is already his. A poinding of the ground is a proceeding merely for the purpose of giving effect to a creditor's security, and it is analogous to those other remedies open to heritable creditors, such as adjudication, or sale, or maills and duties. These are all diligences open to an heritable creditor to give effect to his preference which has already been secured to him. He has a preference against all the world. No one can compete with him, and therefore, as far as a security extends, he is entitled to make it effectual.' These observations seem to be applicable to the present case, and the interdict prayed for has accordingly been granted."

* 43 and 44 Vict. c. 19, sec. 88.—"No goods or chattels whatever belonging to any person at the time any of the duties or the land-tax became in arrear shall be liable to be taken by virtue of any execution or other process, warrant, or authority whatever, or by virtue of any assignment, on any account or pre-

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Act, 1845.* The concluding words of that section applied to the case of insolvency, which was the case with the debtor, the Morningside College Company. The respondents were private creditors, and could not compete with the collector of public rates. It was said, on the other side, on the authority of the *Athole Hydropathic Company, Limited,* v. the *Scottish Provincial Insurance Company,*[1] that a heritable creditor poinding the ground was preferable to all the other creditors, having "a preference against all the world," as the Lord President stated it. But that was not a competition between public rates and private debts, and his Lordship's opinion was not intended to be read as applying to such a competition. The diligence of the Crown was preferable to the diligence of the subject, however far it had proceeded, and these public rates were by the statute placed on the same level with Crown taxes.

Argued for the respondents;—On 12th January, before the liquidation, the respondents raised and served their process of poinding the ground. That placed a *nexus* on the goods on the ground and made them subject to the heritable creditors' claim just as the land itself was.[2] The result was that there was a completed security. It was of no consequence that the debt was a private one, for the 88th section of the Poor-Law Act, 1845, while providing that the poor-rates should be preferable to "all other debts of a private nature" did not purport to affect existing and completed securities. Further, the same section provided that the rates should be paid "out of the first proceeds of the estate." It would therefore fall to a trustee or liquidator in a bankruptcy to pay them out of the first funds in his hands, but he would get no such funds till the preference of the heritable creditor who had poinded the ground was satisfied. Even assuming that these arguments were erroneous, the Taxes Management Act, 1880, gave a preference only for taxes which had "become in arrear" over the claims of ordinary personal creditors. But these rates were not in arrear when decree was obtained in the action of poinding the ground, for though the notices were issued in October the ratepayers had till 28th January to pay them, and they could not be "in arrear" till that day was passed, and proceedings could be taken to recover them. It was probably true that in the *Athole Hydropathic* case[3] the Lord President was

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tence whatever except at the suit of the landlord for rent, unless the party at whose suit the said execution or seizure shall be sued or made, or to whom such assignment shall be made, shall before the sale or removal of such goods or chattels pay or cause to be paid to the collector all arrears of the said duties or land-tax which shall be due at the time of seizing such goods or chattels, or which shall be payable for the year in which such seizure shall be made, provided such duties and land-tax shall not be claimed for more than one year."

* The Poor-Law Act, 1845 (8 and 9 Vict. c. 83), sec. 88, enacts "That the whole powers and rights of issuing summary warrants and proceedings and all remedies and provisions enacted for collecting, levying, and recovering the land and assessed taxes, or either of them, and other public taxes shall be held to be applicable to assessments imposed for the relief of the poor . . . and all assessments for the relief of the poor shall, in case of bankruptcy or insolvency, be paid out of the first proceeds of the estate, and shall be preferable to all other debts of a private nature due by the parties assessed."

[1] March 19, 1886, 13 R. 818.

[2] Bell v. Cadell, Dec. 3, 1831, 10 S. 100, 7 F. 93; Campbell's Trustees v. Paul, Jan. 13, 1835, 13 S. 237, 10 F. 143; Barstow v. Mowbray, March 11, 1856, 18 D. 846, 28 Scot. Jur. 341; Lyons v. Anderson, Oct. 21, 1880, 8 R. 24; Bell's Comm. ii. 56-61.

[3] Athole Hydropathic Co. v. Scottish Provincial Assurance Co., March 19, 1886, 13 R. 818.

not speaking of public taxes; but the principle of that case, that the completed diligence of the heritable creditor excluded all other claims, applied.

LORD JUSTICE-CLERK.—I am unable to see any difficulty here. The Sheriff seems to have gone off on a case which appears to me to have no application.

Paterson, the defender, appeals against a decree which the pursuers have obtained interdicting him from interfering with certain property in the premises of the Morningside College Company, which are subject to the rates which it is his duty to collect—poor-rates, education-rates, rates in every possible respect of a public character as distinguished from private debts. The Poor-Law Act substantially enacts that the rates and taxes therein dealt with shall have a preference over the diligence of all ordinary creditors. Certain kinds of diligence are specifically mentioned, and poinding of the ground is not among the number, but it would be a strong thing to say that, on that account, it shall have the effect of conferring a preference over the rates, for the reason of the clause is quite plain—the rates must be paid. We are not in the category of competing creditors at all. The property must pay the rates, no matter into whose hands it may happen to pass. The distinctions arising with reference to the preferences of ordinary creditors have no bearing on this case.

I am therefore of opinion that the interlocutor of the Sheriff ought to be recalled.

LORD YOUNG.—I am of the same opinion, and I must confess to feeling some surprise that the learned Sheriff should have decided as he has done. The case appears to me too clear for argument.

The defender is the collector of the poor-rates and the education-rates for the St Cuthbert's Combination, for the year 1886-87, which became due and were exigible on and after October 1887. The rates were imposed on the Morningside College Company, and were payable by the proprietor thereof. The College Company went into voluntary liquidation in January 1888,—that is to say, a few months after the rates became due and exigible, but a certain latitude as to the time of payment is given to the ratepayers for their convenience, and in the case of those having any considerable property with perfect safety. When that latitude had expired the collector applied to the liquidator for the rates due from the college, but he declined to pay, because he said he had no money. The collector thereupon proceeded to poind the moveables in the premises of the college, but after he had done so these money-lending creditors come forward and object to the collector going on with the sale of the poinded goods. "We have a heritable security over the property," they say, "and we have poinded the ground, and we do not mean that any rates shall be paid in respect of it until our debt is satisfied." The object of the present action is to have the sale of the moveables by the appellant under his poinding interdicted, because these creditors say that their poinding of the ground gives them a preference over the appellant's claim as tax-collector. They maintain that they are entitled to sell the house and the moveable property in it for their own debts, and to exclude the other ratepayers altogether. For that is the effect of it. The rates must be paid somehow, unless the paupers are to be starved, and if you are not entitled to get the rates from these people you must take the more from those who do pay. That is really the meaning of the preference which the statute confers on the rate collector. Its object is to ensure that the money required to be raised by the rates is made good as far as possible by all the property equally.

Now, what is the pretence which this heritable company puts forward as a ground for preventing payment of the rates? It is that a poinding of the ground is a sort of diligence which creates a different kind of attachment from that resulting from any other diligence, and in support of this contention the case of the *Athole Hydropathic Company*, 13 R. 818, is referred to, and particularly certain passages in the Lord President's opinion. Apparently there was a question in that case under the Liquidation Acts, whether a poinding of the ground subsequent in date to the liquidation entitled the poinding creditor to a preference over the ordinary creditors. I should humbly have been of opinion that it did not, but we are not required to decide that here, and therefore we may assume that it did. We were, however, referred to an expression of opinion by the Lord President, which is in these terms:—"The security which a heritable creditor holds over moveables is of exactly the same nature and has the same effect as that which he holds over the *fundus* itself. In extent, of course, it varies with the amount of moveables on the ground, but his right to them is secured by his infeftment, not by his action of poinding of the ground. A heritable creditor, therefore, in raising his action is not seeking to obtain a preference, but to give effect to a preference which is already his. A poinding of the ground is a proceeding merely for the purpose of giving effect to a creditor's security, and it is analogous to those other remedies open to heritable creditors, such as adjudication, or sale, or maills and duties. These are all diligences open to an heritable creditor to give effect to his preference which has already been secured to him. He has a preference against all the world. No one can compete with him, and therefore, as far as a security extends, he is entitled to make it effectual."

Now, a poinding of the ground is just what our neighbours across the Tweed would call an impounding of what is on the ground. There must be some antecedent right in the poinding creditor entitling him to poind, but what he does is simply to impound what actually is on the ground. Before the goods came on to the ground he could have no right whatever to them as a heritable creditor. They may not have been there five minutes before his diligence was executed, and he may have invoked the aid of this legal process for the very reason that he has seen the goods taken on to the ground. He has no right by attachment to the goods before he has poinded the ground, but if he presents his application, relying on the antecedent warrant, and obtains a decree of poinding, I should have thought that the date of the attachment was the date of the application, and that it did not draw back to the date of the bond, when the property which it is sought to attach need not have been, probably was not, on the ground. But we are not required to consider that question here. Assume the poinding to be of any date you please—and it was only a question of date that the Lord President was considering—it is nevertheless a poinding of goods in a house which is subject to the rights of the tax-collector for his rates, and these rights give him a preference over all other and private creditors.

I have said so much, as however clear we may regard a case, when we alter the judgment of a learned Sheriff on a point of general interest and importance,

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it is proper to explain the grounds on which we have arrived at the conclusion which we deem the sound one.

Lord Rutherfurd Clark concurred.

Lord Craighill was absent.

This interlocutor was pronounced:—"Having heard counsel . . . Recall the judgment of the Sheriff appealed against, affirm the judgment of the Sheriff-substitute, of new recall the interdict granted *ad interim*, and dismiss the petition."

Welsh & Forbes, S.S.C.—Smith & Mason, S.S.C.—Agents.

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July 12, 1888.
Dawson v. Thorburn.

Mary Ann Dawson, Pursuer (Respondent).—*Young—Forsyth.*
Thomas Thorburn, Defender (Appellant).—*Gloag—Shaw.*

Bankruptcy—Act 1621, *c.* 18—*Conjunct and confident person—Conveyance by insolvent to prejudice of creditor—Just and necessary cause.*—A father who was insolvent, and had no other property than the furniture of a lodging-house, conveyed the furniture to his daughter on the narrative that she had for fifteen years acted as his housekeeper without remuneration. A creditor of the father, whose debt existed at the date of the conveyance, obtained decree for his debt and poinded the furniture. In a petition for interdict presented by the daughter against the sale of the furniture, the only evidence adduced by her in proof of her claim against her father was her own testimony to the effect that she had acted as a domestic servant to him for fifteen years without wages. *Held* that she had failed to prove that the disposition by her father to her had been granted for a just and necessary cause, and interdict refused.

2d Division.
Sheriff of Stirling and Dumbarton.
I.

William Dawson was for many years prior to 1886 proprietor of a house in Bridge of Allan, which was occupied as a lodging-house. In 1861 he borrowed on the security of it £700, and in 1877 £150, from the trustees of a Mr Baird. In 1882 he further borrowed on the security of the house £125 from Thomas Thorburn, to whom he granted an *ex facie* absolute disposition qualified by a back-bond.

The interest having fallen into arrear Baird's trustees served on Dawson schedules of intimation, requisition, and protest in February 1886. They also executed a poinding of the ground.

At a third exposure of the property it was purchased by Mary Ann Dawson, Dawson's daughter, who lived with him, for £855. A disposition in her favour, to which Thorburn was a party, was granted by Baird's trustees. On 6th January 1887 Dawson disponed to her all the furniture in the house, conform to inventory annexed to the disposition, which furniture had been attached by the poinding of the ground. The narrative of the disposition bore "that my daughter Mary Ann Dawson, residing with me, has for the last fifteen years acted as my housekeeper and otherwise assisted me and her mother without any remuneration being hitherto paid to her, and which I estimate at the sum of £100." On 19th March 1887 Mary Ann Dawson obtained from Baird's trustees an assignation to their decree of poinding the ground. The consideration for this assignation was a sum of £19, 7s. 8d., the balance due to them by Dawson, after applying the £855, the price of the house. In May 1887 Thorburn raised an action against Dawson for the £125 due to him, and obtained decree in absence. On this decree he gave a charge and then proceeded to poind the furniture in the house on the footing that it was still Dawson's.

Mary Ann Dawson then presented a petition to the Sheriff for interdict against Dawson selling the furniture. She averred that it was hers and not her father's, and founded both on the assignation to the poinding of the ground and on the disposition by her father in her favour.

The defender admitted that by reason of the assignation to the poinding of the ground the pursuer was preferable to him to the extent of the £19, 17s. 8d., the balance due under the bonds, which the pursuer had paid to Baird's trustees. He denied that she had any other right to compete with him. He averred that the disposition by William Dawson was executed when he was insolvent, and that it was in favour of his daughter, a conjunct and confident person, without just, true, and necessary causes, and without a just price really paid.

The pursuer pleaded, *inter alia*;—(2) The said disposition having conveyed and made over to pursuer the said furniture and other effects, the said defender was not entitled to poind them for a debt alleged to be due by the said William Dawson, and his doing so was most illegal and unwarrantable.

The defender pleaded, *inter alia*;—(2) The disposition produced having been granted by Mr Dawson when he was insolvent, in favour of a conjunct and confident person, "without just and true and necessary causes, and without a just price really paid," is struck at by the Act 1621, cap. 18, is liable to exception in this process, and the pursuer founding on it is not entitled to interdict.

A proof was led. It appeared from the pursuer's testimony in addition to the facts already stated, that she was about thirty-one years of age, had resided with her father all her life, and for fifteen years had assisted in the house, which they used as a lodging-house, doing the work of a cook, and except in the busy season, of a housemaid as well. She had no bargain with her father for wages, and never got any, but got money from him to buy her dresses. For five years before the action, during which time her mother had been insane and in an asylum, she had managed the house in addition to doing the domestic work of it. At the time of the disposition of the furniture to her (as to which the pursuer deponed that it was arranged in December 1886 that she should purchase the house as a lodging-house, and that her father should make over to her the furniture, so far as not carried away by the decree of poinding of the ground), her father had no other effects than the furniture, which was worth about £100. The pursuer deponed that she considered that sum due to her for her fifteen years' service in the house.

Dawson, who was over eighty, was, at the time of the proof, too feeble to be examined as a witness, and he died during the dependence of the action.

The Sheriff-substitute (Buntine) found that the assignation was not a gratuitous alienation, but was granted for an onerous consideration; therefore repelled the defender's second plea in law, and made perpetual an interim interdict which had been granted.

On appeal the Sheriff (Muirhead) pronounced this interlocutor:—"Finds in fact (1) That the pursuer gave her domestic services to her father, the deceased William Dawson, for fifteen years, receiving board and lodging and money to buy dresses, &c., but no wages: (2) That the disposition of household furniture, &c., of 6th January 1887, by the said William Dawson to the pursuer, was in consideration of said unwaged service: Finds in law, that said disposition was granted for a just cause in the sense of the Act 1621, cap. 18: In respect of these findings, recalls the finding on the merits in the interlocutor appealed against: *Quoad* *ultra* adheres to said interlocutor, and of new declares the interdict perpetual."* No. 164.

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* "NOTE.— . . . The third ground upon which interdict is craved by the pursuer is that the furniture, &c., in question is hers, and cannot be sold by the defender in execution of the decree obtained by him against her father. To this the defender replies that the conveyance of it to her is struck at by the Act 1621, cap. 18, that she is conjunct, that it was without true, just, and necessary cause, and that her father was insolvent at the date of granting. There can be no question that the pursuer was conjunct with her father, and the Sheriff-substitute seems to have been of opinion that Mr Dawson on 6th January 1887, though not notour bankrupt, was, nevertheless, insolvent. In this I agree with him. I have more hesitation in concurring in his opinion that the consideration for the conveyance was sufficient to exclude the operation of the statute. It is thus set forth in the deed,—'That my daughter, Mary Ann Dawson, residing with me, has for the last fifteen years acted as my housekeeper, and otherwise assisted me and her mother without any remuneration being hitherto paid to her, and which I estimate at the sum of £100.' It is proved that Mr Dawson, at one time a joiner, but latterly disabled by old age, had for many years occupied the house now belonging to the pursuer, and had been in the practice, during the season, of letting part of it to lodgers. It was only during the season that he hired a domestic; during the rest of the year, and at all times before he began to let rooms, the household service was done by his wife and two daughters. Neither of the latter ever made any bargain for wages, and never got any—only 'money to buy dresses, &c.' The elder sister married about ten years ago, and it is not said that her father then gave her anything in recognition of her services. The mother has been laid aside for about five years, and for the last three been in an asylum, and the pursuer has, for that time, had the management of the house. She has worked in it altogether for fifteen years, *i.e.*, since she was sixteen years old, but, latterly, according to her own account, it has been as mistress of the establishment. For she says in her evidence,—'My father retired about five years ago; and since then I have kept lodgers, and my father has stayed with me.'

"I am very far from saying that the conveyance of his furniture, &c., said to be worth £70, which Mr Dawson made to the pursuer in January 1886, was an unreasonable recognition of her prolonged and unwaged service. But I doubt very much whether she could have compelled her father to pay her £70, or any smaller sum in consideration of that service. In other words, I do not think there was any 'necessary cause' for the conveyance. The interpretation that has been put upon the statute, however, distinguishes between 'just' and 'necessary,' so that though there be no 'previous obligation, yet if the deed be granted for a true and just cause, it is not reducible.'—(Kilkerran's Report of *Grant* v. *Grant*, 1748, M. 952.) From this point of view the question comes to be—are domestic services rendered for fifteen years by a daughter to her father, with whom she has all the time lived in family, receiving from him such money as she required for 'dresses, &c.,' but nothing in name of wages, a 'just' cause or consideration for the conveyance to her by her father of £70 worth of furniture, he being at the moment insolvent? But for the recent decision in *Hodge* v. *Morrison*, 1883 (21 S. L. R. 40), I should have some difficulty in answering it in the affirmative. In that case daughters living in family with their father, but carrying on a laundry business on their own account, contributed part of their earnings towards the support of the domestic establishment, and those contributions were held to be a sufficient consideration for a subsequent conveyance to them by their father, notwithstanding his alleged insolvency. In principle, I am unable to distinguish between that case and the present. Therefore, although I cannot go the length the Sheriff-substitute does, in thinking that 'the pursuer had a valid claim against her father, which she might have vindicated by an action in the event of his disputing it,' I feel constrained, in deference to the judgment in *Hodge*, to hold that the conveyance to her proceeded on a 'just' cause, and is consequently protected by the statute."

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The defender appealed, and argued;—The conveyance of the furniture, Dawson's only asset, to his daughter was not fair and reasonable, having in view that it wholly deprived his creditor of any fund for payment of a debt to the claim for which he had no defence. In the case of *Hodge*, on which the Sheriff founded, the disposition was given two years before insolvency, and in respect of money contributions by the granter's children to the expense of his household. There was no savour of fraud about it. It was not sound in law to say that whenever a son or daughter lived in family with his or her father, and took part with him in supporting the household by his or her exertions, a legal claim for payment of these services arose against the father. Such a case was different from those in which a relative was brought in to give his aid.[1] If such were held to be the law immense advantage of it would be taken by relatives of an insolvent to the prejudice of his just creditors. The *onus* was on the pursuer, being a conjunct person with her father, to prove that the transaction was a *bona fide* one.[2] That had not been done. Even assuming there was an imperfect obligation on Dawson to remunerate the pursuer, a creditor could not be prejudiced by his determining in such circumstances to fulfil it. The case might be illustrated by a postnuptial contract. A man could lawfully make provisions for wife and children by a postnuptial contract, but not such provisions as to entitle the objects of them to compete with his prior creditors.

Argued for the pursuer;—(1) The pursuer had an enforceable claim against her father for her many years' service in supporting him, or helping to support him, by acting as a servant in his lodging-house. It was not to be presumed, because she was his daughter, that she intended to give all that labour for nothing.[3] (2) If there was a "just" cause, the transaction would be supported even though the Court would not have sustained action by the pursuer against her father. The words "true, just, and necessarie cause, and without a just price really payed," which were used by the Act 1621, c. 18, were disjunctive, not conjunctive.[4] The case was within the principle of *Hodge* v. *Morrison*, relied on by the Sheriff.

At advising,—

Lord Rutherfurd Clark.—This case was heard by Lord Young, Lord Craighill, and myself on 12th May last. The question is whether the pursuer, Miss Dawson, is proprietor of certain articles of furniture specified in the prayer for interdict. She claims the property of these articles by virtue of a disposition from her father, dated 6th January 1887. These articles admittedly belonged to her father prior to that date, for she claims the property in them only by virtue of the disposition. The defender also claims these articles by virtue of a poinding of the ground which he has used as an heritable creditor of the father. There is no question that the diligence is sufficient if the father was the proprietor of the articles which it attached. In these circumstances the defender objects to the assignation on which the pursuer founds, on the allegation that it was granted in contravention of the Act 1621, cap. 18. That raises this issue, Whether the disposition was granted without "true, just, and necessary cause"? for it is not disputed that at the date of granting the granter was insolvent, and of course it cannot be disputed that the pursuer was, in relation to her father, a conjunct person. The only remaining question therefore is, whether there was true, just, and necessary cause to sustain this disposition, although it was granted by an insolvent to his daughter.

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[1] Fraser on Master and Servant, 44; Addison on Contracts, 436; Jones' Trustee v. Jones, *ante*, p. 328.

[2] North British Railway v. White and Others, Nov. 16, 1882, 20 S. L. R. 129.

[3] Shepherd v. Meldrum, Jan. 23, 1812, Hume Dec. 394; Adam v. Peter, Feb. 3, 1842, 4 D. 599, 14 Scot. Jur. 240.

[4] Grant v. Grant, 1748, M. 952.

The only cause which the pursuer alleges is that her father was her debtor in respect of services rendered. She says that he owed her at least £100 in return for services rendered in keeping his house. I am not going to say that if proved this would not be a perfectly good cause. It is quite possible that for services such as these a daughter may become the creditor of her father, but it must be proved, and considering that the granter was insolvent at the date of granting, and she was conjunct with him, it lies upon the person standing on the deed to prove by sufficient evidence the existence of the true, just, and necessary cause, which alone will sustain it. In this I think the pursuer has entirely failed. She has adduced no evidence except her own. Her father is unfortunately not in a condition to be examined, and it is a great loss to her that his evidence is not available. There is some other evidence which is said to be corroborative of hers, but I think we must lay it aside, and hold that she herself is the only witness in support of her case. I am therefore forced to the conclusion that she has failed to prove the existence of a true, just, and necessary cause for the granting of this deed, and consequently I think that the defender must be assoilzied.

Lord Young.—I have come to the same conclusion, and have not much to add beyond expressing my concurrence in the result at which Lord Rutherfurd Clark has arrived, and my regret in arriving at it. Not that I say that this poinding creditor has acted otherwise than properly—indeed generously, but I am satisfied that this young woman has been of great service to her aged father for some years past, in aiding him to keep lodgers, and so supporting him. But nevertheless I cannot think that the relation of debtor and creditor was thereby established between them. She was a dutiful daughter to him; but I cannot infer from that the relation of debtor and creditor. The case stands thus: the father is absolutely insolvent. He has borrowed £700 from one creditor on the security of his house, and then £125 from another creditor on the same security—of course a postponed bond. The house is brought to sale by the first bondholder, and realises less by £19, 17s. 8d. than the amount of the bond, but the bondholder makes up the difference by bringing a poinding of the ground and claiming the furniture, on which the pursuer pays the £19, 17s. 8d., and takes an assignation to the poinding. But then the creditor for £125 steps in. He, too, proceeds to poind the furniture, and the pursuer now seeks to have him interdicted from selling it under his poinding. It is stated that this proceeding on her part is just so much money thrown away, and I rather think that is so. I think the defender was willing to act honestly, or as I have said even generously by the pursuer, for I find that his agent says this in his evidence,—"In December 1886 I was wishing to compromise this claim of the defender's by any payment which I could get from Dawson's friends, and I believe it might have been settled then for £25 or £30." They would not agree to this, and then the father, not having a shilling in the world, makes a present of his furniture to his daughter. I am not surprised that Mr Thorburn, not getting the £25 which he was willing to take for his £125, should have

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objected to this, and proceeded to poind the furniture. I think he was entitled to do so, and cannot be stopped.

LORD YOUNG intimated that LORD CRAIGHILL, who was absent through illness, concurred in the judgment.

LORD JUSTICE-CLERK.—As I did not hear the case I give no opinion.

> THIS interlocutor was pronounced:—"Find that the pursuer has failed to prove that the disposition granted to her by William Dawson, her father, was granted for a just and necessary cause; Therefore sustain the appeal; recall the judgments of the Sheriff and Sheriff-substitute appealed against: Dismiss the petition," &c.

JAMES FORSYTH, S.S.C.—WISHART & MACNAUGHTON, W.S.—Agents.

No. 165.
July 13, 1888.
Steel v. Steel.

WILLIAM STRANG STEEL, Pursuer (Respondent).—*D.-F. Mackintosh—C. S. Dickson—Sir L. Grant.*

ROSETTA EDITH BARBER OR STEEL, Defender (Reclaimer).—*Sir Charles Pearson—Murray.*

Husband and Wife—Divorce for desertion—Jurisdiction—Domicile—Foreign—Anglo-Indian domicile.—A person's domicile of origin must prevail until he has manifested and carried into execution an intention of abandoning it and of acquiring another as his sole domicile.

A Scotsman, born and educated in Scotland, in 1857 went to Rangoon, Burmah, and became a partner of a firm of merchants there. Until 1872 he resided chiefly in Rangoon, but came to Scotland on various occasions on visits of considerable duration. In 1873 he formed in London a branch of a new business which he had started in Rangoon, and lived in London, taking the leading part in the business till 1887. In October 1881 he married and lived with his wife in London till 21st February 1884, when she left his house and refused to return. In 1887 he took a lease of Braco Castle in Scotland and went to reside there. On 17th March 1888 he raised an action of divorce in the Court of Session against his wife on the ground of desertion. The wife having pleaded that the pursuer had lost his Scottish domicile and not reacquired it, and that, therefore, the Court had no jurisdiction, proof was led on the question of domicile. Evidence on which the Court *held* that the pursuer had not lost his domicile of origin, and that, therefore, the Court had jurisdiction in the cause.

Observations (*per* Lord President) on Anglo-Indian domicile.

1ST DIVISION.
Lord Fraser.
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WILLIAM STRANG STEEL was married to Rosetta Edith Barber in London on 25th October 1881. Two children were born of the marriage, and the spouses lived together as man and wife till 21st February 1884, when Mrs Steel left her husband's house and went to live with an aunt in London. After that date she never returned to her husband's house, and never lived with him.

On 17th March 1888 Mr Steel raised an action of divorce on the ground of desertion against his wife. In the summons Mr Steel was designed as an East India merchant, residing at Braco Castle, Perthshire. He stated that he had repeatedly endeavoured to induce the defender to return to cohabitation with him, but that she had refused to do so.

The following averments by the defender, and answers thereto for the pursuer, were made on record:—(Stat. 1) "The pursuer, after his early youth, resided in Java in the employment of a Mr Martin, and afterwards of the mercantile firm of Gladstone, Wyllie, & Company of Calcutta. In or about 1871 the pursuer came to London, where he entered into a partnership with his brother, James Alison Steel, along with whom he carried on business as an East India merchant in East India Avenue, London, the firm having also a large store at Rangoon, and rice-mills at Rangoon and other places in Burmah. The pursuer still carries on the said business. Up to his taking a lease of Braco Castle, as after mentioned, the pursuer had no connection with Scotland, and he was and is a domiciled Englishman." (Ans. 1) "Denied. Explained that the pursuer was born and educated in Glasgow, where his parents, who were both Scotch, resided; that he entered the office of Martin, Turner, & Company there in 1845, and remained in that office till 1851, when he was transferred to the business house of the said firm in Batavia. In 1856 he returned to Scotland and commenced business in Glasgow. In 1857 he went to Burmah, where in 1859 he became a partner of Gladstone, Wyllie, & Company in Rangoon; he returned to Scotland in 1864, went back to Burmah in 1865, returned home to Glasgow in 1868, and went back to Burmah in 1869, where in 1870 he established his own firm of W. Strang Steel & Company. In the autumn of 1871 he returned again to this country, and resided partly in Glasgow and partly in London, and went back again to Burmah in the spring of 1872. In November 1872 he came to London, and about midsummer of the following year (1873) established a branch of his business in London in partnership with his brother, James Alison Steel. He went out again to Burmah early in 1874, and in the autumn of the same year returned to London." (Stat. 2) "After coming to London, the pursuer lived for some time at Chislehurst and afterwards at No. 65 Lancaster Gate. After that he took No. 88 Lancaster Gate, where he lived with his mother at the time when he first formed the acquaintanceship of the defender. The pursuer and defender, shortly after their marriage, took a journey to India and Burmah, and on their return lived in London and in Brighton. After the pursuer and defender ceased to live together, in February 1884, as hereinafter set forth, he continued to live at No. 88 Lancaster Gate until on or about 28th July 1887, when, for the first time, he went to Scotland, having taken a lease of Braco Castle. The defender's object in going to Scotland was solely in order to give colour to the assertion that he was a domiciled Scotsman, and his residence there is not intended to be permanent, and is merely taken up in order, if possible, to found a jurisdiction against the defender. The defender was born in Demerara, her parents being of Irish origin, and prior to her marriage she lived in London, and never has been subject to the jurisdiction of the Scotch Courts. By the law of England, desertion, even if proved, is not a ground of divorce. Prior to their marriage the pursuer and defender entered into a settlement of marriage, which was conceived and executed according to the law of England, and it was understood and agreed by both parties that the matrimonial domicile should be England." (Ans. 2) "Admitted that the pursuer lived occasionally with his brother near Chislehurst in the year 1871. Admitted that after returning from Burmah in the winter of 1872 he again resided (excepting during his absence in Burmah in 1874, and other absences on the Continent and in Scotland) with his brother at 65 Lancaster Gate, London, his mother having also come to live there after the death of his father in the summer of 1872. Admitted that at Christmas 1880 the pursuer rented a house, No. 88 Lancaster Gate, and resided there till his marriage in 1881; that immediately after his marriage he proceeded to Burmah with his wife, returning to London in 1882, where, with the exception of short intervals, he continued to reside till February 1884, when he took a furnished house at Brighton, where he was temporarily residing when deserted by the defender. Admitted that the pursuer thereafter resided in London till May 1887, when he returned to Scotland, having taken a lease of Braco Castle, and with the exception of occasional business visits to London, he has since continued to reside there. The averments as to the defender's birth, parentage, and residence in London are admitted. Admitted that the antenuptial settlement between the parties was in the English form. *Quoad ultra* denied. Explained that the pursuer's residences in England were entirely in connection with his business, and were of a temporary character, and that it has always been his desire and intention to return to his native country, and to settle there permanently, and for a number of years he has been on the outlook for a suitable estate there, intending to purchase it and to make it his permanent abode."

There were also averments on the merits which need not be further referred to.

The pursuer pleaded;—The defender having been guilty of non-adherence to and wilful desertion of the pursuer as her lawful husband, for a continuous period exceeding four years, he is entitled to decree of divorce as craved.

The defender pleaded, *inter alia;*—(1) No jurisdiction.

The Lord Ordinary allowed the pursuer a proof of her averments in support of her first plea, and to the pursuer a conjunct probation.

From the evidence led it appeared that Mr Steel was born in 1832 in Glasgow, and was educated there. Both his parents were Scottish, his mother being a daughter of Mr Strang of Westhouse, East Kilbride, whose family had possessed that estate for many years. In 1845 he entered the office of Martin, Turner, & Company, merchants in Glasgow, and remained in Glasgow till 1851, when he was transferred to the firm's house of Martin, Dyce, & Company in Batavia. In 1856 he returned to Glasgow, and set up there in business for himself. In 1857 he went out to Rangoon, Burmah, to manage the business there of Gladstone, Wyllie, & Company, the correspondents of James Finlay & Company, merchants, Glasgow. In 1859 he became a partner of the firm of Gladstone, Wyllie, & Company, and remained in Rangoon till 1864, when he returned to Scotland, and lived in Glasgow with his brother for nearly a year. In 1865 he again went out to Burmah, returned to Glasgow in 1868, and remained there, having his father's house as his head-quarters, till 1869, when he returned to Rangoon. In October 1870 he retired from the firm of Gladstone, Wyllie, & Company, and established his own firm of William Strang Steel & Company in Rangoon. That firm was opened in conjunction with James Finlay & Company of Glasgow, who were the firm's only correspondents in this country. In 1871 he returned to Scotland, he went again to Burmah early in the spring of 1872, and came back to London in the autumn of the same year. In 1873 he established a branch of his Burmese business in London in partnership with his brother, J. A. Steel. In 1874 he went out again to Burmah, and returned late in the same year to London. After his return from Burmah in 1872 he resided when in Europe chiefly with his brother in London, being absent only for short visits to the Continent and to Scotland. In 1880 he took a house of his own in London, still, however, retaining his private house in Rangoon. After he took his house in London his mother and brother (his father being dead) resided with him there.*

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* With reference to his various visits to this country prior to 1873 the pursuer stated in cross-examination,—" My visit to Glasgow in 1864 was a visit of health and pleasure, and in order to see my relatives. It had no business character at all. It was expected that when I was in Glasgow on the various

The pursuer was married to the defender on 25th October 1881. Miss Barber was born in Demerara of Irish parents, and was brought up in Ireland. The marriage-contract was prepared and revised in London. The pursuer deponed that he told the defender before the marriage that he was a Scotsman, and had been brought up in Scotland, but this latter statement the defender denied. There was no arrangement come to before the marriage that they should live in England. Immediately after the marriage the pursuer went to Burmah on business, and was accompanied by his wife. The spouses returned to the pursuer's house in Lancaster Gate, London, in 1882. While in Rangoon they resided in the pursuer's house there. The spouses continued to live in London, with the exception of short intervals, till February 1884, when the pursuer took a furnished house at Brighton. On 21st February of that year the defender left the pursuer. The evidence of the pursuer and defender with regard to any expression of intention on the part of the pursuer to make his home in Scotland is given below.*

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occasions between 1857 and 1870 I should call upon people with whom we did business. I did not come home for that purpose, but being there I called on various people on business matters. Gladstone, Wyllie, & Company was chiefly a consignment house, but they also purchased rice on commission. On those occasions, between 1857 and 1870, when I was in Glasgow, I always stayed with my relatives. I had one brother in Java and two in Glasgow. . . . . I am still a partner of the firm which I established in 1873. After the establishment of the London branch, the Burmah branch of the business was carried on through managers. From that time my brother and I, as partners, have attended to the business in London, and we assumed other partners in 1874. The first time we had partners in Burmah was when we promoted our managers to be partners about 1881 or 1882."

* The defender deponed,—"During the time from my marriage until February 1884 Mr Steel never communicated to me in any way his intention to live in Scotland, except on one occasion at Brighton, when he brought forward a large map of Scotland and pointed with his finger, and said he was thinking about taking a place there. I don't know where it was. That was the only occasion I ever heard Scotland mentioned. (Q.) Did he use the word 'take'? (A.) I really don't remember the exact words. That was in 1884. On the other hand, he was always saying he was looking out for a place in England to purchase, and he once mentioned a sum of £20,000 that he was thinking of giving for a place. I remember a conversation I had with him in the drawing-room at 88 Lancaster Gate immediately after our engagement. I was looking at a large case of stuffed birds that was standing behind the drawing-room door, and Mr Steel came forward and remarked that it was not the proper place for this case of stuffed birds—that he was looking out for a place in England not far distant from London, and that when he purchased such a place he would have the case removed there. He led me to believe he was making inquiries about various places in England. I did not go with him to any house-agents. I remember one day when we were taking a long drive he pointed out a place in the neighbourhood of Watford, Hertfordshire, and said he was thinking of it. I also heard indirectly from a Miss Andrews that he had mentioned the neighbourhood of Windsor. During my married life all Mr Steel's relations, so far as I was brought into contact with them, were living in London and the neighbourhood of London. He had no near relations that he told me about in Scotland at all. His mother was living, and still lives, with her son James in Cleveland Square, London. On one occasion Mr Steel and I went to Scotland for a few weeks to pay visits. (Q.) Were they relations that you went to, or only friends? (A.) Only friends. During the time we were in Scotland he never said anything to me about considering himself a Scotchman, or that he was going to live in Scotland. (Q.) Mr Steel says in the present case 'that it has always been his desire and inten-

After his wife left him the pursuer returned to London, where he continued mainly to reside till May 1887, when he went to Braco Castle,

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tion to return to his native country, and to settle there permanently, and for a number of years he has been on the outlook for a suitable estate there, intending to purchase it and to make it his permanent abode.' Is that the first you ever heard of that? (A.) Yes, I never heard that that was his intention, because he had always been talking about England. I certainly do not believe that during our married life he had the slightest intention of going to Scotland to establish himself permanently there. He never spoke or behaved in any way as if he considered himself a native of Scotland at that time."

In cross-examination,—"(Q.) During your engagement was not Mr Steel a good deal in Scotland? (A.) I did not hear that. I wrote to him there during our engagement. He was paying a few visits in Scotland. I was only once in Scotland in his company during our married life. I think that was in 1883. (Q.) Did he not on that occasion propose to take a house at Braemar for the summer and autumn months? (A.) I never heard it before. (Q.) Did you not object to go there? (A.) I did not. (Q.) And did you not arrange in consequence to go upon a tour of visits with him in Scotland? (A.) I never heard of it. He went and paid some visits, and I went with him. On one occasion only I heard him say something about purchasing an estate in Scotland. (Q.) Do you say positively there was no other occasion? (A.) I do not remember. Mr Muir of Deanston was present on that occasion. (Q.) Was the estate then mentioned the estate of Findynate, in Perthshire? (A.) I never heard the name. (Q.) Did not Mr Steel tell you at that time that he was looking after that place, and thought of buying it as a residence? (A.) I never heard it. (Q.) Were you listening to what he and Mr Muir were saying? (A.) Mr Muir and he were not conversing—it was merely a few words, and I did not hear the name of the place in Scotland; at that time we were living on such terms that we were really not speaking to each other. (Q.) When your husband spoke of taking a place in England, were these places all near London? (A.) They were to be within easy reach of London. (Q.) So that he could go back and forward to his business? (A.) He did not say to his business; he said he would go back and forward to Lancaster Gate. I heard he had had a place for pheasant shooting near London, before our marriage. (Q.) Can you say whether the conversations to which you have referred had reference to similar places? (A.) I understood he was going to purchase a place of his own."

Miss Andrews, a witness for the defender, deponed that Mr Steel told her in February 1884 that he "had either taken or was in treaty for one of the handsomest places in England," near London, she thought.

The pursuer deponed,—"The acquisition of an estate in Scotland has been for a very long time the object of my desire, and both before and after my marriage I had considered the particulars of various estates in Scotland which were brought under my notice. As far back as 1864 I had endeavoured to repurchase my mother's family estate, and more than once since then I have renewed the attempt, but the present proprietor will not part with it. Among the other places which have been brought under my notice are Roseneath Castle, Airthrey, Coldoch, and Findynate. I remember, while we were at Brighton, and before my wife left me, having a conversation with her about the estate of Findynate. At the time I found it necessary to get out of London I had written Mr Muir rather pressingly to see if there was any nice place in Perthshire likely to be immediately available, and he sent me the particulars of an estate there belonging to a Mr Walker. I considered the matter, but I wanted to have an opportunity of speaking to my wife on the subject before saying anything positive. She was in such a temper at the time that I could get no opportunity of speaking to her in a reasonable way till Mr Muir arrived at Brighton on a visit to us. He introduced the subject, and said, 'What do you say to Findynate?' I said, 'Well, I have not had the chance of speaking to my wife about it, but I will get the particulars and shew them to her now.' I got the particulars, shewed them to her, got hold of a map to shew the various

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Perthshire, which he had taken in February in that year on a lease for five years, with a break in his favour on three months' notice at the end of each year. The evidence of the pursuer with reference to the intention with which he came to Scotland in 1887, both as regards his *animus remanendi* and his wish to procure a divorce on the ground of desertion, is given below.* At the date of this action the pursuer had let his house

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places it would be near, and asked her to give me her opinion of that place for a residence. Her reply was,—'Where would my aunt stay?' I said, 'Let us first get a place that suits ourselves, and we shall consider your aunt afterwards.' I pointed out where the place was, and shewed her the stations we would be near. I asked her for an opinion, and she said she would give no opinion; she took no interest in me or my estates, or anything else belonging to me. The matter then dropped. I never considered that I had ceased to be a Scotchman. I was rather proud of being a Scotchman. Nearly all the visitors to my house were Scotch. Scotchmen were continually in and about my house, and Scotland was continually being talked of. I had no intention of settling permanently in England—not longer than my business required me to reside there. I had all along the prospect of getting my business into such a position that I would not require to supervise it. I had always the intention of ultimately settling in Scotland as soon as business arrangements permitted. That was my intention both before and after my marriage. Naturally it would only be to my very intimate friends that I would mention that, but it was spoken of in the family circle and amongst my intimate friends."

In cross-examination,—"(Q.) Had you made inquiries in London during your married life as to purchasing or taking an estate? (A.) I had the matter in view even before my marriage. I cannot recollect making any special inquiries in London. (Q.) Did you ever make any inquiries in Scotland prior to October 1884? (A.) Except as regards the family property at East Kilbride, I was never close enough to the period when I could see my way to leaving London to enter into very close negotiations. The East Kilbride matter was in 1864 and subsequently. I cannot say whether or not it was resumed during my marriage. Prior to 1884 there was one estate which I thought would be in the market, and which I had information about from one of my managers. That was the estate of Ardmillan, near Girvan. That was about 1879. . . . Apart from the matter of my mother's family property, I cannot fix any particular date when my aspiration to have a place in Scotland first took shape. It is an aspiration which I have had from the time I have seen any prospect of being able to afford it. My mother's family property is a very small property at East Kilbride, with a small residence on it. I don't know the acreage—it may be from 150 to 200 acres."

The evidence of intention to settle in Scotland or take a Scottish place was corroborated by various witnesses.

* "I have at present no intention of leaving Braco. I am settled in Scotland with the firm intention of never leaving it. I think I am not at all likely to leave Braco except for a place of my own in Scotland. I am still looking after an estate to purchase. I have no thought or intention whatever of returning to live in London. There is nothing in connection with my family or business arrangements which renders that necessary, so far as I know. . . . After my wife left me, the matter of settlement in Scotland came up more prominently. I made up my mind to move to Scotland as soon as a suitable place offered. I knew that according to Scotch law I was entitled to divorce for desertion. (Q.) May I take it you also knew or had learned that resumption of residence in Scotland might be of importance or might be useful in enforcing that remedy? (A.) Well, I felt it would at all events put aside any suggestion that my residence away from Scotland had at all prejudiced my position as a Scotchman. The condition of my business at the time and other circumstances tended to the same result. My business was in a groove, and my younger partners had gained experience and accumulated money, and I felt quite safe in leaving them. I had also a strong hope that my wife might come back to me, and I thought that

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in Rangoon. He was still, however, a member of both the Rangoon and London firms, though he left the management entirely to his partners.

On 26th June 1888, the Lord Ordinary (Fraser) pronounced this interlocutor:—"The Lord Ordinary having taken the proof allowed by the interlocutor of 15th June current, and heard counsel, finds that the domicile of the pursuer is in Scotland: Therefore repels the first plea in law stated for the defender, and sustains the jurisdiction of the Court; and on the merits allows to the parties a proof of their averments, and to the pursuer a conjunct probation." *

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if she did come back, having our home in Scotland might simplify matters, because I thought she would be away from the influences which had in my view caused the disagreement. Having all these things in view, I proceeded to look about for a suitable estate or residence in Scotland."

In cross-examination,—"He (Mr Graham, Glasgow) knew my views generally—that I wished to have a property in Scotland—and when I saw him from time to time we discussed properties. He never took any decided step to bring about business until 1887. I have no doubt that I consulted him generally in 1884 on the state of my relations with my wife. After she left my roof, Mr Graham strongly advised me not to consent to any deed of separation, as it would interfere with my getting a divorce, which I might have to go for if the separation continued. Now that it is put to me, I do not think there was anything said about a divorce; Mr Graham's anxiety was to bring about proper relations. (Q.) Did you get up the law of Scotland on the subject of divorce for desertion yourself, independently? (A.) I was not thinking of divorce at that time. (Q.) But did you get up the subject of the law of Scotland on the subject of divorce independently? (A.) From time to time when in Scotland no doubt I had conversations with Mr Graham on the subject. I believe Mr Graham did shew me a book on the subject. There was nothing about coming to live in Scotland with reference to improving my chances. That was in my own mind. (Q.) How did you come to the knowledge that that was important with reference to getting a divorce? (A.) I never thought it was important. No doubt it was in my mind by way of stopping any suggestion about my not being a Scotchman on account of my residence away from Scotland. (Q.) Was it your own discovery, or Mr Graham's suggestion, that you had been so much away from Scotland that it was desirable, in order to stop doubts on the subject, that you should come to reside here now? (A.) I had always intended to come and reside in Scotland, and the prospect of these proceedings may have accelerated the carrying out of that intention. (Q.) But you cannot say whether it was your own discovery or Mr Graham's suggestion? (A.) I cannot say. The subject was no doubt discussed between Mr Graham and myself."

* "OPINION.—I do not think it necessary in this case to call for a reply from the counsel for the pursuer, as I am satisfied, upon the proof which has been led, that the domicile of the pursuer is in Scotland, and was so at the time he raised this action. We start with the fact that the domicile of origin was in Scotland. The bearing of this fact on the question now to be answered is very important. Lord Chancellor Cottenham, in the case of *Munro* v. *Munro* (10th August 1840, 1 Rob. App. 606), expressed his opinion as follows:—'Questions of domicile are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted, not only by the laws of England, but generally by the laws of other countries. It is, I conceive, one of those principles, that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and acquiring another as his sole domicile. Such, after the fullest consideration of the authorities, was the principle laid down by Lord Alvanley in *Sommerville* v. *Sommerville* (5 Ves. 787), and from which I see no reason for dissenting. So firmly indeed did the civil

The defender reclaimed to the First Division, and argued;—(1) Between the years 1857 and 1873 the respondent had acquired a Burmese or Anglo-

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law consider the domicile of origin to adhere, that it holds that if it be actually abandoned, and a new domicile acquired, but that again abandoned, and no new one acquired in its place, the domicile of origin revives. To effect this abandonment of the domicile of origin and substitute another in its place, it required "le concours de la volonté et du fait," "animo et facto"; that is by actual residence in the place, with the intention that the place then chosen should be the principal and permanent residence, "larum rerumque ac fortunarum suarum." There must be residence and intention; residence alone has no effect *per se*, although it may be most important as a ground from which to infer intention. Mr Burge in his excellent work (1 Burge, For. and Col. Law, 54), cites many authorities from the civilians to establish this proposition. "It is not," he says, "by purchasing and occupying a house, or furnishing it, or vesting a part of his capital there, nor by residence alone, but it must be residence with the intention that it should be permanent."'

"In like manner Lord Cairns thus expressed himself on the point:—'The *onus* lies upon those who desire to shew that there was a change in this domicile, by which I mean the personal status indicated by that word,—the *onus*, I say, lies upon those who assert that the personal status thus acquired, and continued from the time of his birth, was changed, to prove that that change took place. The law is beyond all doubt clear, with regard to the domicile of birth, that the personal status indicated by that term clings and adheres to the subject of it, until an actual change is made by which the personal status of another domicile is acquired' (*Bell* v. *Kennedy*, L. R., 1 Sc. App. 310, 6 Macp. (H. L.) 69). The *onus* therefore is upon the defender in this action to shew that the domicile of origin was changed, and in regard to change of domicile it must be kept in mind, as the authorities I have quoted shew, that it is not effected by the mere fact of residence, however long continued, without the *animus* or purpose of permanent domiciliation and adoption of the laws of the new domicile. Much more where the question is whether a man has changed his domicile, abandoning that which he held from his birth, must there be proof not only of the fact of residence elsewhere for a time, but of an intention to constitute a new domicile in exclusion of the old.

"Now, I can find no proof that the pursuer of this action, while he was attempting to establish a business in Rangoon, had any intention whatever of becoming a domiciled Burmese. He travelled during the years before his marriage between Rangoon and London and Scotland, all in the way of business. His whole plan of life, as regards his domicile, was unsettled; and until the marriage in 1881, I am of opinion that there is no ground for saying that he had changed his domicile of origin.

"Did he then do it in 1881? He lived with his wife most unhappily—according to the account of both parties—from 1881 to 1884 in London and at Brighton. His business was in London and at Rangoon. He required to attend to his business at London, but this was not enough to effect a change of domicile according to Lord Cottenham; and I refrain from expressing any opinion as to whether or not a domicile different from that of origin was adopted when the pursuer and his wife took up house at Lancaster Gate, London, in 1881. I will assume, for the purpose of this case, that such a domicile was acquired; and then comes the question whether the domicile of origin was revived by what took place at Whitsunday 1887. Upon this point I have no doubt whatever. It is clearly proved by the evidence of the pursuer's friends—acquainted with him from childhood—that he had always looked forward to settling in his own country of Scotland when he had made a fortune. It was the theme of constant talk among them, and it is proved beyond all controversy that he had been, long before the unhappy separation between him and his wife, looking out for an estate in Scotland. He was unable to get himself suited in regard to the purchase of such an estate; but at Whitsunday 1887 he obtained a lease for a term of years of Braco Castle

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Indian domicile. (2) Subsequently to 1873, the Anglo-Indian domicile was superseded by an English domicile.

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in Perthshire, to which he transferred the whole of his household, and such of his furniture as he did not give to his brother James. He depones that he did this with the view of permanently settling in Scotland, and making it his home, and I entirely believe this statement; and this is quite sufficient to constitute him a domiciled Scotsman. In regard to the revival of the domicile of origin the case of *Udny* v. *Udny* (3d June 1869, 7 Macp. (H. L.) 89), shews that this takes place upon the mere abandonment of a domicile of choice, without the acquisition of another domicile of choice. And Lord Stowell says, in regard to this matter, that, 'it is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicile in the case of a native subject, than to impress the national character on one who is originally of another country.'—(The Harmony, 2 Rob. Ad. 322.)

"But there has been mixed up with this question as to domicile another question with which it has no connection. It is said, in the first place, that the pursuer in coming to Scotland did so with the purpose of acquiring a domicile, in order to give the Scottish Courts jurisdiction in an action of divorce by him against his wife. Secondly, it is said that his object in coming to Scotland was to obtain the advantage or benefit of the Scotch law, which enables a deserted spouse to obtain divorce after four years, which four years' desertion, it is said, must take place in Scotland, and not in a foreign country. These two points were settled—so far as they can be in an undefended action—in the case of *Carswell* v. *Carswell* (6th July 1881, 8 Ret. 901). But as it is stated by the defender that she means to contest the soundness of that judgment, I may here explain, in a few words, the grounds on which I entirely concur in it.

"I have often had occasion to consider these two questions. First, the motive of the pursuer in coming to Scotland is, in my opinion, totally irrelevant. The husband is the master of the situation. He can determine the domicile of the spouses, and according to that domicile the rights of the spouses must be settled. He can, for example, change the domicile from Scotland to England, and, if he does so, the wife is without *jus relictæ* at his death. He is entitled in like manner to change the domicile to a country whose laws give him privileges and advantages that he does not enjoy under the law of the country where the spouses may be at the time resident. He exercises only a legal right when he comes to Scotland and there appeals to the law of that country for redress against a conjugal wrong. When he comes to Scotland he is subjected to all the restraints imposed by the laws of this country upon individuals, and in like manner he is entitled to all its privileges, among which one of these is the right of divorce against a deserting wife.

"Then, on the other hand, the plea that the desertion must have taken place in Scotland has always appeared to me to be one of the most untenable that could be stated against the operation of a most beneficial law. The conjugal wrong which the Statute of 1573 was intended to repress was not a wrong committed merely in Scotland, but anywhere. It is the law of all countries, and it is the obligation undertaken by the matrimonial vow at marriage, that the wife shall adhere to the husband, and whether the non-adherence be committed in America, or Africa, or elsewhere out of Scotland, yet if it is committed, a Scotsman domiciled in Scotland is entitled to found upon this violation of the matrimonial vows as a ground for divorce, in like manner as he would be entitled to found upon an adultery committed at the Cape of Good Hope or Rangoon by the wife.

"The defender may put an end to this action at any time she pleases. She has only to do what she promised at her marriage and what the law requires of her. The pursuer stated when examined as a witness that he is willing to receive her, and that he is anxious that she should return to cohabitation. Apparently she is still under the same malign influence that caused the estrangement originally, and will not fulfil the duty which the law declares to be incumbent upon her of adhering to her husband. The husband cannot obtain from any Court of

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In 1857 the respondent had gone to Rangoon, had become in 1859 the partner of a firm whose principal place of business was in England, in 1870 had established a business of his own in Rangoon, and had resided abroad almost continuously until 1873. The few visits which he paid to Scotland during this period were visits purely of pleasure. His business tied him to Burmah, and residence abroad as a merchant, with the intention of remaining until a fortune should be made, and then returning in the evening of life, was sufficient to give a man a domicile in the foreign country.[1] Moreover, the respondent's intention to return was at best vague and inchoate, and such an intention was not to outweigh all the acts of his life.[2] His residence abroad indicated a settlement for an indefinite period, and it was just such a settlement that gave an Anglo-Indian domicile.[3]

With regard to the period subsequent to 1873, there was no room for saying that the domicile of origin revived on the respondent's coming to England, even if it could be shewn that another domicile in England arose at once. In 1873 he established a branch of his business in London, and in 1874 he came to reside there permanently, living at his brother's house. His mother and near relatives were all now settled in London. Each successive act of his life hereafter served to establish him more securely in London. In 1880 he hired a house on a long lease, in 1881 he married in London, and thus *larem constituit*, and his marriage settlement was English. The only connection that the respondent had with Scotland was that he had been born there, and a not unnatural feeling of pride in this fact was the key to all his conversations and expressions regarding Scotland.

The next question was, Did the respondent's domicile of origin revive on his return to Scotland in 1887? His motive in coming was this action of divorce, and although motive on the authorities[4] was not to be considered if the intention to settle in Scotland were *bona fide*, it should be considered for the purpose of testing the intention. The character of the residence in Scotland must also be regarded. Now, the respondent only held Braco on a lease of five years with yearly breaks in it, and the ties which bound him to London were not entirely severed. But even if the respondent's domicile of origin had revived in 1887 two questions with

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law in Scotland an order directing her to resume cohabitation to be followed up by arrest as was formerly the custom in England if the order were disobeyed. The obligation of adherence is punished not by enforcing it but by dissolving it. There are, however, certain inconveniences which the defender ought to contemplate before continuing to persist in her present resolution. A wife who deserts her husband is in general not entitled to the custody of the children of the marriage, and she has the custody of one of them at present; and she can claim no separate maintenance from her husband; and the legal rights in the husband's property which the law confers upon a widow will be denied her; and although she is defender in an action of divorce, yet looking to the peculiar character of this action, and the offer made by the husband to receive her back to his society, the right which the wife has of conducting her defence at the husband's expense may not be held here to exist. All these matters should be kept in mind by this defender."

[1] Bruce v. Bruce, April 15, 1790, 3 Pat. 163; Aikman v. Aikman, March 12, 1861, 3 Macq. 854, see Lord Chancellor at p. 858.

[2] Doucet v. Geohegan, 1887, L. R., 9 Ch. Div. 441.

[3] Udny v. Udny, Dec. 14, 1866, 5 Macph. 164, 39 Scot. Jur. 163, June 3, 1869, 7 Macph. (H. L.) 89, and 41 Scot. Jur. 457, L. R., 1 Sc. App. 441.

[4] Carswell v. Carswell, July 6, 1881, 8 R. 901; Stavert v. Stavert, Feb. 3, 1882, 9 R. 519.

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regard to the relevancy of this action presented themselves. In the first place, did the revival of the respondent's Scottish domicile entail a corresponding change of domicile on the part of his wife. The rule that the wife's domicile followed that of the husband was not invariable,[1] and although in the present case the Scottish Courts might have jurisdiction over him, it did not necessarily follow that they had jurisdiction over her. In the second place, even assuming that the domicile of both parties was changed by the pursuer's coming to Scotland in 1887, if the matrimonial domicile was English in 1881, and the contract was English, the reclaimer should not be subjected to penalties unknown to English law, which she could not be supposed to have contemplated at the time of marriage.[2] The alleged desertion was not a Scottish desertion, it had not continued for four years since the revival of the Scottish domicile, and the grounds of action having risen entirely in England, the rights and liabilities of parties must be regulated by English law.[3]

Argued for the respondent;—Mr Steel's domicile in 1857 was unquestionably Scottish, and that threw the entire *onus* upon those who asserted that there had been a subsequent change. Not only must change of residence be established,[4] but the reclaimer must shew that the domicile of origin had been abandoned, and more than this, that a new domicile had been deliberately acquired.[5] The respondent's residence in Burmah was temporary, and only extended over fifteen years, during which period he paid no less than three visits home. The facts in favour of the original domicile being retained were much stronger than those in *Jopp* v. *Wood.* A broad distinction was to be drawn between persons holding appointments in India which required them to reside there and private merchants; the former acquired an Anglo-Indian domicile, the latter did not.[6] The intention to return home ultimately was always present to the respondent, and took definite shape in the year 1864, when he made inquiries with a view to repurchasing the estate which had belonged to his mother's family.

In 1873 he established a branch of his business in London, but in his evidence he explained that London was the centre of the rice market, and his subsequent residence in London was necessitated simply by business, and fell therefore within the same category as the residence in *Jopp* v. *Wood.* Until Christmas 1880 he lived in his brother's house in London, and the mere fact of his hiring a house of his own at that date did not *per se* entail change of domicile.[7] There was the clearest evidence that during his residence in London he had always spoken of himself as a Scotsman, and of Scotland as his ultimate home, and on several occasions had made inquiries about estates in Scotland with a view to purchase.

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[1] Shields v. Shields, Dec. 1, 1852, 15 D. 142, 25 Scot. Jur. 99; Jack v. Jack, Feb. 7, 1862, 24 D. 467, 34 Scot. Jur. 234; Pitt v. Pitt, April 6, 1864, 2 Macph. (H. L.) 28, 36 Scot. Jur. 522; Fraser, ii. 1254.

[2] Farnie v. Harvey, 1882, L. R., 8 App. Cases, 43.

[3] Goodman v. London and N.-W. Railway Co., March 6, 1877, 14 S. L. R. 449.

[4] Munro v. Munro, Aug. 10, 1840, 1 Rob. App. 492; Lord Wensleydale in Aikman v. Aikman, 3 Macq. 854, 1861, L. R., 10 Clark's H. of L. Reports, 272, 33 Scot. Jur. 363; Moorhouse v. Lord, *re* Capdevielle, 1864, 2 H. and C. 1010.

[5] Moorhouse v. Lord, *ut supra;* Donaldson v. M'Clure, Dec. 18, 1857, 20 D. 307 (Lord Curriehill at 321), 30 Scot. Jur. 165, aff. March 7, 1860, 3 Macq. 852; Jopp v. Wood, 1865, 34 L. J. Ch. 212; Bell v. Kennedy, May 14, 1868, 6 Macph. (H. L.) 69, 40 Scot. Jur. 476.

[6] Forbes v. Forbes, 1854, Kay, 341; Jopp v. Wood, 34 L. J. Ch. 212.

[7] Burge, For. and Col. Law, 54; Bell v. Kennedy, *supra,* 6 Macph. (H. L.) 69, 40 Scot. Jur. 476.

These intentions were realised in 1887 when he came to Braco Castle, Perthshire. His motive in coming was well explained in his evidence. He came to Scotland partly to put aside any suggestion that his absence had at all prejudiced his position as a Scotsman, partly in the hopes of inducing his wife to follow him. There could be no doubt that he intended to remain; his business could now be entrusted to junior partners; his whole London establishment had been removed to Scotland; and his residence there was just the fulfilment of his lifelong intention. Even if his domicile of origin had been lost it was clear that it was regained in 1887, and such being the case the domicile of the reclaimer changed simultaneously, for the domicile of the husband was the domicile of the wife,[1] and the present case was quite distinct from the cases of *Shields*, *Jack*, and *Pitt*, where no obligation lay upon the wife to follow her husband.

With regard to the reclaimer's last argument, the law of the *bona fide* domicile was to be looked to without any reference to the law of the place of the marriage, or of the place where the offence for which divorce was craved was committed.[2] There was no authority for saying that the desertion must be desertion for four years by a person whose domicile was Scottish during the whole of that period; the authority of *Carswell* was against that view. When an act was regarded as a wrong, both in England and Scotland, but there was a different remedy in either country, the *lex fori* determined the remedy,[3] and the question whether there was a wrong must be judged by the law of the country where the action was raised.[4]

At the hearing in the Inner-House the defender added the following pleas in law:—(2) The pursuer's averments are not relevant or sufficient to support the conclusions of the summons. (3) In the circumstances condescended on the pursuer lost his domicile of origin, and the said domicile has never revived. (4) Even assuming the pursuer's domicile to be now in Scotland it has not, at least in the circumstances of this case, the effect of giving jurisdiction for divorce on grounds not admitted by English law. (5) *Separatim*, the alleged desertion not having continued for four years after such revival, the same is not sufficient to warrant decree under the statute.

At advising,—

LORD PRESIDENT.—The pursuer, Mr Steel, brings this action of divorce against his wife upon the ground of desertion, and he is met with the plea of no jurisdiction, which is founded upon the allegation in point of fact that he is not a domiciled Scotchman. The Lord Ordinary has repelled the plea, and sustained the jurisdiction of the Court upon a finding that the domicile of the pursuer is in Scotland. But the defender, since the case came before us, has added other pleas which might have raised in certain circumstances important questions of law. She has maintained, among other things, "that, in the circumstances condescended on, the pursuer lost his domicile of origin, and the said domicile has never revived"; and another plea is,—"Even assuming the pursuer's domicile to be now in Scotland, it has not, at least in the circum-

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[1] Warrender v. Warrender, June 28, 1834, 2 Sh. and Mac. App. Cases, 154.

[2] Bishop, Marriage and Divorce, secs. 141, 172; Wilson v. Wilson, 1872, 2 L. R. Prob. and Div. 435.

[3] The "Halley," 1868, L. R., 2 Priv. C. App. 193.

[4] Horn v. North British Railway Co., July 13, 1878, 5 R. 1055; M'Larty v. Steele, Jan. 22, 1881, 8 R. 435.

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stances of this case, the effect of giving jurisdiction for divorce on grounds not admitted by English law." And further, she maintains that "the alleged desertion not having continued for four years after such revival"—that is, of the domicile—"the same is not sufficient to warrant decree under the statute," —meaning the Statute 1573.

Now, according to the view which I take of this case, it is not necessary to consider or determine the questions raised by these additional pleas, because I am of opinion that Mr Steel is not only a domiciled Scotchman, but that he never was anything else—he never lost his domicile of origin; and I think the arguments for the defender have really proceeded very much upon a misapprehension, or at least a misstatement of the true nature and effect of a domicile of origin. It is by no means an easy thing to establish that a man has lost his domicile of origin, for, as Lord Cranworth said in the case of *Moorhouse* v. *Lord*,—"In order to acquire a new domicile a man must intend *quatenus in illo exuere patriam*," and I venture to translate these words into English as meaning that he must have a fixed intention or determination to strip himself of his nationality, or in other words to renounce his birthright in the place of his original domicile. The serious character of such a change is very well expounded by Lord Curriehill in the case of *Donaldson* v. *M'Clure*. He says,—"To abandon one domicile for another means something far more than a mere change of residence. It imports an intention not only to relinquish those peculiar rights, privileges, and immunities which the law and constitution of the domicile confer on the denizens of the country in their domestic relations, in their business transactions, in their political and municipal status, and in the daily affairs of common life, but also the laws by which the succession to property is regulated after death. The abandonment or change of a domicile is therefore a proceeding of a very serious nature, and an intention to make such an abandonment requires to be proved by satisfactory evidence." Perhaps that last sentence might have been more strongly expressed, because there must be not only an intention to change, but that intention must be carried into execution. For, as Lord Cottenham said in *Munro* v. *Munro*,—"The domicile of origin must prevail until he has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile." There is one other point very well settled in the law of domicile, and which is expressed very distinctly and clearly by Lord Wensleydale in the case of *Aikman* v. *Aikman*, where he says,—"Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning the domicile of origin. The change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts that change." And the same doctrine as regards the *onus* of proof is laid down by Lord Chancellor Cairns in *Kennedy* v. *Bell*.

These are very well fixed principles now in the law of domicile, and I say no more about them; but their application here, I think, is obvious and very important. The defender undertakes by this plea of no jurisdiction to establish as matter of fact that her husband has lost his domicile of origin. Now, how has she acquitted herself of that undertaking? The proof upon the defender's part consists of her own statement upon oath, and really of nothing more. There are one or two other witnesses called who contribute nothing to the case at all; and her own statement is of the vaguest and most untrustworthy kind. She states as a sort of general impression that during her married life, or one may say after her first acquaintance with her husband, she had no particular reason to suppose that he was a domiciled Scotchman. She met him in London, and married him there. But when she is asked very special questions as to sentiments that he expressed, and plans that he proposed to her regarding their married life, and regarding a return to Scotland, she falls back entirely on *non memini*, and there is nothing to be had from her at all upon that subject. On the other hand, let us see how the case stands. The first time that the pursuer went from home he went to Java, and the next time he went from home he went to Rangoon—to Burmah; and it was seriously maintained that this born Scotchman made a determination to make himself a domiciled Burmese. It is very difficult to realise what that means; but that any domiciled Scotchman in his senses should come to a determination to live the rest of his life in Burmah is an idea that I cannot bring myself to entertain at all. Nobody goes to Burmah to remain. Nobody in his senses ever goes to Burmah *sine animo revertendi*, and it is really idle to discuss that part of the case. There is no basis or foundation for it at all. He went there in prosecution of his business as a trader. He went there to make his fortune as far as he could, and he continued there for a long time in pursuit of fortune, and at last succeeded. But the idea of its ever entering into his mind that when he had realised his fortune, and made as much in Burmah as he could, he was going to spend the rest of his life there is entirely out of the question.

Something was said about an Anglo-Indian domicile. Now, the notion of an Anglo-Indian domicile has no application in this kind of case at all. Why an Anglo-Indian domicile should be suggested for a Scotchman I do not know. I think with Lord Cranworth that it would be a Scoto-Indian domicile. But let that pass. An Anglo-Indian domicile or a Scoto-Indian domicile applies only to persons who go out to India in the service of the East India Company as it was formerly, or in the service of the Indian Government as the matter stands now, and it is so because the nature of the employment which these parties have accepted makes it their duty to reside permanently in India. But that does not apply in the slightest degree to a trader. He does not go to Burmah because his duty requires him to reside there. The pursuer here went to Burmah for the sake of trading, just as he went to Java before, and as he went to many other places probably in the course of his life. He went there not as a resident, not as a citizen of the country, but as a foreign trader. So that the idea of a domicile acquired in that way must be at once dismissed.

But, then, no doubt it is alleged, and there is at first sight more specious ground for that contention, that after the pursuer came home from Burmah he settled in London, and thus became a domiciled Englishman. Now, the reason of his going to live in London is very well explained by himself. When he went to live in London he certainly did not cease to be a trader, or give up his trade with Burmah. On the contrary, it was in prosecution of that very trade that he was led to live in London. He says,—"At 31st October 1870 I retired from Gladstone, Wyllie, & Company, and established my own firm of William Strang Steel & Company. James Finlay & Company were at the beginning, and for some years, the only representatives we had in this country, and it was in conjunction with them that our business in Rangoon was opened." James Finlay & Company were a Glasgow house. "That arrangement continued till the middle of 1873, when I found it necessary to make an alteration upon it. Our rice business had largely developed, and we

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had erected large rice mills; and while James Finlay & Company were excellent people for the soft goods department of our business, we required to have an establishment in London to get orders for rice, charter ships, and do matters which James Finlay & Company could not do so well as I could do myself. London is the centre of the rice market. I established a branch of my business in London." Thus it appears very clearly that his transactions at home during his trading with Burmah while in the house of Gladstone, Wyllie, & Company were all through a Glasgow house, and not through any English connection at all; and the only reason why he gave up his old friends in Glasgow as his proper agents and correspondents in this country was the reason which he has explained, that London was the place for a rice business, and that James Finlay & Company could not possibly carry on that for him. Therefore it was that he established a branch of his business in London. He had one branch in Rangoon and another branch in London, and I do not think that the establishment of a branch of his business in London affected his position as a domiciled Scotchman any more than the establishment of a branch in Burmah. He goes to live there in consequence of his having this branch in London; but it is quite plain throughout the whole of his evidence that he looks forward from the very beginning of this London connection to a time when he will be enabled to retire from the active superintendence of that business. He takes two of his brothers into partnership, and some other young men, and as they go on gathering experience and acquiring a larger and larger interest in the house, they take more of the management of the business upon them, until at length they are so completely initiated into the whole details of it, and so able to carry it on by themselves, that Mr Steel comes to the resolution to give up the active superintendence of it altogether. That is not a new idea. It is an idea that had been present to his mind throughout his whole life after he established this branch in London; and he is looking forward to it anxiously so as to enable him, as he himself explains, to return to Scotland and buy land there, or settle there. The necessity for his being in London came to an end, as he himself expresses it in his evidence. After mentioning that he had pointed out a place to his wife where he thought he might be comfortably settled in Scotland, and shewn her on a map where it was, he goes on to say,—"I asked her for an opinion, and she said she would give no opinion; she took no interest in me or my estates, or anything else belonging to me. The matter then dropped. I never considered that I had ceased to be a Scotchman. I was rather proud of being a Scotchman. Nearly all the visitors to my house were Scotch. Scotchmen were continually in and about my house, and Scotland was continually being talked of. I had no intention of settling permanently in England—not longer than my business required me to reside there. I had all along the prospect of getting my business into such a position that I would not require to supervise it. I had always the intention of ultimately settling in Scotland as soon as business arrangements permitted. That was my intention both before and after my marriage. Naturally it would only be to my very intimate friends that I would mention that, but it was spoken of in the family circle, and amongst my intimate friends. After my wife left me, the matter of settlement in Scotland came up more prominently." It was about the beginning of the year 1887 that he at last found himself in a position to leave London altogether, and entrust the management of the branch of the business there to the younger partners. And accordingly he came down and set up his establishment at Braco Castle. But in the meantime, and before that had been done, he had been looking for an estate to buy in Scotland. There were several places brought up for his notice, and he took a great deal of interest in the matter, and made a great many inquiries respecting them. And besides all that, there was one *angulus terræ* for which he had a great affection, and that was the small remainder of the family estate of his mother, which he was determined to buy from the beginning. He had it in view all his life. Now, really in these circumstances, if we can believe the statements of this gentleman, and I must say his evidence seems to be given with great frankness and candour, and seems to have impressed the Lord Ordinary in the same way,—I think if we can believe his statements, there never was a clearer case of retention of the domicile of origin. I have said already that there is no discharge of the *onus* lying upon the defender, for she has proved absolutely nothing, and all the statements of the pursuer are consistent with the view that he never for a moment intended to abandon his domicile of origin.

It is a small circumstance, but still it might have been made something of, if his wife had been at the date of the marriage a domiciled Englishwoman; but she was nothing of the kind. She was born at Demerara, and she was of Irish extraction, so that there was not even that slight link to London or England.

On the whole matter, therefore, I have come to the conclusion that this gentleman is giving a fair and true account of the adventures of his life, and I must add that there is some very material corroboration by other witnesses of the statements that he makes. On the whole matter, I must say that I do not think I ever saw a clearer case of a continuing domicile of origin during the whole period of the pursuer's life.

LORD MURE.—I concur in the result that your Lordship has arrived at. In the course of your opinion your Lordship has referred to the judgment of Lord Cottenham in the case of *Munro*, and it has always appeared to me that in that case we have perhaps the most clear and distinct exposition of the law of Scotland upon this question of domicile. In 1 Robinson, 606, I find the passage your Lordship has referred to, and after the words which your Lordship quoted, Lord Cottenham goes on to say that he conceived "that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile. Such, after the fullest consideration of the authorities, was the principle laid down by Lord Alvanley in *Sommerville* v. *Sommerville*, and from which I see no reason for dissenting. So firmly indeed did the civil law consider the domicile of origin to adhere, that it holds that if it be actually abandoned, and a new domicile acquired, but that again abandoned, and no new one acquired in its place, the domicile of origin revives. To effect this abandonment of the domicile of origin, and substitute another in its place, it required 'le concours de la volonté et du fait,' 'animo et facto'; that is by actual residence in the place, with the intention that the place then chosen should be the principal and permanent residence, 'larum rerumque ac fortunarum suarum.' There must be residence and intention. Residence alone has no effect *per se*, although it may be most important as a ground from which to infer intention. Mr Burge, in his excellent work, cites many authorities from the civilians to establish this proposition. 'It is not,' he says 'by purchasing and occupying a house or furnishing it, or vesting a part of his capital there, nor by

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Now, that being, as I apprehend, the law in questions of this description, when I turn to the evidence I am quite unable to come to any other conclusion than that which your Lordship has expressed. Mr Steel goes out to Burmah, and his firm is trading there even to this day, but he never, so far as I see, selected Burmah as a permanent residence; and it would be rather absurd to suppose that he did. But after the period when he first became connected with Gladstone, Wyllie, & Company's house, he returns to Scotland four times from Burmah before he establishes the branch house in London, and on these occasions he goes and resides with his relatives in Glasgow. He does that in 1864, and he goes out and returns in 1865 to Scotland. He goes out again to Burmah shortly after that, and he returns to Glasgow in 1868. He remains there for a certain time, and goes out to Burmah, but he returns again to Glasgow, so long as his father lives. Then after the establishment of the branch house in London, he still goes out to Burmah occasionally on business, but he returns to London, and lives with his relations there. Up to 1874, which is about twenty years after he establishes his business in Burmah, he goes backwards and forwards between that place and London, and never suggests any intention of permanently residing there. As regards the residence in London, he at first, after establishing the business as he explains, resided sometimes with one relation and sometimes with another. He takes the lease of a house, and about the period of his marriage he buys a house there. I agree with your Lordship that he seems to have given his evidence with great candour, and I think his evidence distinctly shews that during the whole period of time that he was engaged in business, what he ultimately looked to was settling in Scotland, and it is in evidence not only that he himself looked about for estates in Scotland some years before 1887, after he had put his firm in London in such a position as would enable him to settle there, but he is confirmed in that by his brother Mr James Steel, and also by Mr John Muir, a partner of Finlay & Company, and by Mr M'Gregor, all of whom speak to what they heard him say, and Mr M'Gregor in particular says:—"I always understood that when he retired partially from business he would reside in Scotland." In these circumstances, I find that there is not only no evidence of intention to give up his domicile of origin, but that there is distinct evidence by the pursuer himself, and his brother and his friends, that he intended, when he had the means of doing so, to settle in Scotland. I therefore agree with your Lordship in thinking that the Lord Ordinary's interlocutor should be adhered to.

Lord Shand.—In the very numerous cases that have occurred over a period of many years regarding questions of domicile, I think the principles upon which a question of this kind must be settled have been frequently and very clearly stated, and I do not mean to say anything upon that subject except this, that it is clear that the domicile of origin must be proved to have been abandoned in the first place, and another domicile chosen by the person whose domicile is in question. And the question here for consideration is, has it been proved by the defender that there ever was an abandonment of the Scottish domicile, and a choice of a domicile in England as the sole domicile of Mr Steel?

I am of opinion with your Lordship that there is an entire failure to prove the intention either to abandon the Scottish domicile or to adopt a new one. So far as regards the residence in Rangoon, I entirely agree with all that your Lordships have said. There is every probability against a man selecting Rangoon for the purpose not merely of prosecuting his business, but of adopting it as his home, in which he means to live and die. I should say it would be almost impossible to point to anyone who had ever done so. At least if such a man could be found, it might be certainly predicated of him that he was singular in his tastes, and very eccentric. Looking to the evidence, I think it is perfectly clear that Mr Steel's residence at Rangoon was temporary, and for a temporary purpose; and I do not think that the argument which was submitted with reference to the acquisition of a domicile there is worthy of serious consideration.

The only question in the case is whether something stronger cannot be said for a domicile in England, in consequence of his residence in London; and there I think there was room for argument, although I think the argument clearly fails. There is, of course, more probability in favour of a man choosing London or England as his permanent home, in the view that he is never again to return to Scotland, so that he abandons his home in Scotland, and the question is whether, upon the evidence here, we have proof that that was the state of facts as regards Mr Steel. He lived there a considerable time. He took the lease of a house for seven, fourteen, and twenty-one years in London; he was married in London, and no doubt appeared to have settled there. But along with these facts we must take the body of evidence which we have in regard to the state of his mind during all this time. As your Lordship has pointed out, the purpose of his going to London is obvious, viz., the prosecution of his business—the connection with Rangoon being still kept up. We have, however, in regard to intention, the clearest possible evidence from Mr Steel himself. That evidence seems to me to put the case beyond any question. As I said in the course of the discussion, if this question of domicile had arisen upon a question of succession, Mr Steel having died while still living in London, the Court might have been deprived of a good deal of light in the evidence which Mr Steel has himself given, and might have been driven to decide this question of jurisdiction upon imperfect evidence, the proof of animus being only supplied from conversations that he had had with his friends, and the intention he had then expressed. Even then I should have said that upon the proof, as we have it, there is evidence through his friends that all the time during which Mr Steel was in London he was living there as a Scotchman who held to Scotland as his home, and was looking steadily forward to the time when he would return to it. But I think that matter is put beyond all question by the very clear evidence which Mr Steel has given, and which there is no reason whatever to doubt. He tells us himself that he had all along hoped to return to Scotland—meant to return to Scotland, I should rather say—and that he still regarded himself as a Scotchman, and that it was a mere question of time and convenience when he should return. We have also his evidence corroborated in all that he has said by his two friends who were examined, and who knew him intimately—by the fact proved in evidence, that again and again he was making inquiries about Scotch estates—and finally by the fact that he has returned to Scotland to live here, and is now resident at Braco. I notice that questions were put to Mr Steel as to whether this return to Scotland was not with a purpose, the suggestion being that he had acquired a domicile in England in the meantime, and that he desired to get rid of that domicile, and to acquire a Scotch domicile, or to appear to re-acquire a Scotch domicile without seriously meaning to do so. On that matter I think

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Steel v. Steel.

Mr Steel was quite frank, as he was in all the rest of his evidence. He says that he had all along meant to return to Scotland, and that what he was waiting for was a time when he might be able to make such arrangements as would not require his close personal attention at business in London. He says quite frankly that his return to Scotland at the time he did return was indeed accelerated by the idea that it would be better that this question should be raised when he was residing in Scotland. He puts it, I think, very reasonably when he says,—"I had always intended to go and reside in Scotland, and the prospect of these proceedings may have accelerated the carrying out of that intention"; and in an earlier passage he says he never thought that change of residence was important. "No doubt," he says, "it was in my mind by way of stopping any suggestion about my not being a Scotchman on account of my residence away from Scotland." It does not appear to me that the circumstance of his intention to raise such an action as the present having accelerated his return to Scotland—his return to Scotland having been in his mind all along, and he always having regarded Scotland as his home—is of any moment. His having come to Braco, thinking it might be of advantage to him with reference to these proceedings, while carrying out the intention that he had all along entertained, does not appear to me to have any serious bearing on the question now before us. On the whole matter it appears to me that Mr Steel never abandoned his Scottish domicile, and so never acquired any other.

Lord Adam was absent.

The Court pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary, and find that the pursuer's domicile of origin was in Scotland, that he had never changed that domicile, or acquired another: Repel the 1st, 3d, 4th, and 5th pleas for the defender; and remit to the Lord Ordinary to allow the parties a proof of their averments, and to proceed farther in the case."

Tods, Murray, & Jamieson, W.S.—John Clerk Brodie & Sons, W.S.—Agents.

No. 166.
July 13, 1888.
Robertson's Trustee v. Nicholson.

Walter Galbraith (Robertson's Trustee), Pursuer (Respondent).—*Shaw*—*J. G. Stewart.*

Benjamin Nicholson, Defender (Reclaimer).—*Sir Charles Pearson*—*C. S. Dickson.*

Robert Kedie, Defender.

Foreign—Jurisdiction—Trust.—A person carrying on business in Scotland granted a trust-deed for behoof of his creditors to two trustees, one of whom resided in Scotland and the other in England. In an action of accounting raised in Scotland against both trustees, the trustee residing in England pleaded no jurisdiction. The Court *repelled* the plea, on the ground that the trust-estate was in Scotland.

Lord M'Laren's opinion in *Kennedy* v. *Kennedy*, 12 R. 275, *approved.*

1st Division.
Lord Fraser.
M.

The affairs of the firm of James Robertson & Company, tailors and clothiers in Glasgow, of which James Robertson was the sole partner, having become embarrassed, Robertson, on 5th June 1886, granted an assignment or trust-deed in English form in favour of Robert Kedie, a partner of the firm of Stewart, M'Donald, & Company, warehousemen, Glasgow, and Benjamin Nicholson, accountant, London, for behoof of four creditors of his firm, two in Glasgow and two in London. On 16th July following Robertson granted a second trust-deed in favour of the same two persons, as trustees for behoof of all his creditors.

On 23d May 1887, Robertson having died meantime, his estates were sequestrated by the Court of Session, and Walter Galbraith, accountant, Glasgow, was appointed trustee.

Galbraith now sued Kedie and Nicholson in an action of count, reckoning, and payment in respect of their intromissions with the bankrupt estate.

The defender Kedie stated that he had paid over all the funds in his hands (amounting to a small sum only) to the pursuer, and that he had left the management almost entirely to Nicholson.

The other defender, Nicholson, pleaded, *inter alia;*—(1) No jurisdiction. . . . (5) In respect of the proceedings in the Chancery Division of the High Court of Justice in England, this defender should be assoilzied, or otherwise the present action should be dismissed.

Nicholson stated, *inter alia ;*—(Stat. 3) "On the 19th November 1887 Kearsley & Co." (who were one of the two English creditors above referred to) "issued a writ calling on the pursuer and the defenders in this action to enter appearance in an action at the instance of Kearsley & Co., raised in the Chancery Division of the High Court of Justice, London, and the said writ was duly served. In said action the said Kearsley & Company claim to have the trusts under the said two deeds of 5th June and 16th July 1886 carried into execution under the direction of the said Chancery Division, and to have an account taken of the moneys received by the defenders Benjamin Nicholson and Robert Kedie, under the same. The pursuer and both of the defenders have appeared in said action, which is now proceeding, and in the said action this defender has consigned in Court £500 of the funds recovered by him, to abide the orders of Court. . . ." (Stat. 4) "The defender is resident in England, and is not subject to the jurisdiction of the Court of Session." He admitted that Robertson had been a domiciled Scotsman.

It was stated in answer by the pursuer that the whole trust-estate was situated in Scotland, and that Kearsley & Company, who were the only creditors who did not support him, were personal friends of Nicholson, and were acting in concert with him to prevent the pursuer from getting possession of the estate. It was further set forth that Nicholson had appeared to oppose the granting of sequestration in the Bill-Chamber. The pursuer further stated in answer to statement 3 quoted above, —(Ans. 3) "The proceedings in London here mentioned are referred to for their terms, beyond which no admission is made. Denied that any sum has been consigned in said action in terms of any order of the English Court. It is, however, believed and averred that the defender Nicholson after the present action was raised, and in order to prevent or impede the accounting which is sought in the said action, made, at his own hand, a deposit of £500. He did so in spite of the protest of his co-trustee, Mr Kedie, and in spite of the repeated demands by that gentleman that the accounts of the trust should be produced, and payment of the estate made over to the present pursuer. Explained further, that in the said proceedings in the High Court of Chancery, which were raised by Kearsley & Company, acting in concert with the defender Nicholson, an order was made for service of the writ upon the defender Kedie, and also upon the present pursuer, as being furth of the jurisdiction. The said defender and the pursuer, by motion on 21st December 1887, applied for the discharge of said order, and after discussion Mr Justice North, sitting in judgment upon said date, discharged the order for service, and found the plaintiffs liable in costs. It is, accordingly, impossible that any progress can be made with the proceedings in England, and it is explained that the same were taken solely for the purpose before mentioned, No. 166. namely, to avoid, if possible, any accounting by the defender Nicholson to the pursuer of the present action."

July 13, 1888. Robertson's Trustee v. Nicholson.

The Lord Ordinary (Fraser), on 20th March 1888, repelled the defender's first plea in law, and appointed the case to be put to the roll for further procedure.*

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* "OPINION.—The estates of James Robertson, a tailor and clothier in Glasgow, now deceased, were sequestrated by the Court of Session in May 1887, and the pursuer was appointed trustee upon the estate. It is averred on behalf of the pursuer that the whole estate is situated in Scotland. No counter averment is made by the defender Nicholson. He admits 'that the said James Robertson was a domiciled Scotchman, and lived and carried on business in Glasgow.'

"Robertson before the sequestration executed two deeds conveying over his property to the defenders in this action in trust for the benefit of his creditors. The defenders accepted the office of trustees under these deeds, and proceeded to ingather the estate. No dividend was paid by the trustees to the creditors. The defender Kedie intromitted with it only to a very small extent (£27, 10s.), which he has paid over to the pursuer, the other defender, Nicholson, having taken the chief management, which Kedie says he allowed him to do, as being an accountant, and therefore better fitted to discharge the duty as trustee. The pursuer now asks an accounting with these persons for their intromissions, and this upon the footing that the sequestration put an end to the trust in their favour. One of the trustees is resident in Scotland, where the estate is situated, and the other, Nicholson, is resident in England, and no arrestment to found jurisdiction has been used against him. The first plea in law for the defender Nicholson, which falls now to be disposed of, is, that this Court has no jurisdiction to entertain the action as regards him. If this plea be sustained, the alternatives would be that the pursuer must sue the defenders in an English Court, when the plea of Kedie would be that he is not subject to the jurisdiction, or that the pursuer must proceed with this action against Kedie in the Court of Session, letting Nicholson out of it; to which Kedie's answer would be, that he cannot be sued without calling his co-trustee; and in like manner the same answer would be open to Nicholson in an English Court if he was sued there alone without Kedie. Nicholson after this action was in Court instituted a suit in the Chancery Division of the High Court of Justice in England in name of Kearsley & Company (creditors for whom he is acting), to have the trusts under the two deeds carried into execution under the direction of that Court, and to have an account taken of the moneys received by the defenders. This proceeding was taken against the protest of the defender Mr Kedie. An order for service of the writ upon Kedie and the pursuer was obtained, but upon 21st December 1887 this order was discharged, with costs, by Mr Justice North, who said,—'It seems to me that, on the grounds both of convenience and expense, it is very much better that the matter should be litigated in Scotland.' His Lordship referred to the present action, and said,—'There is a proceeding going on in Scotland by Galbraith, as trustee representing the estate of the debtor, against the other two persons who are the trustees of these deeds, in which proceeding Nicholson, the English trustee, has entered an appearance. He therefore is properly before the Court with respect to those deeds. . . . It seems to me that every question between these parties can be fairly and conveniently dealt with there. . . . . Under these circumstances, it seems to me that the cost and convenience are both in favour of their being tried in Scotland, and there is nothing in them in any way to prevent their being so tried, because, although the two deeds are said to be in English form, they are in a form which is perfectly intelligible. . . . I do not see anything in them whatever to prevent their being equally well administered by the Court in Scotland as by the Court in England. Further than that, there are questions which, it appears to me, must necessarily arise relating to Scotch law, with respect to which it is far more convenient, and far better as regards the evidence, that they should be dealt with by a Scotch Court, which knows what the Scotch law is, The Lord Ordinary thereafter allowed a proof, and Nicholson thereupon reclaimed against both interlocutors.

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than that they should be dealt with by an English Court, which is not at any-rate familiar with Scotch law, and which cannot know anything whatever of it except as a matter to be proved by the attendance here of experts to state what the Scotch law is. Convenience and expense, in my opinion, require that I should not allow the two defendants, who are resident in Scotland, to be brought here to litigate the question in dispute, though, as I have said, I can conceive a state of things possible hereafter—though I do not think it likely to arise—in which some proceedings might be necessary in England in which these persons might be served and made defendants here, so as to litigate the matter here.'

"Thus, then, so far as regards the English Court, there is no action pending as against Kedie, and the question now arises whether the present action against both defenders can be allowed to proceed. It would certainly be a case of great hardship if the pursuer were obliged to raise two actions—one against Kedie in Scotland and another against Nicholson in England—in regard to an accounting for intromissions with an estate of which both parties were trustees, and this all the more that, as pointed out by Mr Justice North, the first question to be determined is one of Scotch law,—as to the effect of a Scotch sequestration on the prior trust-deeds. The case of the *Magistrates of Wick* v. *Forbes, &c.* (11th December 1849, 12 D. 299) shews that an action may be competent in the Scottish Courts against executors, although a number of them may be resident abroad, and no arrestment to found jurisdiction be used. On the other hand, the case of *Gillon & Co.* v. *Dunlop and Collett* (27th February 1864, 2 Macph. 776) is an illustration of the rule that the Court will not entertain an action against an executor resident abroad, where a more convenient *forum* for trying the case exists in England. But in that case no part of the executry estate was situated in Scotland; it was under distribution in terms of a will executed in India, and under the authority of the foreign Court. This distinguishes that case from the present one.

"According to the practice of the Court of Chancery, the objection to the jurisdiction in such a case as this would be repelled, as is illustrated by the case of *Seymour* v. *Seymour* (27th January 1888, 84 Law Times, p. 242, and 4 Times Law Reports, 250), before Mr Justice Chitty. There were here several defendants, some residing in England, and some residing in Ireland. Two parties in Ireland, interested in the matter as sub-mortgagees, moved to discharge the order for service out of the jurisdiction, on two grounds:—(1) That the cause of action against them was one in which no parties within the jurisdiction were interested, and that consequently there was no jurisdiction to make the order; and (2) that any question, so far as they were concerned, might effectually be raised in proceedings now pending for sale of the mortgaged estates in the Land Court in Ireland, and consequently that the Court ought not to exercise the jurisdiction, even if it possessed it. Mr Justice Chitty, in delivering judgment, said that, 'with regard to the defendants' first ground of objection, in his opinion all the defendants were necessary parties to the action, wherever it might be tried. The cause of action was the same against all, although the remedies against, and the liabilities of, the different defendants were different. With regard to the second objection, if he were to uphold it, either the parties resident in England would have to be served with the proceedings in Ireland, or two sets of proceedings would have to be carried on, one in England and the other in Ireland. In the first alternative, the parties resident in England would raise exactly the same objection in the Irish Courts, to be taken to Ireland, and the result would be a deadlock. In the second alternative, there would also be two sets of proceedings, one in England and the other in Ireland, in each of which all the same evidence would have to be gone through. Therefore, on the ground of comparative cost and convenience, he came to the conclusion that the action in this Court should continue as at present constituted, and that the defendants were properly served.' Upon the whole matter, the Lord Ordinary is satisfied that this Court has jurisdiction to try

Certain amendments were thereafter allowed by the Court to be made upon the record, but as these dealt chiefly with the proceedings in the sequestration, and did not affect the general question upon which the decision of the Court ultimately turned, it is unnecessary to refer to them further.

Argued for Nicholson;—The Scottish Courts had no jurisdiction over him. I. Neither the fact that the truster's domicile was in Scotland when the trust was constituted, nor the fact that confirmation was taken out in Scotland, was sufficient to found jurisdiction.[1] The cases, such as *Watt* v. *Richmond's Trustees*,[2] in which the jurisdiction had been upheld, because of the existence of heritable estate within it, were not opposed to this view. The case of *Kennedy*, 12 R. 275, was that of a Scottish marriage-contract trust where one of the trustees was domiciled in Scotland, all the funds being also there. It did not therefore apply. Lord Blackburn's view in the *Orr Ewing* case (13 R. (H. of L.) 18) also supported this contention. [LORD PRESIDENT.—I think Lord Blackburn has misread the case of *Preston* v. *Melville*,[3] and if none of the other Judges in the House of Lords take the same view, I cannot adopt it.] There was no decision which would subject the reclaimer to the jurisdiction. The case of *Gillon*[4] was a case of *forum non conveniens* and was not applicable, and the case of the *Magistrates of Wick*[5] was decided on the ground that there had been confirmation. Mr Justice North, in his opinion, delivered in discharging the order for service of the writ in this case, had gone wrong in treating Nicholson's appearance in the present action as an appearance for all purposes,—his Lordship had not understood that in Scotland it was only by entering appearance that the jurisdiction could be objected to. As matter of fact Nicholson had consigned £500 in the English Courts, and part of the estate was therefore there. Further, Kearsley & Company, the English creditors whom Nicholson represented, were not here at all, and neither they nor Mr Nicholson had taken any part in the sequestration since it was granted. These were very important facts in the consideration of the question.[6] Further, it did not follow that the trust-deed was put an end to by the sequestration,[7] nor could the Scottish Courts proceed upon the ground that the Court of Chancery had no jurisdiction over Kedie. II. The plea of reconvention, which had been founded on, did not apply.[8] It was always held to be excluded unless

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this case, and that it is immaterial to say that the defender Nicholson had taken the chief part in the management with the concurrence of the other defender."

[1] Halliday's Executor v. Halliday's Executors, Dec. 17, 1886, 14 R. 251 (Lord Shand, p. 254); Orr Ewing's Trustees v. Orr Ewing, July 24, 1885, 13 R. (H. of L.) 1.

[2] Watt v. Richmond's Trustees, Guthrie's Sheriff Court Cases, 241.

[3] Preston v. Melville, March 29, 1841, 2 Rob. Apps. 88.

[4] Gillon v. Dunlop and Collett, Feb. 27, 1864, 2 Macph. 776.

[5] Magistrates of Wick v. Forbes, Dec. 11, 1849, 12 D. 299.

[6] Watt v. Richmond's Trustees, decided by Lord Fraser when Sheriff of Renfrewshire, Guthrie's Sheriff Court Cases, 241; Black v. Duncan, Dec. 1827, 6 S. 261; Mackenzie v. Drummond's Executors, June 19, 1868, 6 Macph. 932, 40 Scot. Jur. 537; Charles v. Charles' Trustees, May 19, 1868, 6 Macph. 772, 40 Scot. Jur. 397.

[7] Goudy on Bankruptcy, 477, 478; Kyd v. Waterston, June 5, 1880, 7 R. 884; Thomson v. Tough's Trustee, June 26, 1880, 7 R. 1035.

[8] Thomson v. Whitehead, Jan. 25, 1862, 24 D. 331; M'Ewen's Trustees v. Robertson, March 9, 1852, 15 D. 265; Barr v. Smith & Chamberlain, Nov. 18, 1879, 7 R. 247; Ord v. Barton, Jan. 22, 1847, 9 D. 541; California Redwood Co. v. Merchant Banking Co. of London, July 20, 1886, 13 R. 1202; White v. Spottiswoode, June 30, 1846, 8 D. 950.

the two actions were pending at the same time. But all Nicholson had done in the sequestration was to appear to oppose its being granted. After that he had taken no further step in the sequestration. It was no doubt true that Kearsley & Company had put in a claim, but this action was not brought, and could not be brought, against them. Nicholson and Kearsley & Company were not identified; he held the funds for many purposes other than for payment of their particular debt. The law on this subject had never gone further than in *Ord* v. *Barton*.

Argued for the trustee;—I. There were two facts in the case of great importance in the question of jurisdiction,—(1) The bankrupt estate was situated in Scotland, and the bankrupt had been a domiciled Scotsman; and (2) one of the two trustees who were called as defenders was resident in Scotland, and that had been held to be enough to found jurisdiction.[1] If the contrary were held, it would lead to great inconvenience and expense. Mr Justice North had taken the right view of the matter. II. Besides Nicholson had submitted himself to the jurisdiction, in the first place, by appearing to oppose the sequestration, and in the second place by the fact that Kearsley & Company, with whom Nicholson was practically identified, and of whom he was at anyrate the representative, had lodged a claim in the sequestration. The plea of reconvention therefore was well founded.

At advising,—

Lord President.—The pursuer of this action is trustee upon the sequestrated estate of the late James Robertson, a tailor in Glasgow, who carried on business there for a number of years. His trade was very much confined to Glasgow and its neighbourhood; but of course he had some creditors in England also, although apparently a very limited number. His assets were all in this country, and his debts, with a trifling exception, were in this country also. His estate, therefore, was essentially a Scottish estate, and fell to be distributed among Scottish creditors. It appears that in the difficulties in which Robertson found himself prior to his death he had executed two deeds of trust in favour of Mr Kedie, who is a Glasgow merchant, and of the reclaimer, Mr Nicholson, who is an accountant in London. The first is dated 5th June 1886, and looks very like an attempt to create a preference in favour of a certain class of creditors. I give no opinion whether it does so or not, but undoubtedly, as appears upon the face of the deed itself, the granter was at the time insolvent. Another trust-deed was granted in July 1886 in favour of the same trustees, conveying to them his entire estate for behoof of the whole body of creditors. It is needless to say that these trusts were superseded by the sequestration.

The object of the present action is to call the trustees under these two deeds to account for their intromissions. As to the title of the trustee in the sequestration to bring the action there can be no doubt. But Mr Nicholson pleads that he is not subject to the jurisdiction of this Court,—he being a domiciled Englishman carrying on business in London. He contends that the action cannot be maintained against him in this Court. The result of that contention would be that, *pari ratione*, an action in the English Courts could not be maintained against Kedie, the other trustee, because he is a domiciled Scotsman. There would require to be two actions, one against one trustee in one country, and

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[1] Magistrates of Wick v. Forbes, Dec. 11, 1849, 12 D. 299; Watt v. Richmond's Trustees, Guthrie's Sheriff Court Cases, 241; Halliday's Executors, Dec. 17, 1886, 14 R. 251; Gillon v. Dunlop and Collett, Feb. 27, 1864, 2 Macph. 776; Kennedy v. Kennedy, Dec. 9, 1884, 12 R. 275.

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another against the other trustee in the other country. And so a deadlock would arise, or at least the great inconvenience of pursuing one trustee in the one country and another in the other in an action for what ought to be a joint accounting.

It appears to me that there are good grounds for holding that where trustees are liable jointly to account for their intromissions, as they undoubtedly are here, the proper *forum* to try the question is the *forum* of the country where the trust is said to subsist and where it comes to be executed. In this case that is Scotland. The estate is a Scottish estate belonging to a Scottish trader; it falls to be uplifted in Scotland, and to be distributed for the most part among Scottish creditors. The liability to account is indivisible, and the accounting must be carried on in a process in which both or all the trustees must be summoned. In a case of this kind the jurisdiction of the Court is founded not upon domicile, but upon the situation of the funds of the trust.

I am very much disposed to adopt the views taken by Lord M'Laren in the case of *Kennedy* v. *Kennedy* (12 R. 282) in which his Lordship says:—"Where a trust is constituted in Scotland, and is to be executed in Scotland, the Supreme Court of this division of the United Kingdom has jurisdiction over the whole subject-matter of the trust, including in that expression not only the interpretation of the trust, but the duty of making due provision for its continuance, and the power, in cases of negligent administration, of calling the trustees or trustee to account. It is matter of frequent occurrence that a body of marriage trustees, having originally the domicile of the spouses, become in some degree scattered before the necessity for administering the trust arises; and it would be mischievous in the extreme if it were necessary to take separate action against the different members of the trust in the various parts of Her Majesty's dominions or elsewhere, in which they might be resident for the time. The obligation of trustees to account for their administration is one and indivisible, and is in general to be enforced by an appeal to the Courts of the country in which that obligation is to be fulfilled, and where the trust is to be executed."

His Lordship's judgment in that case sustaining the jurisdiction of this Court against a trustee who was an Englishman was not taken to review, and therefore, in so far as that case was concerned, the decision rested solely on the authority of Lord M'Laren. But in my view, the principle there expressed is directly applicable, and I am therefore for refusing this reclaiming note.

LORD MURE.—I am of the same opinion. In addition to what your Lordship has said as to this being the estate of a Scottish trader, the majority of whose creditors are in Scotland, it is not unimportant to observe that it also now appears that the whole estate has been sequestrated in Scotland, which is therefore the *forum* where it must be finally wound up. It is therefore, I think, most desirable, if not necessary, for the due and convenient administration of the trust-estate that the defender, who is one of the original trustees, should answer in Scotland for his intromissions along with his co-trustee, and be subject to the jurisdiction of this Court.

LORD SHAND.—The inconvenience which would result if effect were given to the reclaimers' argument would be necessarily very serious. A trust-deed has been executed in this country—one of the two trustees being in this country,

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and the other in England—and they have now been called upon to account for their intromissions. If we were to give effect to the argument which has been submitted, it would come to this, that there would be one action in the Courts of Scotland against one of the trustees, and another in the English Courts against the other—and questions of nicety might possibly have to be decided in the two Courts—it may be with a different result in each. The only possible way of removing the difficulties which would thus arise is to hold that both the trustees are subject to the jurisdiction of one Court, and bound to account there. It is essential that both should be convened in one Court, for a defence may be stated for one which involves the liability of the other, and justice requires that each should be heard in the same process. It may be a question of convenience which Court ought to decide the question on the merits, but in the present case I have no doubt. This is a Scottish trust which was executed for the purpose of collecting and administering and distributing a Scottish estate in great part among Scottish creditors. I am of opinion that this Court not only has jurisdiction, but that this is likewise the convenient *forum*. That seems to me to be all the clearer because Nicholson has endeavoured to have the trust administered in the English Courts but has failed in his endeavour, because Mr Justice North thought that "on the grounds both of convenience and of expense, it is very much better that the matter should be litigated in Scotland."

I also adopt the view which was taken by Lord M'Laren in the case of *Kennedy* to which your Lordship has referred.

LORD ADAM concurred.

THE COURT adhered.

CAIRNS, M'INTOSH, & MORTON, W.S.—J. A. CAMPBELL & LAMOND, C.S.—Agents.

No. 167.

July 14, 1888.
Markey v. Colston.

JOHN MARKEY, Petitioner.—*G. W. Burnet—Forsyth.*
JAMES COLSTON AND OTHERS, Respondents.—*C. J. Guthrie.*

Parent and child—Custody—Child placed voluntarily in charge of charitable institution.—A father voluntarily placed his child, aged ten months, in the hands of the directors of a charitable institution for children, who, in pursuance of their scheme for the benefit of the children under their charge, sent the child to a branch of the institution in Nova Scotia. Ten months after parting with the child the father petitioned the Court for an order on the directors to deliver it to him. The Court remitted to the Sheriff of the county to inquire into the case, and subsequently ordained the directors to bring the child within the jurisdiction. This having been done the Court resumed consideration of the cause. It appeared from the report of the Sheriff that the child when it was received into the institution was nearly starved, and much emaciated, and that the parents were both confirmed drunkards, and lived in great poverty and misery in a wretched room in which there was little or no furniture. The Court being satisfied that the welfare of the child would suffer if it were restored to its parents, in the special circumstances of the case *refused* the prayer of the petition.

1ST DIVISION.
M.

ON 19th December 1887 John Markey, ship-rigger, Leith, presented a petition to the First Division in which he prayed the Court to find that he was entitled to the custody of his child, John Markey, and to ordain James Colston and Others, the directors of the Edinburgh and Leith Children's Aid and Refuge, to deliver up the child to him.

He stated "that the petitioner, in consequence of domestic affliction, in or about the month of February 1887, applied to the directors of the

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Edinburgh and Leith Children's Aid and Refuge, and Miss E. M. Stirling, founder and honorary superintendent thereof, for the temporary admission of his son, John Markey, an infant aged ten months, to the Homes of the said institution, which was agreed to, and his said son was thereupon received into the Home of the said institution situated in High Street, Edinburgh, and the said directors and the said Miss Stirling undertook his safe custody during his residence there.

"The petitioner, being desirous of resuming the custody of his said son, has frequently applied to the said directors and Miss Stirling to deliver up the said child to him, but they have refused to do so."

The directors lodged answers, in which they stated:—"1. Early in the said month of February 1887, the petitioner applied at the respondents' Shelter for Children at 150 High Street, Edinburgh, for the admission into the respondents' said Shelter of his infant son John Markey, stated by him to be fourteen months old. The petitioner stated to the nurse to whom he applied, that the child had been much neglected, and that it had been fed on whisky. The respondent Mr Young went to see the child, to ascertain if it was a fit subject for admission to the Refuge. He found it had been shockingly neglected, and he reported that it seemed to be in a dying state. In consequence of this report, and in the absence of suitable accommodation for such cases, the petitioner's application was refused, . . . 2. Later in February the petitioner again applied for the child's admission. He stated that he had made no previous application, when it was pointed out to him that the child had been already refused admission; and he at last confessed that he was the same man who had previously applied. He then urged that the case was even more necessitous than it had been before. He said that his wife was behaving worse than ever; that she had sold her children's clothes for drink, that she had been seven days in prison for assault and breach of the peace, and that after coming out of prison she had deserted him. He also stated that, owing to his employment on the Forth Bridge, he was obliged to be away from his house from early morning till evening, and that the child was left all day on the floor of the house to look after itself. This account was substantially confirmed by a neighbour, Mrs Murray, who also pled for the child being taken into the Home. According to her account, the mother of the child was sometimes out all night in the streets carrying the child with her, and she stated that the child at such times had hardly any clothing to protect it from the severe winter weather prevailing at the time. 3. In these circumstances, the respondents agreed to receive the child into the Shelter for Children, 150 High Street, Edinburgh. Before the child was received a form of application for its admission was signed by the petitioner, which is produced herewith and referred to. The information contained in the said form was obtained from the petitioner. These entries are referred to, and in particular the eleventh entry, which is as follows:—'(11) State circumstances connected with child causing this application.—Mother in prison, and father goes out all day, and has no one to look after the child.' 4. The respondents had no means of ascertaining whether the statements made by the petitioner and the said Mrs Murray were correct. They believed them to be true, and they were amply corroborated by the appearance and conduct of the child when admitted. It bore all the appearances of the grossest neglect. The certificate of the nurse who received it, written at the time, is as follows:—'I hereby certify that I have stripped and examined the child referred to above, and find it very delicate, and sore on arm through neglect. C. Malloch, nurse.' She now states 'that it was a perfect skeleton, bones nearly through; and that it was ravenous for food.' When admitted, it had absolutely no clothing whatever, and was covered only by an old dirty shawl lent by the said Mrs Murray, which was returned to her when the child was left under the respondents' charge. 5. The petitioner subsequently signed a form of application for the child's admission to the respondents' Homes. The Shelter above referred to is intended for the temporary relief of urgent cases. The Homes are for the reception of children for lengthened periods. Of this the petitioner was well aware when he signed the form of application last above mentioned, which is produced and referred to. The petitioner's application was acceded to by the respondents, and the child was sent to the respondent's Home at Merleton, Wardie, on 25th February 1887. 6. When the petitioner first applied to the respondents, and all through his subsequent dealings with them, he led them to believe that he desired them to take the entire charge of his child, and to act towards it in such a manner as seemed to them best fitted to promote its interests. They understood that not only was he unable to take charge of the child, but that owing to his wife's habits and other circumstances, he saw no prospect of being able to look after it in the future. In accordance with an agreement endorsed on the form of application, second above mentioned, he undertook to pay to the respondents 2s. 6d. per week for the child, but he only paid altogether a sum of 5s. The petitioner is at present due for the board of the child £6, 10s. to the respondents. 7. The child was kept at Merleton from 25th February to about 12th April, when, in consequence of an outbreak of measles at Merleton, it was removed to Beattock, where Miss Stirling was in the habit of boarding children in their weaker condition. On 26th April it was taken by Miss Stirling, along with other children, to Nova Scotia. In Nova Scotia, in the neighbourhood of Aylsford, King's County, Miss Stirling has purchased a farm, on which she has erected, and maintains, under suitable management, a house where children, destitute and neglected in this country, are sent out. These children are placed in suitable homes in Nova Scotia, and a prospect of comfort and usefulness is thus opened to them which would be impossible in this country. Shortly after the child had been taken to Merleton the father called, accompanied by his wife, and was taken into the house and shewn the child. He then expressed himself as satisfied as to the care that was being taken of the child, and said that he was leaving Edinburgh in search of work, and had come to bid it good-bye. The petitioner called once again to inquire after the child, and his wife also called on two other occasions. They left no address, and the respondents were thus unable to communicate with them before removing the child from Merleton, but in the interests of the child's physical and moral wellbeing, and in the exercise of the discretion which the petitioner had expressly committed to them, the respondents resolved to send the child to Nova Scotia. During the period of its residence in the Shelter and at Merleton, the child rapidly improved in health, and it has continued to thrive during its residence in Nova Scotia, the climate of which is well suited for its constitution. The petitioner's wife called, after the child had been in the course of last summer taken to Nova Scotia, at the High Street Shelter, and was informed as to the child's then residence. (8) The respondents submit that, in the circumstances, they were justified in the whole proceedings taken by them relative to the said child, and that they are not bound to bring the child back from Nova Scotia and deliver it to the petitioner. So far as they can ascertain, the petitioner is in no better circumstances to secure proper attention and care for the child than he was at the time when it was handed over to the respondents. In Nova Scotia the child is comfortably fed and clothed and

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housed. In due time it will be suitably educated, and no difficulty will be found in obtaining for it remunerative employment. The children are in great demand among farmers and others, by whom they are brought up to their own business. On the other hand, the respondents believe and aver, that if the child is brought back, it will be deprived not only of the comfort and health which it is at present enjoying, but of its prospects of happiness and usefulness for the future. But if the Court should be of opinion that the petitioner has not lost his technical right to obtain the custody of the child, the respondents maintain that the petitioner, through the statements made by him to them, and his failure to pay for its support, has been himself the cause of all that has taken place, and that payment by him of the child's board, and of the sum necessary for bringing the child home from Nova Scotia, ought to be made a condition precedent to the granting of the prayer of the petition."

On 3d March 1888 the Court remitted to the Sheriff of the Lothians to inquire into the circumstances of the petitioner, and into the matters of fact averred in the answers, and to report.

On 16th March 1888 the Sheriff (Crichton) reported as follows:—"The statements of fact contained in the answers are substantially correct. The petitioner, however, denied that when he applied for admission for his infant son to the respondents' shelter he informed Catherine Malloch, the matron, that his wife was in prison. He also stated that when he signed the application for the admission of the child to the respondents' Home, he thought it was only to be there temporarily, and until his wife should, as he expressed himself, 'get back to her natural senses.' He added that he understood it was a sort of nursery where he could go and get back his child when he liked. On the other hand, Catherine Malloch stated that the conditions were fully explained to him, and that he expressed his thankfulness at the prospect of the child being well cared for, as he would never see his wife again. On one occasion when he called at Merleton to bid good-bye to the child, he said he was satisfied the child was well taken care of, and that, above all things, it was to be kept from its mother. Miss Stirling admitted that she made no inquiry regarding the petitioner's address before the child was taken to Nova Scotia. I think it right to say that the statements of the petitioner and his wife cannot be relied on, as I found them, in regard to several particulars, untruthful.

"On Thursday, the 8th of March, I visited the house occupied by the petitioner and his wife at No. 5 Queen Street, Leith, where they have been residing since May 1887. It is a single room situated at the top of a land of four stories, and at the end of a passage in which there are several tenants. It is about 9 or 10 feet in length, and about the same in breadth. The ceiling slopes to the front, where it is only about 2 or 3 feet from floor. The part a person can stand upright in is about 6 feet high and 4 feet broad. The only articles of furniture in the room are an old iron bedstead, on which there is some straw in a very dirty packsheet ticking, but no bedclothes; a small form upon which two people could sit, and two small pails or tubs. Markey and his wife were in, also two of his children, girls, one aged six, the other eight. He said he was employed at the Forth Bridge, but had been off work for ten or eleven weeks in consequence of an accident. He had resumed work on Friday, the 2d March, but he had not been at work on Monday or Wednesday, and had missed the boat that morning. He can earn from 18s. to 22s. a-week. He said that as soon as he had earned a few weeks' wages he intended to remove to a better house. I was surprised to see the two children living in such a miserable place in such good health, but I afterwards ascer-

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tained that since the month of December they had been living at the Emigration Home for destitute children at No. 6 Lauriston Lane, under the name of Murray, and had only been brought home that morning. When he was disabled in consequence of the accident he received from the Forth Bridge Company 10s. per week. He also received from a charitable society 2s. a-week.

"The police informed me that they had visited petitioner's house on the 3d of January 1888, which they described as one of the most wretched dens they had ever seen. They found Mrs Markey very much under the influence of drink, and the petitioner lying on a shakedown in a corner, just awakened out of a drunken sleep. There was no bedstead in the room. Mrs Markey spoke to them in the most coarse and filthy language.

"I have ascertained that both the petitioner and his wife are persons of extremely intemperate habits. A Mrs Grubb, who resides at Queen Street, Leith, said she could not say she had ever seen them sober. When Mrs Markey had money she would be three or four times every day in the grocer's or publican's getting drink, which she took to her house. When she was unable to go herself, her children were sent for it. The children were allowed to go about in the coldest weather with only one garment, and without shoes or stockings, or any covering for the head. The petitioner and his wife make it a matter of general talk that they will make money in consequence of their child having been taken away from them."

On resuming consideration of the petition with the report, the Court ordained the respondents, *ante omnia*, to bring the child within the jurisdiction of the Court before 15th May.

This having been done, the petitioner moved that the prayer of the petition should be granted.

Argued for the petitioner;—The circumstances here were not such as to induce the Court to interfere with the legal rights of the parent. It was always a question of circumstances whether the Court would so interfere.[1] There were no averments here that the child would suffer physical hurt if it were given over to the charge of the petitioner. The father's right to the child was absolute.

Argued for the respondents;—The circumstances here were very strong, and shewed that the child would suffer both morally and physically if restored to the father. The Court ought to consider both the moral and physical welfare of the child.[2]

In answer to the Court, counsel for the petitioner stated that he could not point to any material change of circumstances since the date of the Sheriff's report, with this exception, that the petitioner was now regularly employed on the Forth Bridge works.

At advising,—

LORD PRESIDENT.—This is a petition by a workman, describing himself as a ship-rigger, for the recovery of the custody of his infant child. The right of the father to the custody is beyond dispute, but when it is necessary to bring a petition for the recovery of a child, that of course leads us to inquire how the custody was lost. On that point we have before us very full information. It appears that in February 1887 the petitioner applied to the respondents, who are the directors of an institution for children's aid and refuge, and asked them to take the child into their custody, and relieve him from further care of it, subject only to a small payment. The child was then ten months old. The respondents took the child, and they now resist the prayer of the petition on the ground that the petitioner is not fit to take charge of his child, and that his wife is still less so, and that delivery of the child to its parents would involve danger to its life.

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[1] Sutherland v. Taylor, Dec. 22, 1887, *ante*, p. 224.

[2] Sutherland v. Taylor, *supra;* Kennedy v. Steele, Nov. 16, 1841, 4 D. 12, 14 Scot. Jur. 4.

This is rather a singular kind of case, and we have given it our most serious consideration, and applied our minds to it carefully. The result at which I, and, I believe, your Lordships, have arrived is that the prayer should not be granted. The petitioner at the time that the child was delivered over to the respondents was living in a most wretched apartment in Leith. He was employed, when in work at all, at the Forth Bridge works, and was absent all day. He could not therefore take any charge of the child, and it was very natural that he should avail himself of this charitable institution. But further inquiry has shewn that the petitioner and his wife were in a state of extreme poverty, and that they were both of confirmed intemperate habits. In consequence this child and the other children of the family were allowed to go about half-clothed, their clothes having been sold for drink. The inquiry made by the Sheriff has resulted in bringing these facts to our notice.

Now, without going into the somewhat revolting details set forth in the Sheriff's report, I shall merely say that it seems to me that the health, indeed the life of this child, would be placed in great danger if we ordered that he should be delivered to his parents. It may be thought somewhat surprising that people in the condition of the petitioner and his wife should wish to have the child back, but we have a trace at least of a motive in the Sheriff's report, and it is to make money by trading on the charitable feelings of the respondents. The Sheriff states that he discovered this from their neighbours, and that being the only motive that is disclosed, I am inclined to believe that it is the true one; but apart from that I think there is sufficient evidence to justify us in refusing the prayer of the petition.

Lord Shand.—It is without doubt a serious thing to refuse to give a child of tender age into the custody of his parents (for I think we may take it that both the father and mother wish to have the child restored to them), and notwithstanding the flagrant circumstances of the case, I have felt the question to be attended with difficulty; but after full consideration I have come to the conclusion that the Court ought in the special circumstances of the case to refuse the prayer of the petition. In recent cases, which have for the most part occurred in questions under the Conjugal Rights Act, it has repeatedly been laid down, both here and in the House of Lords, that the interest of the child is the primary consideration for the Court, and I cannot doubt that here that interest clearly demands that the application should be refused. It must be observed that it is not proposed in this case to take the child from the custody of his parents; he was voluntarily given into the charge of the respondents, and they have provided him with a home and comforts. The father says he intended the arrangement to be merely temporary, but the whole circumstances narrated in the answers, and verified in the Sheriff's report, shew that that was not really in his view, but that it was intended that at least for a considerable time the charge of the child should be given up to the institution. If there were

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anything in the circumstances to shew that if the child were restored to its parents his interests would not suffer, I presume the petition would be granted; but, on the other hand, I think it is clear that if it is shewn that danger to the life or health of the child would follow, then the Court ought to refuse to give him back. Now, it is, I think, proved that the child when given to the respondents was in a wasted condition, and in a very emaciated state, and was indeed reduced almost to a skeleton. He was ravenous for food, and had only a shawl on to cover him. It was proved that the child was in an extremely delicate state of health, and that the father had no home to offer him, and if the Court be satisfied that it would be dangerous to restore the child, we should undoubtedly refuse the petition. The only difference now is that the child has been restored to health. Comforts and clothes have been given to him, but the report of the Sheriff shews that though the child is now healthy, the immediate result of restoring him to his parents would be that his health would inevitably suffer—that he would be starved, and his clothes would be taken away. The parents occupy a wretched room, in which there is no furniture, not even a bed; it is proved, too, that they are both confirmed drunkards, and that the mother is in the habit of taking the children's clothes and pawning them. In the whole circumstances, and looking to the paramount consideration of the welfare of the child, I think the application should be refused.

LORD ADAM.—I am satisfied that to give up this child to its father would certainly result in injury to its life or health, and therefore I have no hesitation in concurring with your Lordships.

LORD MURE was absent.

THE COURT refused the petition.

W. R. RODGER, Solicitor—R. C. GRAY, S.S.C.—Agents.

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LORD ELIBANK AND OTHERS (Lord Elibank's Trustees), Pursuers.—
Sir Charles Pearson—Low.
REV. JOHN HART (Minister of Aberlady), Defender.—*Murray.*

Teinds—Subvaluation—Dereliction.—Mere lapse of time is no bar to a subvaluation of teinds being approved, the right to obtain approbation being *res meræ facultatis.*

A subvaluation of teinds will not be held to be derelinquished unless there is evidence of an intention to abandon it.

Overpayments of stipend will not be evidence of the abandonment of a subvaluation if it appear that at the time of the overpayments the heritor making them was ignorant of the existence of the subvaluation.

In a process of approbation and valuation raised in 1886 for approbation of a subvaluation dated in 1630 it appeared that the pursuer and his predecessors had made large overpayments under successive localities since 1791, but that they had been ignorant of the subvaluation till 1885. *Held* that as the overpayments of stipend had been made in ignorance of the subvaluation, they did not shew an intention to abandon the subvaluation, and did not infer dereliction, and that the pursuer was entitled to decree of approbation, under reservation to the minister of such rights as he had acquired by prescription or otherwise to stipend, in excess of teind, as valued in the report of the subcommissioners.

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TEIND COURT.
Teind Clerk.

LORD ELIBANK AND OTHERS, trustees under a trust-disposition granted by his Lordship, brought in 1886 a process of approbation and valuation of the teinds of the lands of Ballencrieff (with certain exceptions), and of the lands of Lochiehill, lying in the parish of Aberlady. The defenders called were Lord Wemyss, titular of the teinds of the parish, and the Rev. John Hart, minister of the parish.

The pursuers averred that the teinds of these lands had been valued by the Subcommissioners for the Presbytery of Haddington in 1630; that the existence of the subvaluation first came to their knowledge, and to that of the other heritors of Aberlady, in the summer of the year 1885; that there was no mention of it in any of the processes of augmentation of the stipend of the parish; that its existence had been unknown to the predecessors of the pursuers and other heritors; and that the teinds in question had for a long time been believed to be unvalued.

The titular did not appear.

Defences were lodged for the minister, in which he stated that under localities of 1791, 1807, 1823, approved final on 30th June 1824, and locality of 1865, approved final in 1868, payments of stipend had been made in excess of the subvaluation, and pleaded;—The subvaluation sought to be approved of having been derelinquished by overpayments, the defender ought to be assoilzied, with expenses.

In answer to the pursuers' condescendence the minister, *inter alia*, averred,—"Not known that the pursuers' predecessors were misled as alleged. On the contrary, it does not appear, and it is not averred, that either Lord Elibank, or his agents, or his predecessors, or their agents, ever examined the report of the subvaluation and copy thereof in the Teind Office, or made any inquiry there about them, to ascertain whether their lands in the parish of Aberlady were valued or not until 1885, when the same information on the subject was obtained which might have been obtained nearly a century and a-half previously."

A proof was led before a commissioner. The following facts were established.

The pursuers had no heritable right in their teinds prior to 1870.

There had been augmentations of the stipend of Aberlady in 1673, 1733, 1791, 1806, 1824, and 1865.

Prior to the augmentation of 1791 the amount of stipend which was localled on the lands in question was less than the teind, according to the subvaluation.

The augmentation, however, of 1791, in which an interim locality was approved on 6th February 1792, changed this. The proportion of stipend localled by that interim locality on the lands in question exceeded their teind as valued in the subvaluation by £23, 9s. 5d.

After the augmentation granted in 1806 another scheme of locality was made up, and by interim locality, dated 1st January 1808, there was localled on the lands in question a proportion of stipend exceeding by £58, 3s. 4d. the teind in the subvaluation.

In 1824 the rule of payment thus existing was altered in consequence of the new augmentation of that year. The interim localities of 1792 and 1808 were rectified, and the whole augmentations then granted were localled upon Lord Elibank's lands, since the other heritors had heritable rights to their teinds and he had not. The augmentation granted in 1824 was also laid upon his lands, and the proportion of yearly stipend laid thereon exceeded the valued teind according to the subvaluation by £207, 5s. 6d.

In 1865 there was a further augmentation. It was also localled upon Lord Elibank's lands. The result was that there was localled upon his lands from and after that year £293, 13s. 5d. more than the teind as valued in the subvaluation.

The locality of 1865 was in operation when this action was raised in 1886.

With regard to the question whether the pursuers might have been aware of the subvaluation, it appeared that it was contained in a bound book of valuations by subcommissioners which had been for over a century in the Teind Office. This book contained the valuations of many other parishes in different presbyteries, and counties, such as Haddington, Elgin, Linlithgow, Meigle, Peebles, Cupar-Fife, &c., about fifteen in all.* There was also in the Teind Office what appeared to be a copy or duplicate of this book, but with the peculiarity that it did not contain the report relating to Aberlady. The pursuers endeavoured at the proof to shew that on inquiry at the Teind Office as to the teinds in the presbytery of Haddington the latter book would probably be shewn, but this averment was not established.

The teind records were, at least in part, carried to London by Cromwell in 1649. After the Restoration it was directed that they be retransmitted to Scotland, and they were despatched in hogsheads for that purpose. The vessel bringing them suffered shipwreck, but they were in part recovered and lay in hogsheads in the Laigh Parliament House for many years. In 1744 Lord Monzie, one of the commissioners, moved the Court of Teinds to remit to a committee of Judges to inspect the book of subvaluations. These Judges reported in 1745, and some years thereafter the book of subvaluations was removed from the Laigh Parliament House and placed in the custody of the Teind Clerk.

In order to shew that their predecessors were ignorant of the subvaluation, the pursuers founded on letters written by and for the Lord Elibank who was in possession at the time of the augmentation in 1791. Letters of 15th and 22d May 1791, by Lord Elibank to his agent, Andrew Hamilton, W.S., shewed his intention to oppose the augmentation on the ground that it was not necessary and that he paid a large sum already for stipend. It appeared also from these letters that there was an impression on the part of his Lordship and his advisers that a valuation had been led in a predecessor's time. In December 1791 his local agent, Mr Fraser, Haddington, wrote to Mr Hamilton this letter:—"D. Sir,—I am just now favd. with yours, and have to inform you that Mr Dudgeon is positively certain that Pat Lord Elibank got his teinds valued about or a little more than twenty years ago; and adds that all the tenants were examined upon their rents. Also that he, Mr Du., delivered a message at that time from Lo. E. to the late Earl of Hopetoun, advising him to follow the example, otherways that some day or other his Ldp. or his heirs would repent it. The exact period may be learned from the late Mr Mitchelson's books. I daresay Mr Anderson, his son-in-law, will be obliging enough to communicate any information in his power about it. It was handed down to the late Lord as a perfect matter of fact that the teinds had been valued. Whether you shall get a key to the exact period or not, I certainly think it right to make the search, and I think it must have taken place in 69, 70, or 71, or thereabouts.—I am, D. Sir, your most obdent. servt., ALEX. FRASER."

Argued for pursuers;—In order to the sustaining of a plea of dereliction there must be materials for the inference that the heritor knew of

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* The Teind Clerk recently obtained leave to split up this volume and bind the valuations of the different presbyteries separately.

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the right which he was said to have derelinquished.[1] Dereliction, like homologation, was founded on consent. It was proved that Lord Elibank and his predecessors did not know of the subvaluation. In the cases of *Airlie* and *Fogo*[2] the Court proceeded on the assumption that the heritor knew of the valuation. The mere fact of overpayment would not infer an intention to derelinquish a subvaluation. A very large overpayment was rather to be referred to ignorance of right than to an intention to derelinquish.

Argued for defender;—A use of overpayment was to be attributed to an intention to derelinquish. The fact of overpayment was the evidence, and in many of the cases the only evidence, from which the law presumed dereliction. The case of *Alexander*, as the report in the Jurist shewed, turned on a question of *res judicata*, not on the merits of a plea of dereliction. The only *dictum* applicable in the case was that of Lord Cuninghame, who said that there was there "sufficient to infer dereliction in any ordinary case." That *dictum* was favourable, therefore, to the defender. In *Richmond* v. *Officers of State* the Judges said that the knowledge which would found the plea must be either "proved or presumed." In *Smollet* v. *Simpson* there had been no overpayment under a final locality, the overpayments made had been very small, and they had occurred by reason of the use of a particular standard. The point of *Fogo's* case was that there was no fact proved but the fact of overpayment.[3]

At advising,—

Lord Adam.—This is an action of approbation and valuation at the instance of the trustees of Lord Elibank, of a subvaluation of the teinds of their lands of Ballencrieff and others, situated in the parish of Aberlady, against Lord Wemyss, the titular, and the Rev. John Hart, the minister of the parish. The only defence stated against the approbation is by the minister, who pleads that the subvaluation has been derelinquished by overpayments.

The subvaluation in question is dated 10th May 1630, and by it the teinds of the pursuers' lands are valued as therein set forth.

Augmentations of stipend in the parish were granted in 1673 and 1733, but as the proportion of the stipend then allocated on the pursuers' lands was less than the amount of teinds as valued in the subvaluation, it is unnecessary further to refer to them.

But in 1791 another augmentation was granted, when by interim locality, approved on 6th February 1792, the proportion of stipend localled on the pursuers' lands exceeded the valued teind by the sum of £23, 9s. 5d.

This continued to be the rule of payment down to 1806, when another augmentation was granted. By interim locality, dated 1st January 1808, the proportion of stipend localled on the pursuers' lands exceeded the valued teind by the sum of £58, 3s. 4d.

This continued to be the rule of payment down to 1824, when another augmentation was granted. The previous interim localities of 1792 and 1808 were then rectified, and the augmentations, which had by the interim localities been proportionally localled on the whole lands in the parish were now laid upon the pursuers' lands, the other heritors having heritable rights to their teinds, while Lord Elibank had not.

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[1] Earl of Kinnoull v. M'Donald, June 7, 1826, Shaw's Teind Cases, 105; Richmond v. Officers of State, July 19, 1871, 9 Macph. 1020, 41 Scot. Jur. 539; Alexander v. Oswald, Nov. 13, 1840, 3 D. 40, 12 Scot. Jur. 280; Smollet v. Simpson, June 22, 1885, 12 R. 1150.

[2] Airlie v. Ogilvie, Nov. 10, 1837, 16 Shaw, 63; Fogo v. Colquhoun, Dec. 6, 1867, 6 Macph. 105, 40 Scot. Jur. 67.

[3] See also Ersk. ii. 10, 34; Heritors of Blairgowrie v. Officers of State, Feb. 8, 1797, M. 15,771; Commissioners of Annexed Estates v. Menzies, 1773, M. 7860.

The whole of the augmentation granted in 1824 was also localled on the pursuers' lands, by which the proportion of stipend laid thereon exceeded the valued teind by the sum of £207, 5s. 6d.

This continued to be the rule of payment down to 1865, when another augmentation was granted which was also localled wholly on the pursuers' lands, making the excess of payment £293, 13s. 5d., and that continues to be the rule of payment down to the present time.

As to the fact, therefore, that large overpayments have been made by the pursuers and their predecessors, and continued for a long period, there can be no doubt. And the question in this case appears to me to be whether it is to be inferred from that fact, and from that fact alone, that the subvaluation has been derelinquished, for, so far as I am aware, the defender does not found on any other fact or circumstance as shewing, or tending to shew, that the subvaluation has been derelinquished.

Now, with reference to the law applicable to this case, I do not think that it is necessary to refer to any older decision than that of the *Locality of Kinnoul* (Shaw's Teind Cases, 105) in 1826, because it appears to me that the earlier decisions were considered in that case, and the principles stated which have since ruled such cases.

To the details of that case it is unnecessary to refer, but in giving judgment, Lord Balgray says,—"It is also important to attend to the principle on which dereliction rests. It differs from prescription, being founded on the consent of the party, and is very nearly the same with homologation. But it is an established rule that a party cannot be held to homologate a right unless he be in the complete knowledge of it, and I think that the same rule should apply to dereliction, and, therefore, that the Court has gone too far in holding slight overpayments to imply dereliction."

Lord Robertson, who I believe has always been considered a great authority in teind law, says,—"The only right which a subreport confers on an heritor is to get decree of approval of it. It is not lost by time alone, being *res meræ facultatis*. But if before he applies for approval he has abandoned the subreport, he cannot ask decree of approval. In considering however whether there has been abandonment, we must have clear acts indicative of the fact."

Lord Alloway says,—"I consider dereliction to be the same in point of principle as homologation, except that they act in opposite ways. In judging whether there has been homologation or not, you must look to the *animus* as well as the fact, and the same must be done in regard to dereliction or abandonment; we must see that there is a clear intention to derelinquish."

The Court in that case held that there had been no derelinquishment, and it appears to establish that there must be a clear intention to abandon the subvaluation, and it follows that there can be no intention to abandon a right without, as Lord Balgray says, a distinct knowledge of it.

In the case of *Richmond* v. *The Officers of State* in 1871, Lord Gifford thus stated the principle,—"It may perhaps be gathered as the result of all the cases that dereliction is not easily to be inferred, and if the acts inconsistent with the subvaluation can be reasonably explained, they will not have the effect of destroying the subcommissioners' report. In truth dereliction is not so much a

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question of law as a question of fact, depending upon the special circumstances of each case, the question of fact in each case being,—Has the heritor with or without precise knowledge of the subvaluation, deliberately elected to hold that the teinds of his lands are unvalued? If it is clear in point of fact he has so elected, then the subvaluation has been derelinquished. If the heritor has not so elected then the subvaluation has not been derelinquished. If the heritor has not so elected, he may still recur to the subvaluation, even although he may have submitted to some burdens, to which in strictness he is not liable."

Your Lordship and Lord Deas concurred with Lord Gifford. Lord Ardmillan says,—"On the plea of dereliction I have only a word to say. I think the law is well and clearly stated by Lord Robertson in 1826." He then quotes the passage I have already quoted from the *Kinnoull* case, and adds, "Overpayment may be sufficient to instruct abandonment. But that which must be clearly indicated is not the overpayment, which must be proved, but the abandonment, or, in other words, the intention to abandon must be clearly indicated by the overpayment. This necessarily introduces into the question the element of *animus* or intent,—not indeed as an element to be separately proved, but as an element to be indicated, or to be ascertained, by fair implication from the facts. I think that the tendency of recent jurisprudence is to limit the application of the plea of dereliction."

The last case, which has occurred on the subject is, I think, that of *Smollet* v. *Simpson* in 1885, in which your Lordship said in an opinion which was concurred in by the Court,—"Is it possible to deduce from this an intention to abandon the subvaluation? The heritor did not know that he was paying more in money than he was bound. No doubt he did not investigate the circumstances, but mere negligence—if that can be called negligence—is not sufficient to infer dereliction, for there must be a distinct intention on the part of the heritor to abandon the subvaluation."

These authorities establish that there must be a distinct intention on the part of the heritor to abandon the subvaluation, or in other words, he must have elected to abandon it.

Now, it appears to me that an heritor cannot elect to abandon a subvaluation if he did not know of its existence. The mere fact that overpayments have been made can never *per se* prove that the heritor elected to abandon the subvaluation, because it can never prove that he knew of the subvaluation. But if it be proved, or is to be presumed from facts and circumstances, that he knew of the subvaluation when making the overpayments, then it will be presumed that he had good reason for not producing and founding on the subvaluation, because it is not to be supposed that a man will make payments against his own interest. In the earlier cases of dereliction, in which the overpayments had been made, not many years after the date of the subvaluation, and before the records were carried away by Cromwell in 1649 or 1650, it was a reasonable presumption that an heritor must have known whether or not his teinds had been valued, and, accordingly, the controversy in these cases did not turn upon that point, but whether, assuming the heritor's knowledge, the overpayments could be explained or accounted for consistently with the heritor's having intended to maintain his valuation, it being contended on the one side that the overpayments were so insignificant in amount as not to warrant a presumption that the overpaying heritor intended to abandon his valuation; and, on the other, that the overpayments were such, in character or amount, as necessarily to infer that he intended

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to do so—for it was said that no man would voluntarily make overpayments without a good reason, and the reason commonly pleaded was that the heritor was sensible that valid objections lay against the valuation, which could easily have been substantiated if the report had been produced at an earlier period.

We know also, as matter of history, that in many cases heritors thought that their teinds were estimated beyond their value, whether originally or in consequence of the fall in the value of land which had taken place during the troubles, and for that reason also abstained from producing their valuations.

For such or similar reasons accordingly, it was decided that overpayments of a considerable amount, and continued for a lengthened period, presumed dereliction of a subvaluation, a principle appropriate and applicable to that class of cases.

But it appears to me that such reasons have no application to overpayments made, as in this case, for the first time in the year 1791, and in which the question is whether at the time of making the overpayments the heritor knew of his valuation.

Knowing what we do of the history of the teind records, that they were in part carried away by Cromwell, suffered shipwreck on their way back, were partially consumed by fire in 1700, and lay in hogsheads in the Laigh Parliament House for nearly 100 years—practically inaccessible to the public—would it be reasonable to presume, in such circumstances, that an heritor whose teinds had been valued in 1630, must have known of that fact in 1791? I do not think that it would. But if that presumption be not made in this case I know of no other presumption, or of any fact or circumstance tending to shew that the heritors, when they made the large overpayments in 1791, and subsequently, knew of the valuation.

It appears to me that the presumption arising from these large overpayments, rising from £23, 9s. 5d. in 1791 to £293, 13s. 5d. in 1865, is directly the other way. It is not in accordance with human experience that a man should voluntarily take upon himself such a burden. But, indeed, the burden which Lord Elibank then undertook, if he abandoned his valuation, was not limited to these overpayments, because, as he had no heritable right to his teinds, he at the same time made himself liable to the titular in all time coming for one-fifth of his rental. The defender has suggested no reason why Lord Elibank should have desired to abandon his valuation, and I can imagine none. The reasons which might have induced an heritor in earlier times to abandon his valuation did not exist in 1791, and have no place now.

It appears to me that the only possible way of accounting for the overpayments is the simple and natural one, that the heritor did not know of the subvaluation when he made them.

But, farther, the correspondence of 1791—which has been produced—shews that Lord Elibank was very much opposed to the augmentation which the minister was then demanding, and was certainly not at all likely to make any voluntary overpayment for his benefit. But there is one letter which appears to me to prove—were that necessary—that Lord Elibank and his agents did not know of the subvaluation. It is dated 22d December 1791, and is from Mr Fraser, Lord Elibank's country agent, to Mr Hamilton, his Edinburgh agent, and is in these terms,—"Dear Sir,—I am just now favoured with yours, and have to inform you that Mr Dudgeon is positively certain that Pat Lord Elibank got his teinds valued about or a little more than twenty years ago; and adds that all the tenants were examined upon their rents. . . . The exact period may

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be learned from the late Mr Mitchelson's books" (he had been Lord Elibank's agent). "I daresay Mr Anderson, his son-in-law, will be obliging enough to communicate any information in his power about it. It was handed down to the late Lord as a perfect matter of fact that the teinds had been valued. Whether you shall get a key to the exact period or not, I certainly think it right to make the search, and I think it must have taken place in 69, 70, or 71, or thereabouts."

The information thus furnished we know was erroneous, but it seems to be sufficiently clear that the one agent would not have urged upon the other agent a search for a supposed missing valuation, had they been aware of the existence of the subvaluation in question.

Upon the whole matter, accordingly, I am of opinion, not only that no presumption arises from the facts and circumstances proved in this case that Lord Elibank and his successors knew of the subvaluation when the overpayments were made; but I am further of opinion that it is to be presumed, and is proved, that they did not know of it.

It is said, however, by the defender, that the report of the Subcommissioners of the Presbytery of Haddington, including Aberlady among other parishes, has been in the Teind Office for upwards of a century, and has been, during that time, open to the inspection of the heritors interested, and has been examined and utilised by many of them, and it is said that if the pursuers and their predecessors were ignorant of the subvaluation, it is because they did not take the trouble to search the teind records or examine the report of the subcommissioners.

I think it is true that if the pursuers or their predecessors had made diligent search and inquiry they would probably have discovered the subvaluation in question. But, assuming that to be the fact, I am unable to see how it can bar them from pleading in the approbation proceedings the fact—if it be a fact—of their ignorance of the subvaluation and prevent due weight being given to that fact when proved. The minister was in no way prejudiced thereby, although it may very well be that the pursuers will have to suffer from the consequences of their negligence in this respect by having to continue to make the overpayments which they have already made, but that is a question with which we are not at present concerned.

The pursuers, on the other hand, endeavour to account for the subvaluation having escaped the notice of their predecessors by the existence in the Teind Office of an ancient copy of the report of the subcommissioners, which contains the subvaluations of all the parishes except that of Aberlady. This document, they say, was in use to be given out for examination in place of the original, and they suggest that it may have been so given out to the agents of their predecessors, and if so, that it would have misled them into thinking that there had been no valuation of the parish of Aberlady. In the view which I take of this case it is not necessary to consider this matter. I would only remark that there is no evidence that the pursuers or their predecessors or their agents ever did make any inquiry, or consequently that they were ever misled.

On the whole matter, therefore, I am of opinion that there is no presumption that the pursuers, or their predecessors, when making the overpayments, were in the knowledge of the subvaluation. On the contrary, I think that the presumption is that they were ignorant of it,—that, consequently, being ignorant of it, they cannot have elected to abandon it, and therefore that, in law, the

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subvaluation has not been derelinquished, and that the petitioners are entitled to decree of approbation.

The **Lord President, Lord Mure, Lord Shand,** and **Lord Kinnear** concurred.

THIS interlocutor was pronounced:—"The Lords . . . ratify, allow, and approve of the report of the Subcommissioners of the Presbytery of Haddington libelled on so far as regards the lands libelled: Find and declare accordingly in terms of the conclusions of the libel, but reserving to the minister such rights as he has acquired by prescription or otherwise to stipend in excess of teind as valued in said report: Find the pursuers entitled to expenses, subject to modification," &c.

THOMSON, DICKSON, & SHAW, W.S.—JOHN D. DUFF, W.S.—Agents.

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Queensland Mercantile and Agency Co., Limited, v. Australasian Investment Co., Limited.

THE QUEENSLAND MERCANTILE AND AGENCY COMPANY, LIMITED, AND LIQUIDATOR, Petitioners.—*Muirhead—Blair.*
AUSTRALASIAN INVESTMENT COMPANY, LIMITED, Respondents.—*Balfour—Murray—C. S. Dickson.*

Foreign—Arrestments—Recall—Enforcement of order of English Court—Companies Act, 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 122 *and* 123.—A having used arrestments to found jurisdiction, raised an action against a company in Queensland, and on the dependence arrested sums due to the company in the hands of its shareholders in Scotland.

The Queensland Company went into liquidation in Queensland, and subsequently applied for and obtained a winding-up order in London, where it had assets and creditors. The English liquidator then obtained from the Chancery Division of the High Court of Justice an order restraining A from further prosecuting the action in Scotland, but bearing, "this order is to be without prejudice to the security, if any, upon the amounts payable by the Scotch shareholders which" A "has acquired by the proceedings taken in Scotland." The order further directed that the amounts received from Scottish shareholders in respect of a call should be placed to a separate account.

The liquidator then presented to the Court of Session (1) a petition praying for an order, under the 122d section of the Companies Act, 1862, to enforce the order of the Court of Chancery restraining A from further prosecuting the action in Scotland; and (2) a petition for recall of the arrestments.

In answer to the first petition A contended that he should be allowed to proceed with his action in order that the *nexus* created by his arrestment should be made an effectual security by decree, and, in answer to the second, that he was entitled to maintain his arrestments.

The Court *granted* an order restraining A from proceeding with the action, but subject to the orders of the Court, although at the same time they held it to be unnecessary, and *granted* the petition for recall of the arrestments, holding that the terms of the order by the Court of Chancery prevented the respondent from being prejudiced.

Company—Liquidator.—Observed that there is nothing incompatible in the co-existence of a Colonial and of an English liquidation of the same company.

Opinion (*per* Lord Shand) that it was incompetent for the Court to entertain objections to the validity of the order issued by the English Court.

1ST DIVISION.
B.

THE QUEENSLAND MERCANTILE AND AGENCY COMPANY, LIMITED, was a company duly incorporated under the laws of Queensland, Australia, having their registered office in Brisbane in that colony, but they had also a branch office in London. They had no office in Scotland.

In virtue of letters of arrestment *ad fundandam jurisdictionem*, dated 22d February 1887, raised against the Queensland Company, the Australasian Investment Company, Limited, a company incorporated under the

Companies Acts, 1862 and 1883, and having its registered office in Edinburgh, caused arrestments to be used in the hands of J. T. Paton, Alloa, arresting in his hands funds due by him to the Queensland Company.

On 24th February 1887 an action was raised by the Australasian Company in the Court of Session, before Lord Kinnear, Ordinary, against the Queensland Company, concluding for payment of £40,000, or, alternatively, of £20,000.

In virtue of a warrant to arrest contained in the summons in that action, the Australasian Company caused arrestments to be used on the dependence of the action for various sums in the hands of J. H. Balfour, Edinburgh, and others, shareholders of the Queensland Company resident in Scotland, the sums arrested being the amount of calls due by them to the Queensland Company.

A record was made up in the action, but no interlocutor was pronounced disposing of any of the pleas in the action before Lord Kinnear.

On 28th October 1887 an order was made in the Supreme Court of Queensland that the Queensland Company should be wound up under the provisions of the Queensland Companies Act, 1863, and by order of the same Court, dated 18th November 1887, an official liquidator was appointed.

On 14th January 1888, on an application by the Queensland Company, an order was made in the High Court of Justice in England (Chancery Division) that the Queensland Company should be wound up by that Court under the provisions of the same Act; and by a further order, made on 28th February 1888, Mr E. Waterhouse was appointed official liquidator of the company in England.

On 9th March 1888 the Australasian Company applied to the High Court of Justice in England for leave to continue the above-mentioned action in Scotland notwithstanding the winding-up orders that had been made.

Of the same date the Queensland Company applied to the High Court of Justice in England to restrain the Australasian Company by injunction from further prosecuting the action.

After hearing counsel for the companies, the Court (Mr Justice North) did "not think fit to make any order upon the said motion" of the Australasian Company, but in the application of the Queensland Company, on 9th March 1888, pronounced this order,—"That the said Australasian Investment Company, Limited, their solicitors and agents, be restrained from further prosecuting the said action; but this order is to be without prejudice to the security, if any, upon the amounts payable by the Scotch shareholders in the Queensland Mercantile and Agency Company, Limited, in respect of the call made by the last-named company on the 14th day of December 1886, which the said Australasian Investment Company, Limited, has acquired by the proceedings taken by them in Scotland: And it is ordered that, without prejudice to any question between any of the parties claiming to be entitled to the proceeds of the said call made on the 14th day of December 1886, the liquidator do, instead of carrying all such proceeds to one account, as directed by the said order dated the 23d day of February 1888, carry such part of the proceeds of the said call as shall be received from Scotch shareholders to an account to be entitled 'Amounts received from Scotch shareholders in respect of call made on the 14th day of December 1886, on which the Australasian Investment Company claim to have security by reason of the proceedings in the action of the Australasian Investment Company, Limited, v. The Queensland Mercantile and Agency Company, Limited, now pending in the First Division of Her Majesty's Court of Session in Scotland.'"

That order was not appealed against, and became final.

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On 25th April 1888, on the application of the liquidator, the Scottish shareholders of the Queensland Company referred to in the above order were ordained to pay the sums due by them in respect of calls into the Bank of England in terms of the order.

That order was on 7th May 1888 duly registered, and a charge thereafter given to the shareholders in whose hands the arrestments on the dependence of the action in the Court of Session had been used.

On 20th June 1888 two petitions, in which the above facts were stated, were presented to the First Division of the Court of Session at the instance of the Queensland Company and its liquidator.

The first petition was presented under the provisions of sec. 122 of the Companies Act, 1862,* and prayed the Court to "pronounce an order upon the said Australasian Investment Company, Limited, their solicitors and agents, restraining them from further prosecuting the said action at present in dependence in this Court, at the instance of the said Australasian Investment Company, Limited, against the said Queensland Mercantile and Agency Company, Limited."

In the second petition the petitioners prayed the Court to recall the arrestments used on the dependence of the action before Lord Kinnear. In this petition for recall of the arrestments, the petitioners stated:—"That the security, if any, which the said Australasian Investment Company, Limited, have obtained by the use of the said arrestments is amply protected by the terms of the said order of 9th March 1888."

The Australasian Company lodged answers to both petitions. In both sets of answers the respondents stated:—"By the law of Queensland, and of England, and of Scotland, the effect of the orders of 28th October 1887 and 18th November 1887 was to transfer the whole assets, powers, and privileges of the Queensland Company to the official liquidator appointed by the order of 18th November 1887, subject, however, to all existing securities and preferences, and so far as not already legally attached, and especially without preference to these respondents' arrestments, so that it was not after November 1887 competent for the Queensland Company to present the petition to the High Court of Justice, on which the orders of 14th January and 28th February 1888, and subsequent dates, were pronounced, or for the said High Court of Justice to pronounce said orders of 1888; and the said orders of 1888 are illegal, invalid, and inept. The High Court of Justice of England had no power or jurisdiction to pronounce the said orders. These respondents were never in any way subject to the jurisdiction of said High Court.

"For a considerable time prior to the said application being made to the High Court of Justice of England the said Queensland Company had no place of business in England, and had ceased to carry on business in England, and had no assets or creditors in England."

In answer to the petition to enforce the order of the High Court of Justice in England, they further averred;—"These respondents therefore submit that the petition should be refused, in respect the same is incompetent; that the petitioners' averments are irrelevant, and, so far as material, unfounded in fact; and that the whole proceedings in the High Court of Justice in England, and particularly the order now sought to be

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* Sec. 122 of the Companies Act, 1862, enacts,—"Any order made by the Court in England for or in the course of the winding up of a company under this Act shall be enforced in Scotland and Ireland in the Courts that would respectively have had jurisdiction in respect of such company if the registered office of the company had been situated in Scotland or Ireland, and in the same manner in all respects as if such order had been made by the Courts that are hereby required to enforce the same. . . ."

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enforced, are incompetent and invalid, and outwith the jurisdiction of said Court."

In answer to the petition for recall of the arrestments, they further averred;—"If the arrestments are recalled, in terms of the prayer of the petition, these respondents will lose all benefit whatever therefrom.

"These respondents therefore submit that the petition should be refused, in respect that the petition is incompetent; that the petitioners' averments are irrelevant, and, so far as material, unfounded in fact; that the whole proceedings before the High Court of Justice in England were incompetent and invalid, and beyond the jurisdiction of the said Court; and that these respondents, having duly used the said arrestments, the same ought not to be recalled until the action on which they are founded is disposed of, except on caution or consignation."

Argued for the petitioners—(On the petition to enforce the order of the English Court);—They were entitled to have the order of the English Court enforced in virtue of the provisions of sections 122 and 123 of the Companies Act, 1862, just as if it had been an order of a Scottish Court. The English Court had enforced a similar order granted by the Court in Scotland.[1] The Court of Session could not inquire into the merits of the order of the English Court,[2] and further, the respondents were barred from objecting to the jurisdiction of the English Court, as they had voluntarily appeared and made a motion before that Court.[3] The English Courts had on previous occasions granted winding-up orders in the case of colonial companies,[4] under section 199 of the Companies Act, 1862. Here the English was ancillary to the Australian liquidation.

(On the petition for recall of arrestments);—It was necessary to have the arrestments recalled, otherwise the Scottish shareholders could not pay to the liquidator's account, as ordered by the English Court. The arresting creditors' security was fully guarded by the order of Mr Justice North. A like reservation had been recognised in the Scottish Courts in the case of *Benhar Coal Co.* v. *Turnbull.*[4]

Argued for the respondents—(On the petition to enforce the English order);—Under sections 122 and 123 of the Act of 1862 an order was to be enforced in the same manner as it would be made in Scotland. In Scotland the action would have been allowed to proceed, so as to make the arrestments effectual by decree (*Benhar Coal Co.'s* case).[5] They had not prorogated the jurisdiction of the English Courts, as they had merely appeared there in reply to the call of the petitioners. This took them out of the rule of the *Pacific Coast Mining Co.'s* case. The English Court ought not to have granted a winding-up order, as in point of fact this company had no place of business in England, and no assets there.[6] The English cases cited by the petitioners were unsatisfactory, as they were all cases decided by one Judge only.

(On the petition for recall);—The terms of the English order were

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[1] Pacific Coast Mining Co. v. Walker, May 19, 1886, 13 R. 816; and see Weekly Notes, March 26, 1886, p. 63.

[2] Moyes v. Whinney, Dec. 6, 1864, 3 Macph. 163, 37 Scot. Jur. 89.

[3] *Cf.* Weekly Notes, March 1888, p. 62—In report of proceedings of this case in England.

[4] Matheson Brothers, 1884, L. R., 27 Chan. Div. 225; Commercial Bank of South Australia, 1886, L. R., 33 Chan. Div. 174; Commercial Bank of India, 1868, L. R., 6 Eq. 517; Buckley on Companies Acts, 5th ed. p. 407; Lloyd Generale Italiano, 1885, L. R., 29 Chan. Div. 219; and Weekly Notes.

[5] Liquidator of the Benhar Coal Co. v. Turnbull, Feb. 6, 1883, 10 R. 558; New Glenduffhill Coal Co. v. Muir & Co., Dec. 16, 1882, 10 R. 372.

[6] Goetze v. Aders, Nov. 27, 1874, 2 R. 150.

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self-contradictory, as the respondents' preference was thereby made to be entirely dependent on their success in the Scottish action.

At advising,—

LORD PRESIDENT.—The order which is sought to be enforced in the first petition before us is one issued by Mr Justice North in the liquidation of the Queensland Mercantile and Agency Company, Limited, in England; and it has been contended by the respondents that that order ought not to be enforced, because the liquidation in which it was pronounced was not a statutory or valid liquidation. The company was in liquidation in Queensland before the application for the winding-up order was made in London; and that, it is said, precluded the possibility of any such English winding-up order being pronounced. I am in some doubt whether we ought to entertain that question, because we have before us an order of a competent Court of jurisdiction, whose orders presumably, and upon the face of them, are to be enforced in this country; and I doubt whether it is right that we should inquire into the validity of these orders, unless there is something upon the face of them that shews that they are incompetent. But I think it right to say that I have no doubt whatever of the competency of the English liquidation, assuming the facts to be as stated—that is to say, that the Queensland Company had a branch business in London, that they had assets there and creditors there, and shareholders in the country also. It has been contended that the effect of the liquidation is the same as that of a sequestration in making the administration of the estate of the company one and indivisible; but that I think is a mistake. In a sequestration under our statute of 1856 the entire estate of the bankrupt is transferred to the trustee wherever situated, and his title is of a very effective and strong kind; it makes him for the benefit of the creditors the absolute and exclusive proprietor of that estate, fortified by every kind of title that a statute is capable of conferring upon him. And, therefore, in such a case as that, it is quite impossible to say that there can be a second sequestration either in the same country or in a different country from that in which the first has taken place; the whole estate is vested in one person, and it cannot, therefore, become *pro parte* vested in some other person by a subsequent proceeding. But a liquidation is followed by a very different state of matters. The estate of the company is not transferred from the company to the liquidator, it remains vested in the company just as it was before the winding-up order, and the liquidator is a mere administrator of the affairs of the company. He can do nothing in the way of using action or diligence except in the name of the company; and the company never becomes dissolved, and never is completely divested of its estate until the liquidation has come to an end. It may, therefore, very well be, that although there is a winding-up in the colony which would enable the liquidator there to ingather the whole assets of the company, if he can reach them, it may aid him very much in the performance of that duty that there should be another liquidation in England or elsewhere where also the company has been carrying on business. There seems to me to be nothing incompatible in the coexistence of the two. Therefore the suggestion that the English liquidation is invalid and cannot possibly coexist with the Queensland liquidation I think is out of the case.

Then we have to consider this order pronounced by Mr Justice North; and what we are asked to do in the first petition is to enforce the order under the 122d section of the Act of 1862. I confess, my Lords, it appears to me that that is an unnecessary proceeding. The order is made against a

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party who is the pursuer of an action in this country, the Australasian Investment Company, Limited; and that order being imperative he cannot go on with his action. It is he that is restrained, and not the Court, by an order of this kind. No doubt it may be very proper that the existence of such an order should be made known to the Court in which the action which is restrained is going on; and of course the Court in which that action is depending will give immediate effect to the order pronounced in the liquidation, even supposing the pursuer of the action were seeking to go on in defiance of the order. But I think the 122d section is hardly applicable to such a case as that. The 122d section refers entirely to the enforcing of an order. Now, there are many orders pronounced in an English liquidation that require to be enforced in this country. An order for payment of calls is the most familiar of all; but there are a great many others besides that which require to be enforced by diligence if necessary; but merely to repeat this order of Mr Justice North is not, in my opinion, enforcement in any proper sense of the term. However, if it be thought of any advantage to the parties that we should repeat the terms of Mr Justice North's order I am quite willing to do it; subject, however, to the future orders of the Court, because there may arise a change of circumstances which may alter the position and rights of the parties altogether. With that qualification, I am for granting the prayer of the first petition.

In regard to the petition for the recall of the arrestments, I think that is a demand which the Queensland Company and its liquidator are entitled to make in the circumstances; because I am satisfied that the preference which the Australasian Company would have acquired if they had carried their point—which, of course, is not before us—is completely saved by the terms of Mr Justice North's order. He makes this restraining order against the Australasian Company, but under this condition, that it "is to be without prejudice to the security, if any, upon the amounts payable by the Scotch shareholders in the Queensland Mercantile and Agency Company, Limited, in respect of the call made by the last-named company on the 14th day of December 1886, which the said Australasian Investment Company, Limited, has acquired by the proceedings taken by them in Scotland; and it is ordered that, without prejudice to any question between any of the parties claiming to be entitled to the proceeds of the said call made on the 14th day of December 1886, the liquidator do, instead of carrying all such proceeds to one account, as directed by the said order dated the 23d day of February 1888, carry such part of the proceeds of the said call as shall be received from Scotch shareholders to an account to be entitled 'Amounts received from Scotch shareholders in respect of call made on the 14th day of December 1886, on which the Australasian Investment Company claim to have security by reason of the proceedings in the action of *The Australasian Investment Company, Limited*, v. *The Queensland Mercantile and Agency Company, Limited*, now pending in the First Division of Her Majesty's Court of Session in Scotland.'" It is said that this does not save the preference which the Australasian Company would have acquired if they had been enabled to prosecute their action against the Queensland Company, and bring it to a conclusion by a decree, and this is founded upon what is a perfectly sound view of the nature of an arrestment upon the dependence. No doubt an arrestment upon the dependence creates a nexus merely upon the fund arrested, and it does not become an active security by means of which payment can be operated until a decree is pronounced in the action upon the dependence of which the arrestment is used. That is perfectly sound in point of law. But although that be so, it surely is not impossible by arrangement to save such preference without the necessity of the action being prosecuted to a conclusion. That was done in the case of the *Benhar Coal Company* (Feb. 6, 1883, 10 R. 558), and the preference was completely sustained in that case, because the money being set aside to meet the preference, and the debt being subsequently admitted by the liquidator, there was nothing to prevent the preference being given effect to. It is quite true that in that case the company was allowed to go on and take decree in the action upon the dependence of which the arrestment was used; but we were of opinion that that was quite immaterial. I expressed myself in that action in this way,—"It was arranged between the parties by minute that these arrestments should be recalled, on condition, however, 'that any right of preference which the said George V. Turnbull may have established by the use of said diligence shall not be prejudiced, and further, that notwithstanding the said recall the respondent shall have leave to proceed with and prosecute the actions raised by him against the Benhar Coal Company, Limited, on dependence of which the said inhibitions and arrestments were used.' The consequence of this was that we pronounced an interlocutor upon the 17th February 1881, in which we recalled the diligence, but on the conditions contained in the minute which I have just referred to. Decrees are said to have been subsequently obtained by Mr Turnbull, and the date at which this was done, although not mentioned in the papers, is said to have been the 22d February 1882. It does not appear to me, however, to be of much consequence when these decrees were obtained, or even if they were obtained at all, for their only use was to establish Mr Turnbull's claim against the company—a claim which I hold to have been fully admitted —and the question, accordingly, which we have now to determine comes to be whether for these admittedly good debts any preference has been secured by the arrestments on the dependence." Accordingly, we proceeded to sustain that preference, and to decide in favour of the arresting creditor. What occurred in that case was that the arrestment was recalled. Now, after the arrestments were recalled, it is very plain that a decree in the action could never have warranted a furthcoming. The decree in the action could never have given any effect whatever to the recall of the arrestments, and therefore the decree was a mere form,—nothing else,—the debt being admitted by the liquidator. And so I think it is demonstrated that the preference secured by the arrestment on the dependence may, in a question of this kind, be fully and effectually reserved, without the necessity of any further proceedings in the action on the dependence of which it was used, if the claim in the action is either admitted or proved to be good. I am therefore of opinion that the arrestments in this case should be recalled, and that the recall will not prejudice the preference of the Australasian Company, if that preference is otherwise good.

I may mention that the case of the *Glenduffhill Coal Company* is a very good illustration of the way in which such preferences can be reserved. In that case there was a poinding which, of course, proceeded on an execution of a decree; but the poinding creditor was stopped before he had secured his right to the preference. He had poinded, but he had not brought the poinded goods to sale, and he was restrained from doing so, because it was thought that that might be very prejudicial to the general body of the creditors,—a sale under a poinding being notoriously a very bad sale in respect of the compulsory nature of it,—and

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there a preservation of the right of preference was made although the diligence was never carried into execution.

LORD MURE.—I quite agree with your Lordship on both points.

LORD SHAND.—I am of the same opinion. If it had been proper for this Court when called upon to enforce or give effect to the orders of the Court in which this liquidation is going on, to inquire whether that Court had jurisdiction to grant a liquidation order, I should say that it is clear that notwithstanding the subsistence of a liquidation in Queensland there was no reason to prevent the Court in England from having an ancillary liquidation in this country—a liquidation which we see was applied for by the Queensland Company itself in order to assist the liquidation going on abroad. But I am very clearly of opinion that it is not for this Court in Scotland when asked to enforce an order from the High Court of Justice in England to enter upon any inquiry of that kind. I think we must assume that the liquidation proceedings under the Statute of 1862 and subsequent Acts are going on before a Court of competent jurisdiction, and that the order for liquidation has been properly granted by that Court. We know that in this Court it is necessary to a liquidation order that there shall be full advertisement, that there shall be full inquiry whether the company has been carrying on business in this country, and as to everything necessary in order to put the Court in a position to judge whether a liquidation order shall be granted or not. We must assume that similar proceedings go on in England also, and indeed, we have evidence to-day to the effect that that is so. But, my Lord, it appears to me that if we were to give effect to the argument here, —to inquire whether the liquidation has been properly originated, and whether the Court has jurisdiction to grant the order which we are asked to enforce, —this would involve in many cases an inquiry which would really frustrate the purposes of the Act. There is nothing more common than for the Lord Ordinary on the Bills, either in session or in vacation, to be asked to enforce in this country orders for calls which have been issued in liquidations in England, and the suggestion that on each occasion when anything of that kind is done the person against whom the call is to be enforced may come forward and offer objections to the effect that this liquidation had not properly originated in England—that the Court had no jurisdiction—that the liquidation order had been improperly granted or the like, would simply destroy the efficiency of the clauses of these Acts which are intended for the enforcement of orders granted by one Court of this Kingdom in any other part. These are questions to be determined by the Court issuing the order. And so I am clearly of opinion that the objection taken to the present application, that the Court which granted the order had no jurisdiction, is one that cannot be possibly entertained.

Then, my Lord, there remains only the merits of this question. I assume that the Court had jurisdiction in the liquidation proceedings going on before it to grant the orders which are here in question. What are these orders in substance? They are, first, that the action at the instance of the Australasian Investment Company, Limited, against the Queensland Mercantile and Agency Company, Limited, in this Court shall be stayed. Further, that the amount of the calls which have been arrested on the dependence of that action shall be paid into an account in name of the liquidator in England, a special account headed,—"Amounts received from Scotch shareholders in respect of the call

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made on the 14th day of December 1886," on which the Australasian Investment Company claim to have security by reason of the proceedings in the action to which I have referred; and that this payment shall be made without prejudice to the security, if any, upon those calls which the Australasian Investment Company, Limited, have obtained. And finally, there is an order upon the shareholders themselves to pay the amount of these calls into the account in England referred to in the previous order. Well then, the result of these orders is this: The Court desires the action to be stayed, it directs the money arrested to be transmitted to England and paid into an account, and orders that the shareholders shall pay that money accordingly. Now, these orders having been granted, what is the position of the liquidator when he comes to this Court? It humbly appears to me that this Court is merely administrative in what it is doing. I do not think we have any judicial functions to perform. The statute, in section 122, provides that where you have such orders issued by a Court in one part of the kingdom these shall be enforced in the same manner and in all respects as if such order had been made by the Courts that are hereby required to enforce the same. The words of the statute are, "shall be enforced"; practically, that is, shall have the same force and effect as if these orders had been pronounced in this Court itself. In cases where it may be necessary to take steps to enforce these orders as if they had been pronounced by this Court itself, section 123 provides that this Court shall take these steps. Therefore I say it is not for us to review an order which has been granted in England. Even if the order were contradictory, as is here alleged, or if it seemed to proceed upon some erroneous view of the law of Scotland, I am not prepared to say that we could interfere with that order or proceed to review it. It may be that in such circumstances the respondents would be fairly entitled to say to the Court—"There is an error in this order. It is wrong in some respects, and we desire to put it right." In these circumstances this Court might say, "We shall not give effect to the order until you have an opportunity of going back to the Court that issued the order and let them consider that question." But I think this Court is not entitled to refuse to enforce an order because of any views we may have as to whether it was a right or a wrong order. And I should have very great difficulty, so far as I am concerned, in putting the present judgment on any ground which would entitle this Court to refuse to give effect to the clear provisions of the statute, which declares that the order of a Court in England is to be equivalent to the order of a Court in this country. But, my Lord, while I entertain that view, I agree with your Lordship in thinking that the respondents here are in no danger whatever from the orders which have been pronounced. I think the terms of Mr Justice North's first order directing the moneys to be paid into an account in the Bank of England are framed so as entirely to secure any preference they have, and that if they have such preference they will be clearly entitled to make it effectual. On these grounds I am of opinion with your Lordship that we should grant both petitions.

LORD ADAM.—The only difficulty that I have seen in granting the prayer of this petition is this, that it was truly not a prayer asking us to enforce an order, but simply asking us to repeat an order. I do not myself see that the petitioners will be very much in a better position by having the order they ask made; but as they think they will, I really do not see much objection to granting it. As regards the objection to the second petition, as I understand it on

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the merits, it was this, that whereas it was the clear intention of the Judge in the High Court in England who made the order restraining from further procedure to preserve intact the security which might have been acquired by the respondents, the effect of stopping the action here and recalling the arrestments would be *de facto* to destroy that security which the Court in England meant to preserve. It was said that was inconsistent, and therefore that the letter of the order should not be granted. If I thought there was anything in that, it might be worth further consideration, but I perfectly agree with your Lordship that, protected as the order is by the language used in it, the security will not be impaired in the least by the money being handed over and paid into the particular account directed by the order; and therefore I am for granting the prayer of that petition also.

THE COURT pronounced these interlocutors:—

(In the petition to enforce order)—"Restrain the respondents, the Australasian Investment Company, Limited, from further prosecuting the action at present in dependence in this Court at the instance of that company against the petitioners, the Queensland Mercantile and Agency Company, Limited, and decern, but subject to the orders of Court."

(In the petition for recall of arrestments)—"Recall the arrestments raised by the respondents against the petitioners, and decern."

BLAIR & FINLAY, W.S.—DAVIDSON & SYME, W.S.—Agents.

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July 18, 1888.
Leith v. Leith.

MISS GEORGIANA LEITH, Petitioner (Respondent).—*Jameson—Murray.*
GENERAL ROBERT W. DISNEY LEITH, Respondent (Reclaimer).—*Cheyne.*

Entail—Improvement expenditure—Extent of right of legatee of heir of entail to charge entailed estate—Entail Amendment (Scotland) Act, 1875 (38 *and* 39 *Vict. c.* 61), *secs.* 8 *and* 11—*Entail (Scotland) Act*, 1882 (45 *and* 46 *Vict. c.* 53), *sec.* 6.—The Entail Amendment Act, 1875, enables an heir of entail in possession to charge the entailed estate for improvement expenditure either by granting a bond of annualrent for twenty-five years at a rate not exceeding £7, 2s. per annum for every £100 authorised to be borrowed, or to grant a bond and disposition in security for two-thirds (extended by the Entail Act, 1882, to three-fourths) of the amount authorised to be borrowed.

The former Act further provides that where an heir has executed improvements but has died without charging the estate, any person to whom he has bequeathed his right may obtain a decree ordaining the heir in possession "to execute a bond and disposition in security" over the estate "for the amount with which the deceased heir himself might, under the provisions of this Act, have charged the estate."

Held (*rev.* judgment of Lord Trayner) that the bond and disposition in security to which the legatee is entitled is limited to three-fourths of the sum expended on improvements.

Entail—Expenses—Improvement expenditure—Bond and disposition in security—Expenses of application—Entail Amendment (Scotland) Act, 1875 (38 *and* 39 *Vict. c.* 53), *sec.* 7, *subsecs.* 6 *and* 8.—*Held* that where an entailed estate is charged under secs. 8 and 11 of the Entail Amendment Act, 1875, by bond and disposition in security with three-fourths of improvement expenditure, the charger is only entitled to have included in the bond three-fourths of the actual or estimated costs of the application.

1st Division.
Lord Trayner.
B.

ALEXANDER LEITH, heir in entail in possession of the estates of Freefield and Glenkindie, died on 14th July 1886.

Prior to his death he had expended a sum of £1853, 4s. 10d. on improvements on the estates of the nature contemplated by the Entail Acts, but had not charged the estate with any part thereof.

By codicil to his trust-disposition he, in virtue of the powers conferred by section 11 of the Entail Amendment Act, 1875,* bequeathed to his daughter Miss Georgiana Leith all right and interest competent to him to charge the entailed lands and estates of Glenkindie and Freefield with all expenditure on improvements already executed by him on the said lands and estates.

In November 1887 Miss Leith presented a petition in which she prayed the Court to ordain General Robert W. Disney Leith, the heir of entail in possession of the estates in question, to execute in favour of the petitioner a bond and disposition in security over the entailed lands, other than the mansion-house, &c., thereof, for the above-mentioned sum of £1853, 4s. 10d., or otherwise for three-fourths of the same, and for the costs thereof.

General Leith objected to the first alternative of the prayer of the petition being granted, but offered to grant a bond and disposition in security for three-fourths of the improvement debt.

On 12th June 1888 the Lord Ordinary (Trayner) pronounced this interlocutor:—"Finds and declares that the sum of £1853, 4s. 10d., has been *bona fide* and properly expended on improvements of a permanent nature, and such as are contemplated by the Entail Amendment (Scotland) Act, 1875, upon the entailed lands of Glenkindie and others mentioned in the petition, by the deceased Alexander Leith (tertius), while heir of entail in possession of said lands, and that the petitioner is in right thereof in virtue of a codicil to the trust-disposition and settlement of the said Alexander Leith, dated 21st December 1883, whereby he expressly bequeathed and conveyed the same to her: Decerns and ordains the respondent, General Robert William Disney Leith, the heir of entail now in possession of the said lands, to execute in favour of the petitioner, or of any other person she may think fit, a bond and disposition in security over the said lands other than the mansion-house, offices, and policies thereof, for £1853, 4s. 10d., together with the sum of £136, 14s. 10d., being the estimated cost of the application, and obtaining the loan, and granting security therefor, the said two sums amounting together to the sum of £1989, 19s. 8d." †

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* Sec. 11 of the Entail Amendment Act, 1875, enacts,—"Where any heir of entail in possession of an estate in Scotland, holden by virtue of a tailzie dated prior to the 1st day of August 1848 shall have executed improvements on such estate of the nature contemplated by this or any other Entail Act as the case may be, and shall have died after the passing of this Act without having charged the estate with the amount which he is entitled to charge of the sums expended on such improvements, it shall be lawful for any person to whom such heir of entail may have expressly bequeathed, conveyed, or assigned such sums, or any part thereof, to make application by summary petition to the Court, praying the Court, after such inquiry as to the Court shall seem proper, to find and declare that the sums specified in the petition, or any part thereof, have been expended on improvements on the said estate by the deceased heir of entail; and that the petitioner is in right thereof; and to decern and ordain the heir in possession of such entailed estate to execute in favour of the petitioner, or of any other person such petitioner may think fit, a bond and disposition in security over the said estate other than the mansion-house, offices, and policies thereof, or over some sufficient portion of the said estate other than as aforesaid, for the amount with which the deceased heir of entail himself might, under the provisions of this Act, have charged the estate . . . ."

† "NOTE.—The late Alexander Leith was at his death the heir of entail in possession of the lands of Glenkindie and others, and had prior to his death expended a sum of £1853, 4s. 10d. in improvements on the entailed estates, which he would have been entitled to charge thereon under the provisions of the Entail Acts. He expressly bequeathed to the petitioner the said sum, and

General Leith reclaimed, and argued;—Under sec. 8 of the Entail Amendment Act, 1875,* the heir in possession who executed the im-

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assigned to her the right and interest competent to him to charge the entailed estates therewith. She now petitions the Court to ordain the heir of entail in possession to execute in her favour a bond and disposition in security over the entailed estate (except the mansion-house and policies), for the foresaid sum. The heir of entail in possession objects to the prayer of the petition being granted, but is ready to grant bond for three-fourths of the said improvement debt, which, he maintains, is all the petitioner can demand.

"The determination of the question between the parties depends upon the construction of the 8th and 11th sections of the Entail Amendment Act, 1875. By the 11th section it is provided that any person in the position of the petitioner is entitled to the order or decree of the Court ordaining the heir of entail in possession to execute in his or her favour a bond and disposition in security over the estate, other than the mansion-house, &c., 'for the amount with which the deceased heir of entail himself might under the provisions of this Act have charged the estate.'

"By the 8th section power is given to an heir of entail to charge the estate with improvement expenditure in one or other of two modes. He may charge the estate with the full amount of his expenditure by means of a bond of annualrent, under which the whole expenditure and interest will be paid off in twenty-five years, or he may grant bond and disposition in security in common form for three-fourths of the amount of the improvement expenditure.

"The respondent now contends that as the heir, while in possession could not have charged the estate with a bond and disposition in security for more than three-fourths of the improvement expenditure, so now his assignee or representative is not entitled to a bond and disposition in security over the estate for any larger amount. The question is not, however, what the heir while in possession could charge by way of bond and disposition in security, but what he could charge in any way; the statute providing that the assignee of the deceased heir is entitled to a bond, 'for the amount with which the deceased heir of entail himself might have charged the estate.' If he could competently have charged the estates in any mode with the whole expenditure, his representative or assignee is now entitled to have that done. The measure of the assignee's right is the amount which the deceased heir could have charged upon the estates irrespective of the mode in which that charge was made.

"The respondent maintains that charging the estate with an annualrent is not charging the estate with the expenditure itself. In my opinion the distinction thus drawn is not a good or sound distinction. The bond of annualrent (Jurid. Styles, i. 440) proceeds upon the narrative that the heir charging has received from the person in whose favour the bond is granted the full amount of the expenditure, which sum he binds himself and the heirs of entail to repay, with interest, in twenty-five years, by half-yearly payments of fixed amount; and in security of these payments the entailed estates are conveyed. The whole expenditure is thus charged upon the estates, whenever the bond of annualrent is granted or recorded. No doubt the right of the creditor in one case is limited to insist on repayment of his debt by certain instalments, while in the other he may at once demand payment of his debt in full. But that difference in the right of the creditor does not affect the fact that under the bond of annualrent the heir of entail had validly charged the entailed estates with the full amount of the improvement expenditure; and if he could do that his assignee is entitled to have it done in her favour. This can only be done by means of a bond and disposition in security, for the Act has so prescribed."

* Sec. 8 of the Entail Amendment Act, 1875, enacts,—"It shall be lawful for an heir of entail in possession of an entailed estate in Scotland . . . (notwithstanding any provisions to the contrary contained in the tailzie), who has obtained the authority of the Court to borrow money under this Act on the security of the estate, to charge the fee and rents of such estate other than the

provements could only grant a bond and disposition in security for three-fourths of the amount. The petitioner could not have any higher right than her author. When a bond of annualrent was granted for the full amount of the expenditure, that was not the same thing as charging the estate with the whole amount of the expenditure. A bond and disposition in security formed a permanent burden on the estate, whereas a bond of annualrent imposed the burden of repaying the principal upon the heir in possession himself and his immediate successors or successor within the next twenty-five years.

Argued for the petitioner;—The heir of entail had power to charge the entailed estate with the full amount of the expenditure in virtue of sec. 11 of the Entail Amendment Act, 1875, and the petitioner as his representative had the same right. It did not matter how the heir could charge the full amount so long as he could do so at all. The estate was really as much "charged" when a bond of annualrent was granted over it as when a bond and disposition in security was granted. That the petitioner could only charge the estate by bond and disposition was merely a matter of form, the amount to which he could charge it being the amount to which the heir himself might have charged it.

At advising,—

LORD PRESIDENT.—The petitioner in this case is the legatee of the last heir of entail in possession of certain estates, and her legacy consists of sums expended by the last heir on improvements on the estates, which were not constituted or made burdens on the lands during his lifetime. That legacy was left under the authority of section 11 of the Entail Act of 1875, and the demand made upon the present heir is that he shall execute in favour of the petitioner a bond and disposition in security for the whole amount of the improvement expenditure. The heir in possession, on the other hand, contends that the petitioner is not entitled to a bond for the whole amount, but only for three-fourths thereof. The determination of the question depends on the construction of section 11 of the Act, taken in combination with section 8.

Section 11 provides,—"Where any heir of entail in possession of an estate in Scotland, holden by virtue of a tailzie dated prior to the 1st day of August 1848, shall have executed improvements on such estate of the nature contemplated by this or any other Entail Act as the case may be, and shall have died after the passing of this Act without having charged the estate with the amount which he is entitled to charge of the sums expended on such improvements, it shall be lawful for any person to whom such heir of entail may have expressly bequeathed, conveyed, or assigned such sums, or any part thereof, to make application by summary petition to the Court, praying the Court, after such

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mansion-house, offices, and policies thereof, or the fee and rents of any portion of such estate other than as aforesaid, with a bond of annualrent, binding himself and his heirs of tailzie to make payment of an annualrent for twenty-five years from and after the date of such authority of the Court; . . . such annualrent to be payable by equal moieties half-yearly, and to be at a rate not exceeding £7, 2s. per annum for every £100 so authorised to be borrowed, and so in proportion for any greater or less sum; or where the improvements were executed before the date of the application to the Court, in the option of such heir in possession, and in lieu of such bond of annualrent, with a bond and disposition in security over such estate or any portion thereof, other than as aforesaid, for two-thirds" (altered by the Entail Act, 1882, sec. 6, to three-fourths) "of the sum on which the amount of such bond of annualrent, if granted, would be calculated, in terms of this Act."

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Leith v. Leith.

General Leith reclaimed, and argued;—Under sec. 8 of the Entail Amendment Act, 1875,* the heir in possession who executed the im-

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assigned to her the right and interest competent to him to charge the entailed estates therewith. She now petitions the Court to ordain the heir of entail in possession to execute in her favour a bond and disposition in security over the entailed estate (except the mansion-house and policies), for the foresaid sum. The heir of entail in possession objects to the prayer of the petition being granted, but is ready to grant bond for three-fourths of the said improvement debt, which, he maintains, is all the petitioner can demand.

"The determination of the question between the parties depends upon the construction of the 8th and 11th sections of the Entail Amendment Act, 1875. By the 11th section it is provided that any person in the position of the petitioner is entitled to the order or decree of the Court ordaining the heir of entail in possession to execute in his or her favour a bond and disposition in security over the estate, other than the mansion-house, &c., 'for the amount with which the deceased heir of entail himself might under the provisions of this Act have charged the estate.'

"By the 8th section power is given to an heir of entail to charge the estate with improvement expenditure in one or other of two modes. He may charge the estate with the full amount of his expenditure by means of a bond of annualrent, under which the whole expenditure and interest will be paid off in twenty-five years, or he may grant bond and disposition in security in common form for three-fourths of the amount of the improvement expenditure.

"The respondent now contends that as the heir, while in possession could not have charged the estate with a bond and disposition in security for more than three-fourths of the improvement expenditure, so now his assignee or representative is not entitled to a bond and disposition in security over the estate for any larger amount. The question is not, however, what the heir while in possession could charge by way of bond and disposition in security, but what he could charge in any way; the statute providing that the assignee of the deceased heir is entitled to a bond, 'for the amount with which the deceased heir of entail himself might have charged the estate.' If he could competently have charged the estates in any mode with the whole expenditure, his representative or assignee is now entitled to have that done. The measure of the assignee's right is the amount which the deceased heir could have charged upon the estates irrespective of the mode in which that charge was made.

"The respondent maintains that charging the estate with an annualrent is not charging the estate with the expenditure itself. In my opinion the distinction thus drawn is not a good or sound distinction. The bond of annualrent (Jurid. Styles, i. 440) proceeds upon the narrative that the heir charging has received from the person in whose favour the bond is granted the full amount of the expenditure, which sum he binds himself and the heirs of entail to repay, with interest, in twenty-five years, by half-yearly payments of fixed amount; and in security of these payments the entailed estates are conveyed. The whole expenditure is thus charged upon the estates, whenever the bond of annualrent is granted or recorded. No doubt the right of the creditor in one case is limited to insist on repayment of his debt by certain instalments, while in the other he may at once demand payment of his debt in full. But that difference in the right of the creditor does not affect the fact that under the bond of annualrent the heir of entail had validly charged the entailed estates with the full amount of the improvement expenditure; and if he could do that his assignee is entitled to have it done in her favour. This can only be done by means of a bond and disposition in security, for the Act has so prescribed."

* Sec. 8 of the Entail Amendment Act, 1875, enacts,—"It shall be lawful for an heir of entail in possession of an entailed estate in Scotland . . . (notwithstanding any provisions to the contrary contained in the tailzie), who has obtained the authority of the Court to borrow money under this Act on the security of the estate, to charge the fee and rents of such estate other than the

provements could only grant a bond and disposition in security for three-fourths of the amount. The petitioner could not have any higher right than her author. When a bond of annualrent was granted for the full amount of the expenditure, that was not the same thing as charging the estate with the whole amount of the expenditure. A bond and disposition in security formed a permanent burden on the estate, whereas a bond of annualrent imposed the burden of repaying the principal upon the heir in possession himself and his immediate successors or successor within the next twenty-five years.

Argued for the petitioner;—The heir of entail had power to charge the entailed estate with the full amount of the expenditure in virtue of sec. 11 of the Entail Amendment Act, 1875, and the petitioner as his representative had the same right. It did not matter how the heir could charge the full amount so long as he could do so at all. The estate was really as much "charged" when a bond of annualrent was granted over it as when a bond and disposition in security was granted. That the petitioner could only charge the estate by bond and disposition was merely a matter of form, the amount to which he could charge it being the amount to which the heir himself might have charged it.

At advising,—

LORD PRESIDENT.—The petitioner in this case is the legatee of the last heir of entail in possession of certain estates, and her legacy consists of sums expended by the last heir on improvements on the estates, which were not constituted or made burdens on the lands during his lifetime. That legacy was left under the authority of section 11 of the Entail Act of 1875, and the demand made upon the present heir is that he shall execute in favour of the petitioner a bond and disposition in security for the whole amount of the improvement expenditure. The heir in possession, on the other hand, contends that the petitioner is not entitled to a bond for the whole amount, but only for three-fourths thereof. The determination of the question depends on the construction of section 11 of the Act, taken in combination with section 8.

Section 11 provides,—"Where any heir of entail in possession of an estate in Scotland, holden by virtue of a tailzie dated prior to the 1st day of August 1848, shall have executed improvements on such estate of the nature contemplated by this or any other Entail Act as the case may be, and shall have died after the passing of this Act without having charged the estate with the amount which he is entitled to charge of the sums expended on such improvements, it shall be lawful for any person to whom such heir of entail may have expressly bequeathed, conveyed, or assigned such sums, or any part thereof, to make application by summary petition to the Court, praying the Court, after such

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mansion-house, offices, and policies thereof, or the fee and rents of any portion of such estate other than as aforesaid, with a bond of annualrent, binding himself and his heirs of tailzie to make payment of an annualrent for twenty-five years from and after the date of such authority of the Court; . . . such annualrent to be payable by equal moieties half-yearly, and to be at a rate not exceeding £7, 2s. per annum for every £100 so authorised to be borrowed, and so in proportion for any greater or less sum; or where the improvements were executed before the date of the application to the Court, in the option of such heir in possession, and in lieu of such bond of annualrent, with a bond and disposition in security over such estate or any portion thereof, other than as aforesaid, for two-thirds" (altered by the Entail Act, 1882, sec. 6, to three-fourths) "of the sum on which the amount of such bond of annualrent, if granted, would be calculated, in terms of this Act."

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inquiry as to the Court shall seem proper, to find and declare that the sums specified in the petition, or any part thereof, have been expended on improvements on the said estate by the deceased heir of entail; and that the petitioner is in right thereof; and to decern and ordain the heir in possession of such entailed estate to execute in favour of the petitioner, or of any other person such petitioner may think fit, a bond and disposition in security over the said estate other than the mansion-house, offices, and policies thereof, or over some sufficient portion of the said estate other than as aforesaid, for the amount with which the deceased heir of entail himself might, under the provisions of this Act, have charged the estate . . ." Under that section the only way in which the estate is to be charged is by bond and disposition in security. Now, there is no doubt that the heir of entail in possession could himself only grant a bond and disposition in security for three-fourths of the amount of the expenditure; but the petitioner contends that she is entitled to have a bond and disposition for the whole sum, because the heir in possession might have made the whole sum a charge in the form of a bond of annualrent. Now, it appears to me that there is rather a fallacy in that argument. A bond and disposition in security makes a charge on the estate of a permanent nature. It may be paid off, but till that is done it is of a permanent nature. A bond of annualrent has a totally different effect, for it necessarily comes to an end under the statute in twenty-five years, it is extinguished by the payment of annual instalments, or, in other words, of annualrent.

That leads us to consider the terms of section 8, which confers on the heir of entail in possession the right to execute either a bond and disposition in security for a proportion of the whole, or a bond of annualrent sufficient to repay the whole. That section enacts,—"It shall be lawful for an heir of entail in possession of an entailed estate in Scotland . . . (notwithstanding any provisions to the contrary contained in the tailzie), who has obtained the authority of the Court to borrow money under this Act on the security of the estate, to charge the fee and rents of such estate other than the mansion-house, offices, and policies thereof, or the fee and rents of any portion of such estate other than as aforesaid, with a bond of annualrent, binding himself and his heirs of tailzie to make payment of an annualrent for twenty-five years from and after the date of such authority of the Court; . . . such annualrent to be payable by equal moieties half-yearly, and to be at a rate not exceeding £7, 2s. per annum for every £100 so authorised to be borrowed, and so in proportion for any greater or less sum; or where the improvements were executed before the date of the application to the Court, in the option of such heir in possession, and in lieu of such bond of annualrent, with a bond and disposition in security over such estate or any portion thereof, other than as aforesaid, for two-thirds" (altered by the Entail Act 1882, sec. 6, to three-fourths) "of the sum on which the amount of such bond of annualrent, if granted, would be calculated, in terms of this Act." That is the alternative presented to the heir of entail. One cannot help seeing why in the one case the heir is allowed to charge only three-fourths, and in the other the whole of the expenditure. It is simply this, that a bond and disposition in security is a permanent burden, whereas the annualrent is always working itself off by instalments. The consequence of that is, that in one case the heir when he dies leaves the estate burdened permanently, whereas when a bond of annualrent is granted he is during his own lifetime paying the instalments, and so extinguishing the debt and not merely paying the interest. It might very well happen that the heir who granted such a bond might live until the whole had been paid off;—at all events, in the ordinary case, if I may use the phrase, a good deal of principal and interest is paid off by the heir who granted the bond, and so the estate is relieved to that extent. That, I think, accounts for the difference made by the statute.

Now, in this case a bond of annualrent cannot be granted—the statute says the charge shall be made by bond and disposition. The reason of that is obvious, for the lady could never pay off any part of the debt;—therefore when the statute says that a bond and disposition is to be the form of the charge it is necessarily implied that it can only be demanded to the extent to which the heir of entail himself could have granted it had he himself charged the estate. I am therefore sorry that I cannot agree with the Lord Ordinary in this case, and that, in my opinion, the bond must be restricted to three-fourths of the amount of the expenditure.

LORD MURE.—This is a purely statutory matter, and I am unable to find any words in the statute which give this legatee a right to what she asks in this petition. I therefore agree that the present heir of entail is only bound to grant a bond and disposition in security for three-fourths of the sum actually expended. The 8th section is the one to which we are tied down, as section 11 refers back to that section as to what the heir himself could have done. In that section the heir of entail is given power to grant a bond and disposition in security for two-thirds (now three-fourths) of the whole amount, or he can grant a bond of annualrent for the whole. But persons in the position of the petitioner are given no power in section 11 to insist on a bond of annualrent being granted, and therefore she can only insist on such a bond and disposition as the heir of entail himself could have granted—that is, for three-fourths of the total amount of the expenditure.

LORD ADAM.—The Lord Ordinary finds and declares that the sum of £1853, 4s. 10d. has been properly expended on improvements on the estate, and ordains the present heir of entail in possession to execute a bond and disposition in security for the whole of that sum in favour of the petitioner, or of any other person she may think fit. The question for us to decide is, whether the heir is bound to do so, or whether he is only bound to grant a bond for three-fourths of the sum in question. That question depends on the construction of section 11 of the Act of 1875, which provides that the Court may "ordain the heir in possession to execute in favour of the petitioner . . . a bond and disposition in security over the estate . . . for the amount with which the deceased heir of entail himself might have charged the estate"—that is, I should have thought, by bond and disposition in security. I should have thought that to be the reasonable meaning of the section, and accordingly that the petitioner was only bound to grant a bond and disposition in security for two-thirds of the expenditure, or, by subsequent statute, for three-fourths of the whole. But it is said that it was in the power of the heir of entail in possession to charge the whole of the expenditure by bond of annualrent, and that if the heir had in any way power to charge the whole expenditure, then that the petitioner has a right to demand a bond and disposition for the whole.

That takes us back to the 8th section, by which the power to charge is given to the heir of entail in possession.

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Now, that section authorises the heir of entail to charge the fee and rents of the estate with a bond of annualrent, binding himself and his heirs of tailzie to make payment of an annualrent for twenty-five years,—such annualrent to be payable half-yearly, and to be at a rate not exceeding £7, 2s. per annum for every £100 expended on the estate, or otherwise with a bond and disposition in security for two-thirds (now three-fourths) of the amount expended.

The amount expended therefore forms the basis upon which the amount of annualrent is calculated. But does an heir of entail by executing a bond of annualrent charge the estate with the amount on which the bond is calculated? If that is the effect, then the petitioner may be right in this case, but if the effect is simply to charge the estate with the amount of the half-yearly payments as they periodically recur, then the petitioner cannot succeed. I have no doubt that the effect of the granting of a bond of annualrent is not to charge the estate with the amount on which the bond is calculated but only with the sums as they periodically become due. A person in right of such a bond could take no proceedings so as to affect the fee or rents of the estate for anything more. It is in the power of the heir of entail, when he has obtained authority to charge the estate, to go into the market with the bond of annualrent and to sell it at any price he can get. He is not bound to sell it for the amount on which the annualrent has been calculated. If money is cheap at the time he will probably get a larger sum for the bond than the amount of the expenditure; if money is dear he may get less. The sum, in short, which he gets for it may not be the same as the sum on which the bond is calculated, and in no sense does the bond of annualrent charge the estate with the amount of the improvement expenditure.

I cannot help thinking the Lord Ordinary has been misled by the quotation he makes from the Juridical Styles. He says,—"The bond of annualrent (Jurid. Styles, i. 440) proceeds upon the narrative that the heir charging has received from the person in whose favour the bond is granted the full amount of the expenditure, which sum he binds himself and the heirs of entail to repay, with interest, in twenty-five years, by half-yearly payments of fixed amount; and in security of these payments the entailed estates are conveyed. The whole expenditure is thus charged upon the estates, whenever the bond of annualrent is granted or recorded." Now, I have already said that it does not follow that the price paid for the bond of annualrent represents the amount of the expenditure, and I may further remark that under the statute the charging heir has no power to bind the succeeding heirs to repay anything. He may, of course, bind himself as he pleases, but he can only bind the succeeding heirs to pay a certain annualrent. He cannot bind them to pay any principal sum, nor can he convey the estate in security of the repayment of any principal sum. With all deference to the learned book to which the Lord Ordinary refers, I do not think that there is there set forth the true nature of a bond of annualrent. I have therefore come to the conclusion that the heir of entail could not have charged, by bond of annualrent, the estate with the full amount of the expenditure, and if that is so, the petitioner here can only insist on the present heir granting a bond and disposition in security for three-fourths of the whole amount. It is not a reasonable construction of the statute that it was intended to give the disponee or legatee greater powers than the granter had himself. It cannot have been the intention of the Legislature to put it in the power of an heir of entail, by delaying or abstaining from charging the estate during his own lifetime, to enable his legatee to charge the estate and succeeding heirs with a larger sum than he himself could have done. There seems to be no reason why the next heir or the estate should be bound to pay the whole amount of the expenditure in the one case and not in the other.

I am therefore of opinion that authority should be granted to charge the estate with only three-fourths of the amount.

LORD SHAND was absent.

On 18th July the petitioner moved that the costs of the application should be included in the charge upon the estate.

General Leith objected, and maintained that only three-fourths of the costs should be allowed.[1]

LORD PRESIDENT.—I think that subsection 6 of the 7th section and section 8 of the Act of 1875 must be taken together, but I think that in the 8th section is to be found the conclusive answer to the question before us.

The 6th subsection of sec. 7 provides that "in every case the Court shall, in fixing the amount to be borrowed under their authority, add to the actual or estimated amount of the cost of the improvements the actual or estimated amount of the cost of the application and the proceedings therein, and of obtaining the loan and granting security therefor."

Now, that subsection directs that the two sums—the cost of the improvements and the cost of the application—are to be added together. The 8th section in dealing with the amount to be charged says,—that where a bond and disposition in security is granted, it is to be for two-thirds (now three-fourths) "of the sum on which the amount of such bond of annualrent if granted would be calculated." Now, the amount of annualrent would be calculated on the aggregate sums consisting of the cost of the improvements and the expenses, but section 8 says that the bond and disposition in security is to be granted for only three-fourths of that aggregate. I am therefore very clearly of opinion that the expenses form part of the sum so dealt with, and that in the case of granting a bond and disposition in security over an estate the heir of entail must be content with charging three-fourths of the expenses.

LORD MURE.—I am clearly of the same opinion.

LORD SHAND.—The expenses which must be incurred must be the same whether what is ultimately charged on the estate is the whole of the amount or only three-fourths of it, and I confess that if I could have found any reading of the statute which would have enabled me to regard the whole of the expenses of the application as a proper charge on the estate, I should have been glad to adopt it, for I see no reason for cutting down the expenses in such an application as this, when the whole amount of expenses is allowed in every other application by an heir of entail under the statutes. I agree, however, that the words of the 8th section are too strong, and that we must only allow three-fourths of the expenses here.

LORD ADAM.—I have no difficulty in concurring.

THE COURT pronounced the following interlocutor:—"Recall said interlocutor in so far as it decerns and ordains the respondent (reclaimer), the heir of entail now in possession of the lands of Glenkindie and others mentioned in the petition, to execute in favour of the petitioner, or of any other person she may think fit,

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[1] Gillon Fergusson, Nov. 27, 1886, 24 S. L. R. 113.

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a bond and disposition in security over said lands, other than the mansion-house, offices, and policies thereof, for £1853, 4s. 10d., together with the sum of £136, 14s. 10d., said two sums amounting together to the sum of £1989, 19s. 8d., with interest thereof at the rate of £5 per centum per annum, from the date of said decree till repaid, and with corresponding penalties: *Quoad ultra* adhere to said interlocutor, and decern and ordain said respondent to execute in favour of the petitioner, or of any other person she may think fit, a bond and disposition in security over said lands, other than the mansion-house, offices, and policies thereof, for the sum of £1492, 9s. 9d., being three-fourths of said sum of £1989, 19s. 8d., with interest upon said sum of £1492, 9s. 9d., at the rate of £5 per centum per annum from the date of the Lord Ordinary's interlocutor till repaid."

D. LISTER SHAND, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

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THE EDINBURGH ECCLESIASTICAL COMMISSIONERS, Pursuers (Respondents).—*Gloag*—*G. R. Gillespie.*

THE KIRK-SESSION OF THE HIGH KIRK, EDINBURGH, Defenders (Reclaimers).—*Sir Charles Pearson*—*Murray.*

Church—Seat rents in parochial church in burgh—Annuity-tax (Edinburgh and Montrose) Abolition Act, 1860 (23 *and* 24 *Vict. c.* 50), *secs.* 5, 6—*Annuity-tax Abolition Act Amendment Act,* 1870 (33 *and* 34 *Vict. c.* 87), *secs.* 25, 32—*St Giles' Edinburgh Ancient Church Act,* 1879 (42 *and* 43 *Vict. c. ccxxi.*).—By the Act 23 and 24 Vict. c. 50, the rights of administration and custody of the parochial churches in Edinburgh were transferred from the Magistrates and Council to the Ecclesiastical Commissioners. The Act directed that "the pews or seats in the said several churches" should be let at the sight of the respective kirk-sessions, and that the moneys received by them for "pew or seat rents" should be paid to the Commissioners.

In 1879 the congregation of the High Kirk occupied the ancient church of St Giles, with the exception of the nave, which was separated from the rest of the building by partition walls, and was occupied as the church of West St Giles' parish.

Under the Act 42 and 43 Vict. c. ccxxi., which was passed for the purpose of restoring the ancient church of St Giles according to its original design, another church was provided for the congregation of West St Giles', and the vacant church was incorporated with the High Kirk, the partition walls and the church seats being removed. The addition, forming the nave of the restored church, was left without pews or seats. In consequence, however, of the increase of the congregation the kirk-session of the High Kirk placed chairs in the nave, which were let to individuals in the same way as the other seats.

Held (*diss.* Lord Rutherfurd Clark) that the right of the Commissioners to the seat rents extended to the rents of chairs placed in the nave by the kirk-session.

2D DIVISION.
Lord Fraser.
I.

THE present action was raised by the Edinburgh Ecclesiastical Commissioners, incorporated under the Act 23 and 24 Vict. cap. 50, entituled "An Act to abolish the annuity-tax in Edinburgh and Montrose, and to make provision in regard to the stipends of the ministers in that city and burgh," against the Kirk-session of the High Kirk of Edinburgh for declarator that the defenders were bound, in terms of the Statutes 23 and 24 Vict. c. 50 (Annuity-Tax Abolition Act Amendment Act, 1870), 33 and 34 Vict. c. 87, and St Giles' Edinburgh Ancient Church Act, 1879, 42 and 43 Vict. c. ccxxi., "to pay over to the said pursuers the whole moneys levied and received by them, or that shall hereafter be levied and received by them as rents for seats in the said High Kirk, including therein the area of the church formerly known as the Old Church, and the area of the church formerly known as the New North Church or West St Giles' Church, now incorporated with the said High Kirk, and forming part of it, and that without any deductions whatever: And that the defenders" should be ordained to exhibit and produce "a full and particular account of the whole seat rents levied and received by them, and of their intromissions therewith from the date at which the said West St Giles' Church was incorporated with the said High Kirk, and became part thereof, whereby the true amount due by the said defenders to the said pursuers may appear and be ascertained, . . . and to exhibit and produce annually hereafter to the said pursuers a full and particular account of the whole seat rents levied and received by them, and of their intromissions with the same." The subsequent conclusions were ultimately withdrawn.

The action was brought in the following circumstances:—Section 5 of the Annuity-Tax Abolition Act, 1860, enacted,—"The whole rights of administration and custody as respects the following parochial churches in the city of Edinburgh, viz." (here followed a list of the city churches, including the High Kirk, Old Kirk, and the New North Church), "which the Magistrates and Council have in or pertaining to the same or any of them . . . shall be, and the same are hereby from and after the 11th day of November 1860, transferred from the Magistrates and Council and vested in the Commissioners for the like public uses and purposes, and under the like conditions for and under which the said churches are at present administered by the Magistrates and Council, provided that nothing in this Act shall prevent the Magistrates and Council from causing the bells of said churches to be rung on suitable public occasions."

Section 6—"The pews or seats in the said several churches shall, from and after the 11th day of November 1860, be let by or at the sight of the kirk-session of each church respectively, with the exception of not less than one-tenth of the number, which shall be reserved as free sittings, but subject to any directions which the Commissioners may issue from time to time, and subject also to any rights or conditions presently attaching to such pews or seats, or in case the Commissioners shall think it necessary or expedient, by or at the sight of the Commissioners or their secretary, and at such rents for the said pews or seats as the Commissioners, subject always to the rights and conditions aforesaid, may from time to time determine or approve with reference to the circumstances of the said churches respectively." The kirk-session were directed to lay the accounts before the Commissioners, and to pay the amount received to them after deducting certain church expenses, but the clause allowing this deduction was repealed by the Act 33 and 34 Vict. c. 87.

At the date of the Act the three congregations of the churches above mentioned occupied portions of the ancient church of St Giles, which were separated from each other by partition walls. The eastmost of these portions was called the High Kirk, and was the parish church of the High Kirk Parish of Edinburgh. The south transept was known as the Old Kirk, and was the church of the Old Kirk Parish. The nave or western end was known as the New North or West St Giles' Church, and was the parish church of the New North Parish.

By the Annuity-Tax Abolition Act Amendment Act, 1870 (33 and 34 Vict. c. 87), sec. 19, it was enacted, *inter alia*, that the Old Kirk should cease to be a charge endowed by law, but provided that nothing in the Act should prevent its being subsequently re-endowed from voluntary sources as a *quoad sacra* church. Subsequently the Old Kirk ceased to be occupied as a church. Thereafter the partition between it and the High Kirk was removed, and its area was seated as an addition to the High Kirk.

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In 1879 an offer was made by Dr William Chambers to complete the restoration of St Giles' on certain conditions, and as a result of the negotiations an Act of Parliament was applied for and obtained "to make provision in regard to the restoration of the ancient church of St Giles in the city of Edinburgh" (42 and 43 Vict. cap. ccxxi.).

The Act, on the narrative that by the Annuity-Tax Abolition Act, 1860, the whole rights of administration and custody of West St Giles' Church had been transferred to the Ecclesiastical Commissioners, and that that Act had been amended by the Act of 1870, "and whereas at the passing of the last recited Act the ancient church of St Giles . . . was divided, for congregational purposes, by walls, which formed no part of the original structure, into three distinct churches, viz.: (1) the choir or High Kirk, (2) the southern transept or Old Kirk, and (3) the nave or New North Church (usually called West St Giles' Church); and whereas the part of the building forming the southern transept thereof and formerly known as the Old Kirk has now been added to and incorporated with the High Kirk, the dividing walls between them having been removed; and whereas it is now proposed that a complete restoration of the said ancient church should be effected, so that it shall form, as originally designed, one undivided building, and for this purpose it is necessary that the New North Church (usually called West St Giles' Church) should cease to be occupied as a separate place of worship, the dividing walls between it and the other parts of the said ancient church being removed, and provision being made for the erection of a suitable church for the congregation presently worshipping there, and for all other vested rights therein; be it therefore enacted . . . . Sec. 1. Whenever, as the result of public voluntary subscription or of contributions from any source other than municipal funds or revenues, there shall be paid over to the Edinburgh Ecclesiastical Commissioners, or when security shall be found, to the satisfaction of the said Commissioners, for the sum of £10,500, to be applied as hereinafter provided, the congregation at present worshipping in the New North Church (usually called West St Giles' Church) shall, within twelve months from the date of such payment or acceptance of such security, vacate the said New North Church (usually called West St Giles' Church), which shall thereupon be incorporated with and form part of the High Kirk." Section 2 provided that the commissioners should spend £10,000 of the £10,500 mentioned in the preceding section on the purchase of a site, and the erection thereon of a church, as should be approved by the Presbytery of Edinburgh, in lieu of West St Giles' Church, and should invest the remaining £500, "the interest whereof shall be accumulated and applied *pro tanto* in the maintenance of the fabric of that part of the building presently occupied by the said New North Church, usually called West St Giles', but declaring that nothing herein contained shall limit the obligation of the said Edinburgh Ecclesiastical Commissioners to maintain the fabric of the whole building as provided by the said recited Acts." Section 6 provided that the Act should be construed and read along with and as part of the recited Acts.

After the passing of the Act the partition wall between West St Giles' and the rest of the building was taken down, and the area thus thrown into one with the areas of the High and Old Kirks was restored according to the plans of the Restoration Committee. In accordance with these plans no pews or seats were placed in the area of West St Giles', which formed the nave of the church.

For a short time before the work was completed the High Kirk congregation met in this area of West St Giles', and the kirk-session provided chairs in that area during that time. These chairs were in rows with a beam of wood passing beneath them, to which they were fastened. They remained when the congregation again returned to the High Kirk, and in consequence of the increase in the congregation they were used by strangers and others who attended the services of St Giles'.

In consequence of the kirk-session disputing the right of the Commissioners to demand payment of the sums received for the use of the chairs, the present action was raised.

The pursuers averred with reference to the chairs in the area of West St Giles':—"The portion of the said High Church, which formerly was the New North or West St Giles' Church, was after its incorporation with the High Kirk, furnished by the defenders, or under their directions, with chairs or seats. These chairs are placed in rows, and are fastened together in each row by a beam of wood passing underneath them. The same portion of the area has always been occupied by these seats. The defenders have, ever since this part of the church was so furnished, received rents from persons for the right of occupying these seats, in the same way as for the pews and seats in other parts of the High Kirk. The statements in the defenders' answers are denied. These seats have been let in the same way, and at the same rates, as the other seats in the High Kirk. A uniform rate was charged, and the rate for the seats in question was collected at the same time as the ordinary seat rents. The chairs were numbered, and each person paying the rate fixed by the defenders obtained a receipt or ticket, giving him the same exclusive right to a particular chair as a seatholder had to his seat. The chairs so paid for were reserved for the persons making these payments in the same way as the other seats in the church were reserved for seatholders."

The pursuers pleaded;—(1) In terms of the statutes referred to, viz., 23 and 24 Vict. cap. 50, 33 and 34 Vict. cap. 87, and 42 and 43 Vict. cap. 221, the pursuers are entitled to decree of declarator, count, reckoning, and payment as craved. (2) The defenders having occupied with seats the areas which formerly were the areas of the Old Church and the New North or West St Giles' Church, but are now part of the area of the High Kirk, are bound, in terms of the statutes referred to, to let the said seats, and to account to the pursuers for the sums received by them therefor.

The defenders averred that in respect of the accommodation provided by the chairs "the chairholders gave a donation or subscription to the funds of the church. The defenders did not themselves intromit with these donations or subscriptions, but handed them over to the committee of the congregation which takes charge of the finances of the church. That committee issues a report annually, which is printed and circulated, and which, in the account charge and discharge always appended, contains an entry 'Donations from members for the use of chairs.' No one was allowed the use of a chair in this way until every pew or seat in the High Church which the pursuers could let was occupied and the rent paid to the pursuers."

They further stated that in consequence of the throwing open of the entire building, and the large congregation which met in the area of it, the expenses of the congregation had been largely increased in respect of assistants to the minister, choir expenses, &c.; that the donations derived from the chairholders were applied to meet those expenses, of which, however, they did not amount to one-fifth part.

The defenders pleaded, *inter alia;*—(1) The statements of the pursuers are irrelevant, and insufficient to support the conclusions of the summons.

The Lord Ordinary (Fraser) pronounced this interlocutor:—"Finds and declares that the defenders are bound to pay over to the pursuers the

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whole moneys levied and received by them, or that shall be levied or received by them, as rents for seats in the High Kirk of the city of Edinburgh, including therein the area of the church formerly known as the Old Church, and the area of the church formerly known as the New North Church or West St Giles' Church, now incorporated with the said High Kirk, and forming part thereof, and that without any deductions whatever: Decerns and ordains the said defenders to exhibit and produce annually hereafter to the said pursuers a full and particular account of the whole seat rents levied and received by them, and of their intromissions with the same: Appoints the case to be put to the roll for further procedure, and reserves all questions of expenses."*

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* "OPINION.—From the correspondence produced by the parties, and founded upon in the record, it appears that the dispute between the pursuers and the defenders originally was restricted to the point as to whether the pursuers were entitled to demand from the defenders an account of the rents or donations that they received for the use of chairs supplied to persons who occupied them in the area of the old West St Giles' Church. The defenders maintained that these were donations which they were entitled to apply in defraying the general expenses of the congregation, and which they were not bound to account for to the Ecclesiastical Commissioners, in terms of the Act 23 and 24 Victoria, cap. 50, sec. 6. But the subject of dispute has been enlarged after the parties came into Court under this action; and now it is maintained that not merely are the defenders not bound to account for the sums they receive for the use of the chairs in the area of West St Giles' Church, but also for the rents that they obtain from the pews located in the area of the Old Kirk. The pleas in law stated for the defenders do not bring out distinctly the subjects in dispute—their only plea in law, upon which they maintained the discussion before the Lord Ordinary, being simply that the pursuers' action is not relevant.

"I. As regards the Old Kirk, the matter stands as follows:—By the Act 33 and 34 Vict. cap. 87, sec. 19, it is enacted that 'it shall not be competent to the Ecclesiastical Commissioners, or to any patron or patrons, or to any presbytery, to nominate or present a minister to any of the five churches or charges specified in section 21 of the said Act 23 and 24 Vict. cap. 50, or to the parish of New Canongate, and the said churches and charges and the said parish of New Canongate shall not be provided with ministers, or otherwise maintained as churches and charges endowed by law.' Among the churches and charges so referred to in the Act 23 and 24 Vict. cap. 50, sec. 21, was included the Old Church. Thus the Old Church became extinguished. It was no longer to be provided with ministers or maintained as a charge endowed by law. Provision was made by 33 and 34 Vict. cap. 87, sec. 19, for the erection of the Old Church as a parish *quoad sacra*, on a sufficient endowment being procured for it to the satisfaction of the Teind Court; and such endowment having been procured, and a church having been built, the Court assigned a district, erecting it into a *quoad sacra* parish under the name of the Old Church Parish, Edinburgh (*Stevenson and Others* v. *MacNair and Others*, 24th November 1879, 7 R. 270). The erection of this into a *quoad sacra* parish has no bearing upon the questions now to be determined, and is here merely referred to for the purpose of indicating the ultimate fate of the Old Kirk parish.

"The fabric of the church itself, after being temporarily occupied, with the consent of the pursuers—the Ecclesiastical Commissioners—by another congregation, was disused as a church, and it was in this condition when the Act of Parliament 42 and 43 Victoria, cap. 221, was passed in the year 1879, which is an Act to 'make provision in regard to the restoration of the ancient church of St Giles in the city of Edinburgh.' This Act has a preamble which is important. It recites the Statute 23 and 24 Vict. cap. 50, and then it narrates that the ancient church of St Giles had been 'divided for congregational purposes, by walls which formed no part of the original structure, into three distinct churches, viz. (1) the choir or High Kirk; (2) the southern transept or Old Kirk; and (3) the nave or New North Church (usually called West St Giles'

The defenders reclaimed, and argued;—There was only one legal way of adding to a parish church, viz., by a legal process. The Act of 1879

Church), and then it thus proceeds,—'And whereas the part of the building forming the southern transept thereof, and formerly known as the Old Kirk, has now been added to and incorporated with the High Kirk, the dividing walls between them having been removed,' and then the statute proceeds to deal with West St Giles' Church area, and with provisions for turning the whole fabric into one church, which will be referred to immediately. Thus at the date of this statute in 1879 the dividing wall between the Old Kirk and the High Kirk had been removed; and incorporation, as the statute says, thereby made with the High Kirk. There was thus constituted, not two, but one church in point of fact. What was the effect of this upon the legal right of the Ecclesiastical Commissioners as regards the pew rents of the incorporated kirks? The case in fact and in law was just the same as if an addition had been built to the High Kirk. Their right to the pews in such additional building could not have been disputed, nor can there be any distinction drawn between such a case and what happened. The fabric of the Old Kirk was made separate from the rest of the ancient kirk of St Giles simply by the wall, and when the wall was removed there was just one church. Accordingly the parties so arranged matters. On the area of the Old Kirk fabric pews were placed, and the rents derived from them were regularly paid to the pursuers. It is only since this dispute as to the chairs in West St Giles' area has arisen that it has occurred to the defenders to take up the position that the statement in the Act of Parliament is wrong, when it declares that the Old Kirk area is incorporated with the High Kirk, and that the physical removal of the wall does not legally incorporate the two, and that some process is necessary before that can be accomplished. The Lord Ordinary is not aware of any process that would effect this purpose, and none was suggested by the defenders. He therefore prefers the interpretation which the defenders and all parties put upon the matter, by holding that there was here an incorporation; and that consequently the pursuers are entitled, in terms of their conclusions, to levy rents for pews in the area of the church formerly known as the Old Church.

"II. As regards West St Giles', the question turns upon the construction to be put upon the Act of 1879 (42 and 43 Vict. cap. 221). This Act was passed in order to enable the restoration of the whole ancient church of St Giles to be carried out in accordance with the generous scheme of William Chambers. By that scheme no interference was to be made with the High Kirk; and the Old Kirk, as we have seen, had been incorporated with the High Kirk. But there was a congregation worshipping in West St Giles' which it was necessary to buy out. The preamble of the statute narrates the necessity for this in order that the ancient church should all be restored as originally designed. It was necessary according to that preamble that provision should be 'made for the erection of a suitable church for the congregation presently worshipping there.' The first section of the statute enacts as follows,—'Whenever, as the result of public voluntary subscription or of contributions from any source other than municipal funds or revenues, there shall be paid over to the Edinburgh Ecclesiastical Commissioners, or when security shall be found to the satisfaction of the said Commissioners for the sum of ten thousand five hundred pounds sterling, to be applied as hereinafter provided, the congregation at present worshipping in the New North Church (usually called West St Giles' Church), shall, within twelve months from the date of such payment or acceptance of security, vacate the said New North Church (usually called West St Giles' Church), which shall thereupon be incorporated with and form part of the High Kirk.' Now, the £10,500 was obtained, a new church has been built, and it constitutes the church of the New North or West St Giles' parish. The result of this is stated in the conclusion of the section, which declares, in unambiguous language, that the area of the former West St Giles' Church shall be 'incorporated with and form part of the High Kirk.'

"Now, the pursuers are entitled to draw the whole of the rents of the pews

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no doubt spoke of the Old Kirk as being "incorporated" with the High Kirk. But that meant only physical union between the churches.

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of the High Kirk, and are entitled, in consequence of this, to draw the rents of pews on the area of the former West St Giles' Church, which is now a part of the High Kirk, unless there be some specialty which prevents this legal consequence. The defenders find such a specialty to exist in the 2d section of this Act, which directs the Ecclesiastical Commissioners to apply £10,000 in the purchase of a site, and in the erection thereon of a church 'in lieu of the New North Church (usually called West St Giles' Church), and shall invest the sum of £500 on such separate security as they shall consider proper, the interest whereof shall be accumulated and applied *pro tanto* in the maintenance of the fabric of that part of the building presently occupied by the said New North Church (usually called West St Giles'), but declaring that nothing herein contained shall limit the obligation of the said Edinburgh Ecclesiastical Commissioners to maintain the fabric of the whole building as provided by the said recited Acts.' The argument by the defenders upon this section is—(1) That a new church has been erected in lieu of the old church, and the pursuers draw the rents of the pews in that new church, and consequently they cannot draw rents for pews in the area of the old church. It is quite true that the pursuers do draw the rents of the pews in the new church, but still that does not derogate from their right to draw the rents of all the pews of all the parish churches in Edinburgh, of which the High Kirk of Edinburgh is one, enlarged, no doubt, by incorporation with the area of the former West St Giles' Church. In the second place, it is said that the rents of the pews from that area cannot be demanded by the pursuers, because they have obtained a specific fund for keeping up the fabric of the old West St Giles' Church, and do not need the pew rents to assist them in that particular. It is quite true that the pursuers did get a sum allocated to them under the Act, viz., £500, the interest whereof they were to apply 'in the maintenance of the fabric of that part of the building,' but the interest of this £500 was only to be '*pro tanto*,' and any deficiency arising therefrom they were obliged to make up from their 'general purpose' fund, in terms of the obligations laid upon them by the Act 23 and 24 Vict. cap. 50. There is nothing in the fact that they did obtain this aid in keeping up the walls of the old church that will deprive them of the right to exact pew rents from sitters in a portion of the area of what is now the High Kirk.

"The original dispute arose about a matter which has disappeared in the course of the discussion, viz., whether the sums paid for the use of the chairs placed in the area of the old West St Giles' Church were to be considered pew rents claimable under the 6th section of the Act 23 and 24 Vict. cap. 50, or whether they were donations or gifts with which the kirk-session could deal as they pleased. It was admitted by the counsel for the defenders that he could not maintain the latter proposition, and therefore nothing more need be said upon the subject.

"The summons has a conclusion to the effect that the defenders shall be decerned to produce a full and particular account of the 'whole seat rents levied and received by them, and of their intromissions therewith from the date at which the said West St Giles' Church was incorporated with the said High Kirk, and became part thereof, whereby the true amount due by the said defenders to the said pursuers may appear and be ascertained by our said Lords, and to exhibit and produce annually hereafter to the said pursuers a full and particular account of the whole seat rents levied and received by them, and of their intromissions with the same.'

"Then follows a conclusion for payment of £1000, or such sum as should be ascertained to be the amount of rents received by the defenders since the date of the incorporation, with interest at five per cent, under deduction of a sum to meet the cost incurred by the defenders in providing the chairs and arranging and fitting them up. Now this statutory provision in regard to keeping and furnishing an account is contained in sec. 6 of 23 and 24 Vict. cap. 58. 'The kirk-session shall keep an account of the whole moneys received by them for

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Without a legal process, the area of the Old or the West St Giles' Church could not be legally made part of the High Kirk. They had paid over the pew rents, *i.e.*, rents for the building so far as seated with pews. But there was no obligation to pay over the donations given for the use of chairs which stood during the defenders' pleasure in an area which the pursuers had not seated, or expressed any intention of seating. The contention of the pursuers must be that they could reseat the area of what was once West St Giles' and draw the rents. If so, the same argument would furnish them with ground for restoring the old arrangement and introducing not only pews but a gallery into the building. It was clear that the Legislature had contemplated with regard to the Old Kirk that seat rents should cease to be paid to the Ecclesiastical Commissioners, for it had contemplated that that church, though ceasing to be one of the churches of Edinburgh, might be re-endowed as a *quoad sacra* church. If that had been done the seat rents would have belonged to the committee of management of that church for their purposes. The case with regard to West St Giles' was stronger, for in that case the Commissioners had provided for them another church, and had a sum of £500 invested for the upkeep of the old fabric. The chairs in that part of the building might have been provided temporarily by anyone. A member of the public would have the right to bring his own chair and use it. The duties of the minister were increased by the changed condition of the building, but the liabilities of the Commissioners were not, and they ought not to derive a benefit from it.

Argued for the pursuers;—The real question was whether the former Old Kirk and West St Giles' were not truly parts of the same building with the High Kirk for all purposes. In structure and use they were, so also in law. They were by the statute "incorporated" with it. The churches of Edinburgh were by law not "a congeries of separate parish churches," but their funds derived from the seat rents were to be dealt with as one common fund for defraying the expenses necessary for the conduct of divine worship in them all.[1] At common law a kirk-session had no power to let seats in a church, and there was nothing in the case of St Giles' to distinguish it from any other parish church. A parish church might be enlarged without a legal process if the heritors agreed to do so, and satisfied the Presbytery that it was efficiently done. So in the case of St Giles', space had been taken into the area of the High Kirk by arrangement followed by an Act of Parliament. The £500 invested under the Act of 1879 was merely a guarantee fund to be applied *pro tanto* in discharging the expense which the seat rents of West St Giles' would have been obliged to defray.

At advising,—

LORD JUSTICE-CLERK.—This case raises questions of considerable interest. I cannot, however, say that I have found difficulty in resolving them, and that in the way which the Lord Ordinary has done. It appears to me that the ground of his Lordship's judgment, as well as the narrative which he has given, is

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pew or seat rents, *and of the sums retained for payment of expenses*' [the words in italics are now repealed by 33 and 34 Vict. cap. 87, sec. 32], 'and shall lay the same before the Commissioners yearly, or as often as the Commissioners shall direct.' This is a very plain and peremptory enactment, and entitles the pursuers to have at least a yearly account from the defenders. How far back the account shall be made to run is another question. . . ."

[1] Clapperton v. Magistrates of Edinburgh, July 14, 1840, 2 D. 1385 (per Lord Ivory at p. 1442).

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set out clearly and satisfactorily. The real question is whether the area, which at one time in the history of the building was the West St Giles' Church, is or is not now incorporated with the High Kirk. Now, I do not understand the statute at all if it is not intended so to deal with this area in the clearest way. Before the Reformation the area of the High Kirk was undivided, but after the Reformation there were several congregations worshipping in it, and divisions were set up in the fabric. A movement was set on foot a short time ago to have these divisions cleared away, and the whole fabric occupied, as was originally intended, as one place of worship. By the munificence of private donors that has now been completed.

Now, the Ecclesiastical Commissioners are a body appointed for the purpose of providing machinery for the payment of the stipends of the ministers of Edinburgh since the abolition of the annuity-tax in 1860. As from time to time there have been modifications of their statute, there have been modifications of their duties. One of their duties, however, is to require from kirk-sessions an account of the amount collected from pew rents paid by the congregations accommodated in the churches, and these go into a general fund administered by the Commissioners, applied in part for the maintenance of the ministers of the town. They have a right to require this account, and to have the amount when ascertained paid over to them. Now, the clearing away of these divisions in the High Kirk necessarily threw into one space in the fabric the areas of the Old Church and West St Giles.' In that part of the space thus added to the High Kirk, as it formerly existed, which was occupied by West St Giles', the kirk-session have placed chairs for the use of those coming to worship there, and have received sums from those who occupied them. The Ecclesiastical Commissioners regard the sums paid by those occupying these chairs as nothing else than seat rents or pew rents, and they have called upon the kirk-session to account for the sums so received. I am of opinion that there exists no reason why they should not do so. For most certainly if the area is incorporated with the High Kirk, as I think it is, I think these sums are just the seat rents of one of the city churches within the meaning of the Act constituting the Ecclesiastical Commissioners. I quite understand the view of the kirk-session; they think the space is added to the space within their jurisdiction; and so indeed it is, in so far as they had jurisdiction within their former area but no further. They maintain that the Ecclesiastical Commissioners have no concern with it, because a new church has been erected for the congregation which formerly worshipped there, and that the revenue derived from the space that congregation occupied may be rightly applied towards defraying the expense occasioned by the more attractive services in St Giles'. The object is no doubt a good one, but the question we have to decide is a pure question of construction of the Act of Parliament and the powers and duties of the body acting under it. These are defined by the statute in a manner as to which I have no difficulty in agreeing with the Lord Ordinary.

Lord Young.—This case arises out of a dispute between two public bodies as to their rights and duties. It is a purely legal one, and depends on the construction of Acts—and chiefly one Act—of Parliament. It was fitting to have it determined in Court, but I think, on the whole, it would have been better to have had it presented in the form of a special case. The question is whether two parts or portions of what one would say on looking at it was one building differ with respect to seat rents or anything else from the rest of the church,—whether, indeed, in a legal view, it is possible to divide the church into parts and deal separately with these parts.

One of these public bodies of which I have spoken is the Ecclesiastical Commissioners created by the Act of 1860. The other is a constitutional Court of the church—the kirk-session. But it is not in that capacity that it appears here, except in so far as a special duty is placed on it by the Act which called the Ecclesiastical Commissioners into existence. I need not say that in the ordinary case a kirk-session has no concern with pews or seat rents, or indeed with the administration of parish churches in any way. It is a Court of the church having ecclesiastical duties within the church, but having no concern with the fabric. The kirk-session of the parochial churches of Edinburgh are in this respect quite exceptional. Duties are imposed upon them as to seat rents. By law I need hardly say there are no seat rents in the ordinary parish churches of the establishment. The areas of the churches—the churches having been built by the heritors—are apportioned among the various heritors who contribute to the cost of erecting and maintaining them. They make bargains about their seats, and at anyrate they may give to others gratuitously, or upon such terms as they think fit, the right of using the seats allocated to themselves. The parochial churches of Edinburgh stand on a different footing. They used formerly, as we remember, to be chiefly endowed by means of the annuity-tax, which has ceased to exist. So long as it existed, it led to controversy and disturbance, and it was a great object to substitute some other endowment for it. Even at that time there were seat rents. The churches were in the administration of the magistrates and council, and they levied rents. Part of the funds in the hands of the magistrates consisted of these seat rents, and they applied them in the course of their ordinary duty as magistrates. Indeed, in former times the magistrates applied a good deal of public city money upon the erection and maintenance of churches, and their expenditure, for example, on St George's and St Stephen's, contributed to the unsatisfactory state into which the city finances got. In 1860, when steps were taken to remedy the state of things which then existed, the churches were with respect to management and administration vested in the magistrates and council. They had not a right of property. They could not sell or alienate them; their duty was to hold and administer them as parish churches. It was for this reason,—that the custodiers could not sell or alienate it,—that the first Lord Curriehill used to refer to such churches as examples of allodial property.

Now, by the Annuity-Tax Abolition Act, 1860 (sec. 5) the whole rights of administration and custody with reference to these churches were from and after 11th November of that year transferred from the magistrates and council to and vested in the Ecclesiastical Commissioners. The magistrates and council were by being thus divested of the custody and administration of these churches severed from them altogether, except in one particular, the mention of which shews how complete the severance was, "provided that nothing contained in this Act shall prevent the magistrates and council from causing the bells of said churches to be rung on suitable public occasions."

Now, how are these churches endowed? Not by the annuity-tax as theretofore, but by special funds vested in these Ecclesiastical Commissioners for that purpose. Here, and here only, is there any necessity to refer to the subsequent Act of 1870, which made the abolition of the annuity-tax more complete and

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these special funds more ample. After that the parochial churches of Edinburgh were without distinction vested in the Ecclesiastical Commissioners, and every shilling provided for their endowment vested in their hands only. That is the condition of the church in Edinburgh now. One source of the revenue provided by the Act for the endowment of the clergy consisted of seat rents, and it is just therein that the parish churches of Edinburgh stand distinguished from other parish churches—I should say ordinary parish churches, for a somewhat similar state of things exists in Montrose. These seat rents of all the churches go into the hands of the Ecclesiastical Commissioners, and are placed in a common fund, out of which they have to pay all the clergy. One church provides them with a larger revenue than another, one yields them £800 a-year, and another may yield a small sum. It happens that the High Church, which is in no respect different from any other Edinburgh parish church, yields a small sum compared with that £800, but it stands on the endowment on the same footing as the other parish churches, and its seat rents go to the common fund. This church has been referred to as a cathedral—a name repugnant to Presbytery. It so happens, as every one at all instructed in the subject knows, that before the Reformation the church was not a cathedral. Edinburgh was not a diocese. Indeed it was within the see of St Andrews. In 1633, indeed, when the Protestant Episcopal Church was established, St Giles' was declared to be a cathedral, and a bishop was appointed to a see of Edinburgh. But a few years brought that to an end, and I am not sure that the people of Scotland are generally proud of that episode in their country's history. But it was during that period, and by statute only, that St Giles' was made a cathedral, and after Episcopacy was disestablished there was again no bishop of Edinburgh, no see of Edinburgh, no cathedral. This church, therefore, is simply one of the parish churches of Edinburgh standing under the Act of Parliament in the administration of the Ecclesiastical Commissioners, and endowed like the others out of the funds in their hands. What does it consist of? The High Church was at one time only the east part of the church. There were also under the same roof West St Giles', which was once popularly called Haddo's Hole, and the Old Church. That is, there were parish churches at each end, east and west, and also one in the south transept, the partition walls having been erected so that the congregations should not disturb each other. The same thing will be found in other towns, for example, in Aberdeen, Dundee, and Glasgow, where also the building was so large that it was thought not useful as a place of Presbyterian worship. The idea has now occurred, and I am neither surprised at it nor do I regret it, that it would be a grand and becoming thing to have the church restored to its original unity, and declared to be—the whole of it—the parish church of the High Kirk Parish of Edinburgh. That scheme required money, which was acquired chiefly from one beneficent citizen, and the funds being thus provided West St Giles' and the Old Church were all thrown into one, along with the former High Church,—that is to say, the old High Church was enlarged. It is surely as familiar an idea as can be expressed in language, the enlargement of a parish church. It may be done by adding to the old one, or a very familiar way of adding to a parish church is to pull down the old one and build a new and larger one, but still it is the parish church. In an ordinary parish the heritors have that duty. Here, however, the citizens, to whom the scheme commended itself, provided the funds. But then, it being necessary to provide a church for the West St Giles' congregation, which was to be

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displaced, a part of the scheme was to provide accommodation for that congregation elsewhere, otherwise their church could not be thrown into the High Church, or in other words, the High Church could not be enlarged by taking it in. The Act of 1879 was therefore procured providing that on the requisite sum being set apart to acquire a new site and build a new church "the congregation shall within twelve months from the date of such payment vacate West St Giles' Church, which shall thereupon be incorporated with and form part of the High Church." With respect to the Old Church, there was then no congregation belonging to it, and the statute referred to it in the preamble in these words,—"And whereas part of the building forming the southern transept, and formerly known as the Old Kirk, has now been added to and incorporated with the High Kirk, the dividing walls between them having been removed." The question is now whether these parts of the building are parts of the High Kirk. The Act of 1879 in its enacting clause, and its preamble, declares that they are parts of the High Kirk. To decide anything else would be extravagant. The church is one and undivided, the partitions being taken down just that it might be no longer divided. The immediate question relates to seat rents in the parts formerly occupied by West St Giles.' The former Old Church has, from the sources I mentioned before, been seated in the usual way. The former West St Giles' has not been seated with pews. It is seated in this way (and it is curious to observe the different language used by the parties). The pursuers say (cond. 8) that "it has been furnished by the defenders or under their directions with chairs or seats. . . . These seats have been let in the same way and at the same rates as the other seats in the High Kirk," while the defenders describe the sums thus received as "donations for the use of chairs." I do not much care whether these sums are so described, or described as seat rents. I think one might as well speak of donations for the use of pews, for pews are just seats, and if a man were asked to refer to a specimen seat he would probably say a chair. I do not doubt that if those having the custody and administration of the church,—that is the Ecclesiastical Commissioners,—were so minded they might, if no objection were offered by the congregation, seat the church with chairs throughout. But that is not material, nor is it material how the money is provided to seat the church. This parish church is in fact seated, and there is a congregation worshipping in it under the minister endowed by public law,—a charge upon the funds of the Ecclesiastical Commissioners. Now, what does the statute provide with respect to their duties? Seat rents, we see, are an important part of the endowment fund. Section 6 of the Act of 1860 provided that "the pews or seats in the said several churches shall from and after the 11th November 1860 be let by or at the sight of the kirk-session of each church, with the exception of not less than one-tenth of their number, which shall be reserved as free sittings." The letting of the seats is to be subject to any direction of the Commissioners from time to time. It was to that I referred when I said that there were duties placed upon kirk-sessions of the Edinburgh parochial churches which were not placed upon kirk-sessions of ordinary parish churches. I do not think that any rights are conferred upon them, only duties—statutory duties. They are to levy and collect pew or seat rents as the Commissioners direct, it being reserved to the Commissioners, if they see fit, to levy and collect them themselves. And the kirk-session are bound to keep an account of the seat rents they collect and render it to the Commissioners, and pay over the proceeds to them, to be applied as the statute directs. Now, can we distinguish

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in this matter between that part of the church which was formerly occupied by the Old Church and the old High Church itself? I think we cannot, and, indeed, the counsel for the defenders put themselves into a somewhat absurd dilemma when they said that area was not part of the High Church. If it were so, the defenders would have no right there, for they are the kirk-session of the High Church; and if that is not part of it, they are not the kirk-session of it, and it has no kirk-session or minister. My opinion, therefore, is, that that area is part of the High Church, and therefore within the provisions of the Act imposing upon the kirk-session of the High Church the duties I have mentioned. And so also with West St Giles'. I am totally unable to distinguish between one part of this church and another, and I think it would be absurd to say that only that part which, before the recent enlargement, was the High Church had a minister and kirk-session. It has, all without distinction, a minister and kirk-session, and is, all without distinction, subject to the Act of Parliament.

The Commissioners have no interest in this matter personally. If the High Church yield a large revenue, the endowment in their hands will be larger; if a small revenue, that endowment will be so much less. They have thought it their duty to raise this action, and it was their duty to exercise their judgment in the matter. I cannot assent to the notion that what is paid for these chairs is just a donation for the rest and luxury of a seat. I think these persons pay seat rents.

It is said that the Commissioners got a sum of £500 invested in 1879 for the upkeep of the new West St Giles' Church. No doubt they got it according to the Act of Parliament, and invested it and are applying it exactly as the statute directed.

On the whole matter I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD RUTHERFURD CLARK.—I am satisfied that for the purposes of this action the whole area within the walls of St Giles' must be held to be the High Kirk.

It is true that the southern transept, which was formerly known as the Old Kirk, was thrown into the High Kirk by private arrangement, without any judicial or other legal sanction. But the Act of 1879 in its recital recognises the Old Kirk as having been now added to and incorporated with the High Kirk. Whether the incorporation is legally complete I do not stop to inquire. The incorporation exists *de facto*, and has been accepted by the defenders. Therefore, as matters now stand, and in the question with which we are concerned in this action, the area so added must, in my opinion, be regarded as a part of the High Kirk. This point is, however, of little importance, because the defenders have all along been willing to account for the seat rents drawn from the pews placed in the southern transept or the former Old Kirk.

In regard to the area which was formerly the New North or West St Giles' Church, there can, I think, be no doubt. The Act declares that on the occurrence of certain events, which in fact have occurred, the foresaid area shall thereupon "be incorporated with and form part of the High Kirk." The defenders urged that this statutory declaration meant nothing more than that the New North Church should be incorporated with the High Kirk in the same sense and to the same effect as the Old Kirk. I cannot so hold. The statute is express. There may have been some omission in obtaining proper legal sanction for the incorporation of the Old Kirk with the High Kirk. But that circumstance cannot, in my opinion, deprive the statute of its power, nor can it entitle us to construe it contrary to the plain meaning of its words.

Being thus of opinion that for the purposes of this question the whole area of St Giles' must be held to be the High Kirk, I also think that the defenders are bound to account for the pew or seat rents which are drawn by them.

But the true question which has arisen between the parties relates to the rents drawn from chairs placed in the nave or in that part of St Giles' which was formerly the New North Church.

When the restoration of St Giles' was completed through the liberality of the late Dr Chambers, the church was seated in this manner: Pews were placed in that part of the area which had formerly been the High Kirk and the Old Kirk. But no pews or seats of any kind were placed in the nave. We were told that on the occasion of the opening of the restored church the kirk-session put chairs in the nave for the accommodation of the public, and that these chairs have been allowed to remain ever since. They are the property of the kirk-session, who have thought proper to draw a rent for the use of them. The question is whether they are bound to account for that rent to the pursuers.

In my opinion, St Giles' is seated only in those parts which I have mentioned, viz., the former High Kirk and the Old Kirk. It was left in that condition after the restoration. No proposal or attempt has been made to alter it. The nave is unseated. It is certainly unseated in the ordinary sense in which that word is used in regard to an Established Church in Scotland.

The Act of 23 and 24 Vict. c. 50, which created the Ecclesiastical Commissioners, provides, by the 6th section, "that the pews or seats in the said several churches" shall be let by the several kirk-sessions, and that the rents thence arising shall be accounted for to the pursuers. This is the title of the pursuers to draw the pew or seat rents, and it is under that title that they demand the rents which the defenders have received from the chairs. If the claim of the pursuers is well founded, they must shew that the chairs are pews or seats within the meaning of the clause which I have cited. I do not think that they can. It appears to me that these pews or seats referred to in the Act can only mean the pews or seats which are put into the church by the owners or administrators of the buildimg. It is true that St Giles' was seated at the expense of Dr Chambers. But in restoring the church, he was acting with the authority of the owners and administrators, and in seating it as it was actually seated, he was in my opinion performing their functions. Thus the pews and seats which were placed in the church, though at his expense, must in my judgment be held to be placed therein by the body responsible for the seating of the church, and, therefore, that in the nave there are no pews or seats within the meaning of the Act.

If any one of the public desired to attend divine service in St Giles' Church, I think that he might have brought his chair with him, and sat in the nave free of charge. The pursuers cannot charge for the use of the building. They are only entitled to draw the rents of the pews or seats which are provided by the body responsible for the proper seating of the church. Neither they nor any other person, so far as I can see, could exclude an intending worshipper from the church, or prevent him from making provision for his comfort during the service. But what each individual might do for himself has been done by the kirk-session. They have provided chairs, and they draw a money payment or rent, if the word be preferred, for the use of them. But as, in my opinion, these

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Edinburgh Ecclesiastical Commissioners v. Kirk-Session of High Kirk, Edinburgh.

chairs are not pews or seats within the meaning of the Act, the defenders are not bound to account to the pursuers for these moneys.

We are not called on to decide whether the pursuers are entitled to seat the nave, or even to put chairs therein, in order that they may draw rents from them. That point cannot be decided in this case, nor can it be decided without calling other parties than the present defenders. For the purposes of this action I think that I am bound to take the church as it is, and while it remains in its present condition, the defenders are, in my opinion, bound to account for such rents as they receive for the pews and seats in the area of the former High Church and Old Church; but they are not in my judgment bound to account for the rents which they receive for chairs which they placed in the nave.

LORD CRAIGHILL was absent.

THE COURT adhered, and remitted the cause to the Lord Ordinary for further procedure.

SIR JOHN GILLESPIE, W.S.—L. MACKERSY, W.S.—Agents.

No. 172.
July 19, 1888.
Maclean v. Soady's Trustee.

MRS CAMILLA MACLEAN AND HUSBAND, Pursuers (Respondents).—
R. V. Campbell—J. C. Lorimer.
JOHN TURNBULL (Soady's Trustee) Defender (Reclaimer).—
D.-F. Mackintosh—Low.

Trust—Personal liability of trustee—Loan on heritable security—Security for capital and interest.—Circumstances in which a gratuitous trustee was found personally liable for trust-funds lent by him on the security of heritable subjects.

Observed that where trust-moneys are lent on the security of heritable subjects, if any part thereof is in the occupation of the owner the trustee ought to take that fact into consideration in estimating the amount of the rental available for payment of interest on the loan.

Observed that where the primary purpose of a trust is to secure an alimentary provision, the trustee is bound to be specially careful that the security is sufficient to ensure payment of the interest on the loan.

1st Division, with three consulted Judges.
Lord M'Laren.
M.

MRS DICKSON SOADY, Edrington, Berwickshire, died in 1863, leaving a last will and testament dated in that year, in which she nominated John Turnbull, W.S., Edinburgh, and others, trustees. Mr Turnbull and another, who died in 1865, accepted office as trustees. After the death of his co-trustee Mr Turnbull acted as sole trustee, and also as law-agent for the trust.

By her trust-deed Mrs Soady directed her trustees, after conversion of her estate, to invest the proceeds thereof and pay the interest to her daughter Mrs Camilla Maclean for life, for her sole and separate use and benefit, without power of anticipation, and at Mrs Maclean's death to divide the estate as directed.

The trust-funds under Mr Turnbull's charge consisted of £500, which he administered as trustee under an *inter vivos* trust-deed, and £2500, being the amount of Mrs Soady's estate after conversion was effected.

Prior to 1881 £2000 of Mrs Soady's trust-funds were lent on the security of the lands of Tandlaw, Berwickshire, and £500 over houses in Merchiston Avenue, Edinburgh. The £500 administered by Mr Turnbull under the *inter vivos* deed was also lent over Tandlaw.

In 1881 Tandlaw was sold by the liquidators of the City of Glasgow Bank, and was bought by Mr Turnbull, who, on 6th September of that year, paid up the bonds affecting the estate.

On 8th September 1881 the whole trust-funds, amounting to £3000, were lent by Mr Turnbull as trustee, upon a bond and disposition in security over the estate of Nenthorn, Roxburghshire, to Mr Frederick L. Roy, proprietor of the estate.

At the date of the loan the estate was burdened by fourteen prior bonds for loans amounting to £49,525, a bond of annuity to the widow of the late proprietor of £260 per annum, which was valued at £2700, and a bond of annuity for £300 to the wife of Mr F. L. Roy, in the event of her surviving her husband, which was valued at £5000.

On 9th March 1887 Mrs Maclean, with consent of her husband, raised an action in the Court of Session against Mr Turnbull, as trustee, concluding for declarator, "that the defender has incurred personal liability for the sum of £3000, belonging to the trust-estate of the said Mrs Dickson Soady, together with interest thereon at the rate of five per centum per annum from and after the term of Martinmas 1884 until payment; and that the defender, in his accounts with the said trust-estate, and with the pursuer Mrs Camilla Soady or Maclean as beneficiary under her mother's said testament, is bound, out of his own funds, to replace and make good the said sum of £3000, with interest thereon as aforesaid, to the said trust-estate, and thereafter to invest and to administer the said sum, with the accruing interest thereon, in terms of the said testament, and in accordance with his duty as trustee." The summons also contained a conclusion for payment and an alternative conclusion for damages.

The pursuers averred;—(Cond. 7) "The said loan of £3000 was made by the defender negligently and in breach of his duty as trustee foresaid, and also as law-agent for the said trust-estate. The loan was not such as any neutral law-agent, acting impartially and with due skill and consideration in the interest of the trust-estate, could in the ordinary course of business have advised as an investment for trust-funds. It was also such an investment as no prudent trustee, acting with ordinary care, should have accepted for trust-funds under his charge. The owner of Nenthorn, Mr Roy, prior to the said loan being made to him, was, and was known by the defender to be, embarrassed in his affairs and in pecuniary difficulties. There were sums heritably secured in fifteen separate securities over the estate of Nenthorn, all preferable to the said loan, and amounting in all to the sum of £57,225, and the said bond and disposition in security taken by the defender was a postponed bond, sixteenth in order of ranking after the various securities for the said £57,225. The defender had acted, and did act, as agent for the said Frederick Lewis Roy both before and after the date of the said loan, and being acquainted with the affairs of the said Frederick Lewis Roy, and the correspondent of his local agent, Mr Tait, W.S., Kelso, the said loan was made between terms, in September 1881, to meet the needs and convenience of the said Frederick Lewis Roy, and without due consideration and inquiry in the interest of the said trust-estate. The purpose to which the said sum of £3000 was to be applied—viz., the stocking of the farm of Whitehill, which had fallen into the proprietor's hands—was in itself indicative to a prudent trustee or agent that the loan was hazardous. No formal proposal for the loan, accompanied by a rental, was made to the defender. No valuation of Nenthorn by any neutral and skilled person was asked or obtained by the defender on behalf of the trust as the lender; nor was any attention paid by him to the facts that much of the estate was unlet or was going out of lease, that large reductions in rent had been found necessary and were plainly in prospect, and that on any reasonable calculation, made with ordinary care and prudence in the interest and for the protection of Mrs Soady's trust-funds, the investment under the said bond and disposition in security was sufficient neither for the principal

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nor interest, and should have been at once refused by the defender in the discharge of his duty as trustee and law-agent. The counter statements are denied, except in so far as coinciding herewith, and under the explanation that the National Bank took, in the form of a further postponed bond, the only security to be got for an existing debt."

The defender answered,—"Admitted that no formal proposal of loan was made to the defender, and that he did not get a special valuation of the estate made. *Quoad ultra* denied. Explained that the defender had before him full and reliable information as to the value of the estate and the burdens thereon. He had also previously, acting for other clients, given loans over the estate to the amount of £9000, and he had then made careful inquiry as to the value and position of the estate. The free rental of the estate was estimated at £3137 or thereby when the loan in question was granted. The said estimate was moderate. Mr Roy had then only one farm, viz., Whitehill, in his own hands. The tenant of that farm had been ruined by the failure of the City of Glasgow Bank, and the farm had in consequence to be taken off his hands. The rent which he had paid was £840, but Mr Roy only charged himself with a rent of £650, which was the amount taken in estimating the rental as above. Mr Roy actually paid to Mr Tait, his agent and factor, on account of the rents of said farm, the sum of £2185 between January 1882 and November 1884. In the said rental the value of the mansion-house and shootings (then in the proprietor's hands) was stated at £200. It was previously let for £300. An abatement of £107 for the year then current was also deducted from the rent of Blinkbonny farm. There were then no further abatements. The estate was exposed for sale in August 1881, about a month before the loan was given, at the upset price of £100,000, and in July 1882 at the upset price of £90,000, but no sale was effected. From £80,000 to £85,000 could, however, have been obtained at this time, but the proprietor would not sell at that price. The money borrowed over the estate when the loan in question was granted amounted to £49,525, in twelve separate loans by nine different lenders. There were also secured over the estate an annuity of £260 to the widow of a former proprietor (who is a lady of advanced years), and a contingent annuity of £300 to the present proprietor's wife in the event of her becoming a widow. The surplus rental was about £1032. The defender was not, and never has been, agent for Mr Roy. He was the Edinburgh correspondent of Mr Tait, W.S., Kelso, Mr Roy's factor, and as such his name was inserted in the advertisement of sale of the estate as a person from whom information might be obtained, but he never acted directly for Mr Roy or under his instructions in any way. Subsequently to the loan in question, a body of trustees, for whom the defender acts, after full consideration and inquiry, authorised a loan of £3000 over the estate, and after the latter loan had been granted the National Bank of Scotland advanced to Mr Roy £1250 upon the same security. At the time when the loan in question was granted Mr Roy had also considerable personal means."

The pursuers further averred;—(Cond. 8) "The income actually received from the estate of Nenthorn, as at the date of the said loan, may be stated at from £2000 to £2250. This sum was not sufficient to meet the interest or other charges upon the preferable securities, along with the public burdens and necessary charges for repairs, insurance, management, and the like. The estate of Nenthorn was exposed for sale by the proprietor in 1881 and beginning of 1882, but no purchaser could be obtained. Early in 1885 the proprietor, whose embarrassments had increased, granted a trust-deed in favour of Mr James Haldane, chartered accountant, who

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has since been managing the estate. The difficulties connected with the finance of the estate, arising from the depreciation of its rents and income, and from the large amount of the debts, secured and unsecured, in addition to the preferable securities above mentioned, have increased, and the investment improperly made by the defender of the said £3000 may be taken as having resulted in a total loss. The female pursuer has been paid no interest since Martinmas 1884. The counter statements are denied, except in so far as coinciding herewith, and the defender's arrangements with Mr Haldane as to paying interest on prior bonds are not known."

The defender answered;—"Admitted that in 1885 Mr Roy granted a trust-deed in favour of Mr Haldane. *Quoad ultra* denied. Explained that interest was punctually paid upon the pursuer's bond up to and including Martinmas 1884. The interest due at Whitsunday 1885 was not paid by Mr Haldane until Martinmas 1885, and since that date no interest has been paid on the pursuer's loan. The defender, in order to save the estate from being forced upon the market at the present unfavourable time, when it could only be realised at a great sacrifice, has himself paid the interest when due upon prior bonds, amounting to between £40,000 and £50,000, getting repayment from Mr Haldane as money came into his hands."

The pursuers further stated that they were willing that the defender should, on repayment of the principal sum sued for, retain the bond over Nenthorn for his own use.

The pursuers pleaded;—(1) The sum of £3000, belonging to the trust-estate of Mrs Dickson Soady, having been improperly lent out, owing to the negligence and breach of duty of the defender (1) as trustee, and (2) as law-agent for the trust, the defender is personally liable for the said sum, with the arrears of interest thereon from and after Martinmas 1884.

The defender pleaded;—2. The pursuers' averments, so far as material, being unfounded in fact, the defender should be assoilzied. 3. The defender not having been guilty of any neglect or breach of duty, either as trustee or law-agent, should be assoilzied, with expenses.

Proof was led in the cause, from which the following facts appeared:—Prior to the granting of the loan in question, Mr Turnbull, who acted as correspondent in Edinburgh for Mr Tait, W.S., Kelso, factor and agent for Mr Roy, had been concerned in the obtaining of loans over Nenthorn to the extent of £9000, which were charged by bond and disposition over the estate. In July and August 1881 the estate was exposed for sale, but no purchaser was found. In July, just before the estate was exposed, Mr Tait wrote to Mr Turnbull asking him, if the estate did not sell, to obtain a loan over it for £3000 from Lord Marjoribanks' trustees. The draft bond was made out in the name of those trustees, but, eventually, the loan was granted by Soady's trustees.

The estate, which was one of great amenity, had a total acreage of 1869 acres. There was on it a good mansion-house, with policies. The lands were chiefly let out in farms; there were also, however, woodlands and grass parks which were let for grazing. When it was determined in 1881 to expose the estate for sale, "Particulars of the estate" were drawn up by Mr Tait and were sent to Mr Turnbull to look over. He did not, however, act as agent for Mr Roy in any sense. Mr Turnbull had these "Particulars" when he granted the loan.* He did not get any independent valuation of the estate.

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* Mr Turnbull, deponed,—"Besides the 'Particulars of sale,' I had the rentals in connection with former loans to guide me in making this loan. I was satisfied with the 'Particulars.' I have no doubt I examined them with a

A note of the rental of the estate of Nenthorn, as it appeared in 1881,

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view to this loan. . . . I looked for a margin of income from the estate after providing for the prior bonds. I thought there was enough to pay interest on this bond, and still leave a margin. After providing for everything before this bond there was a margin of £1000. I have no doubt I made a calculation at the time bringing out that, but I have no record of the calculation. My information was derived from the 'Particulars.' I considered whether the estate, with all the previous burdens on it, was a good security for repayment of the principal. It would not be in accordance with my practice as a law-agent to lend £3000 without seeing that there was a margin to meet the interest. I don't know what margin I would require in the ordinary case; in this case there was £1000 a-year. (Q.) Is it a prudent loan, lending in such matters, to see that there is 30 per cent of income free? (A.) Yes, that is a very prudent rule. (Q.) Did you consider this a first-class security? (A.) No, it was not a 3½ per cent security when I got 4 per cent for it. I looked over the 'Particulars' at the time. The mansion-house is put in the 'Particulars' at the annual value of £200 a-year. I consider that was a fair value; it was under the value. If I mistake not, the rent when it was let was £250 furnished, and it is stated in the 'Particulars' as of the unfurnished value of £200. (Q.) If it was worth £200 unfurnished in 1877, was it not proper to value it at less in 1881? (A.) No. (Q.) I shew you a 'Note of the rental of the estate of Nenthorn, belonging to F. L. Roy, May 1881,' prepared by Mr Tait, in which the value of the mansion-house and garden unlet is stated at £150; have you seen that state before? (A.) I don't think so. I don't think I had information in May 1881 that the probable value of Nenthorn mansion-house and shootings did not exceed £150. I did not make any inquiry as to whether £200 was the proper sum or not. I had no means of knowing whether £574 was a proper rent for the farm of Burnbrae in 1881; I knew it was let for that. There had been no reduction in the value of farms since 1866. There may have been some reduction of rents before 1881, but the great depression did not occur until after that time. I believe it was the case, as stated in the 'Particulars,' that abatements of rent had been very general in the district. I have no reason to suppose that £574 was not a good estimate of the value of Burnbrae in 1881. I was not aware at that time that there had been a universal abatement of rents under leases dating back to 1866. I believe abatements were being given in 1881 in Berwickshire and Roxburghshire in such cases as required them. The lease of Burnbrae was, according to the 'Particulars,' to fall out in 1885. There was no term stated for the loan in question. In 1881 I had no reason to suppose that the rent of Burnbrae would either continue or diminish on the expiry of the then current lease. I don't suppose I applied my mind to the question; I could only have ascertained that by getting a valuation, which I did not get. I knew there was a Royal Commission sitting in 1879, inquiring into agricultural depression, and that witnesses were being examined. I am not aware that 1881 was a particularly bad year in a series of bad years. If Mr Haldane says that Burnbrae is now let for £400, I have no reason to doubt it. (Q.) Did you inquire or consider whether the farm of Girrick could be fairly valued, as stated in the 'Particulars,' at £710? (A.) I have no doubt it could. (Q.) Did you consider the matter? (A.) I happened to know that the tenant was quite able to pay it. I am shewn a memorandum with reference to that farm dated 1886. I believe that memorandum was prepared in my office, and was sent by me to the pursuers. It states that the tenant's proposal was that he should get an abatement of £300, and that Mr Haldane advises a reduction of £200,—that is, for one year—the crop of 1886—not a permanent abatement. The annual value of Whitehill is stated in the 'Particulars' to be £840. The farm was in the possession of Mr Roy. The value which I took into account was £650. I did not take the £840, because £650 is stated in the margin as the sum Mr Roy charged himself with. £840 was the rent paid by the previous tenant, who was ruined by the City of Glasgow Bank. I am not aware that the farm is now let by Mr Haldane at £450, but I may have heard it. (Shewn state-was produced, and is given below.* The "Particulars of the estate,"

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ment prepared by witness in 1886)—It is stated there that in December 1885 the largest offer that had been received was £420. I don't know whether it is let for that or not. I assumed that £650 was the proper value of Blinkbonny for lending purposes. I am not aware that I made any inquiry as to whether or not any more than £550 had been paid under the lease of 1879. The only reduction I made from the entries in the 'Particulars' was £190 in the case of Whitehill, and I took into account of course also the reduction of £107 made in the 'Particulars' as to Blinkbonny. It is stated in the 'Particulars' that by arrangement between the proprietor and tenant the lease was to determine at Whitsunday 1882, and the rent to be reduced to £650. I never made any inquiry as to what the arrangement was; in fact there was no arrangement, the parties being at liberty to make an arrangement for the future as they thought proper. I am not aware that from 1879 there was only £550 paid for that farm. The grass parks are entered in the 'Particulars' as of the value of £468, being the average that had been got during a period of ten years. They were let annually. I don't suppose I made any inquiry as to whether that was an exaggerated estimate. I considered myself bound for the safety of the lender. I did not apply my mind as to whether £468 was a fair value or not. The rental obtained during the first five years of the period for which the average is taken is much larger than the rental for the second five years. If the average were taken of the second five years, it would be much lower than the average of the whole ten. There was not a progressive reduction from 1877; in 1880 the rent received was £466, which was considerably over what had been got before. I cannot speak to the rental of grass parks throughout the country prior to 1881. (Q.) Were you aware that from 1877 downwards, in consequence of the fall in the value of stocks, nobody could rely upon an average taken before 1877? (A.) No; I am not aware that the rent of grass parks was falling from 1877, but I know that rents generally were falling from 1881, and grass parks would fall also. I don't consider that in this matter I was

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* "Whitehill Farm, unlet, as in valn.-roll, . . . £650 0 0

Whitehill Farm, unlet, as in valn.-roll,		£650 0 0
Blinkbonny Farm,		650 0 0
Girrick Farm,		660 0 0
Burnbrae Farm, Berwickshire,	£460 0 0	
Do. Roxburghshire,	80 0 0	
		540 0 0
Grass Parks (this year) (average ten years, £417),	£367 0 0	
Lawn Park,	28 0 0	
Haugh,	28 0 0	
		423 0 0
Mansion-house of Nenthorn and gardens unlet,		50 0 0
Cottages, &c. in Nenthorn village—		
Blacksmith's house, smithy, and field,	£13 0 0	
Joiner's house and shop,	10 0 0	
Cottage and garden, Thomas Lothian,	4 0 0	
Cottages and gardens under £4,	6 0 0	
		33 0 0
Free Church manse feu-duty,		1 0 0
Shootings and fishing unlet,		100 0 0
Woodlands, not let, entered in valuation-roll at £20.		
Interest payable by tenants in addition to rents—		
J. Black and J. Hogg for Girrick,	£50 0 0	
J. Black for Burnbrae,	34 2 6	
		84 2 6
		£3191 2 6

Kelso, 20th May 1881."

above referred to, were also produced. They contained, *inter alia*, the

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bound to look only at the five years immediately preceding 1881. I think I was entitled to go back to the good years; good years were expected again. (Q.) Did you at the date when you lent this money apply your mind to consider whether an average of ten years—five good and five bad—was a safe average to go upon? (A.) Yes; I took it all into consideration. The result was that I considered there was a good margin upon the estate to keep the loan safe; that was the conclusion I came to. (Q.) So far as regards these grass parks, did you think ten years was a proper average to take for the purpose of judging of this security? (A.) Probably I did, because, although the second five years were lower than the first, every one expected rents and prices to go up again. I don't know whether the importation of frozen meat subsequent to 1876 had any bearing upon the question of such a valuation from a lender's point of view. Rents were going down, but what the cause was I did not know; probably the importation of frozen meat contributed to it. I cannot say to what particular figures I applied my mind as regards the grass parks; it is six or seven years ago. I assumed the statement of public burdens in the 'Particulars' to be correct. There is no entry of any charge for roads or bridges under the Roads and Bridges Act; the Act had not then come into force. The Act had been passed. I don't think the charges under that Act required to be in the contemplation of a lender, because proprietors were paying tolls and statute labour, which came in place of the assessments under the Roads and Bridges Act. I hold that the passing of that Act did not increase the burdens upon land against the proprietor. I hold that the assessment in the county of Berwick is no more now than was paid by the inhabitants of the county before the passing of the Act. If £60 has to be added to the public burdens in respect of the Roads and Bridges assessment, then there must be a corresponding increase on the rent for the saving to the tenants. I did not take into account the property-tax, or any taxes not stated in the 'Particulars.' I made an allowance from the rental for management, repairs, insurance, &c. I cannot state what the allowance was; I made no note of it. I should think I made a calculation as to what margin there would be after this loan was given, but I have no note of it. I assumed that the whole of the statements in the 'Particulars' were correct. In doing so I relied on the statements of Mr Tait. (Q.) I think you wrote that in giving the loan you did so only in consequence of your confidence in Mr Tait's management. (Shewn letter of 9th February 1885 to Mr Roy)—(Q.) Is it the case that the loan was made only in consequence of your confidence in Mr Tait's management? (A.) If I must tell it, I will. Mr Roy was a most troublesome individual to deal with, and a man with whom it was most difficult to get on, and unless the estate had been in the management of someone in whom I had confidence, and who I was sure would pay the interest without objection when the term came, I would have recommended my clients not to lend the money whatever the security was. By the Court.—My confidence in Mr Tait was only one of the elements that influenced me in granting the loan. Examination continued.—I did not make any special inquiry as to whether the statements in the 'Particulars' were true or not. I did not make any special criticism of them with a view to the protection of the lender. I did not know what the money lent was to be applied to. (Referred to letter by witness, dated 30th November 1886)—It would appear from that letter that it was to stock the farm of Whitehill, which had fallen into the proprietor's hands." The witness further stated that he had in his possession several rentals obtained by him for the purposes of previous loans negotiated by him.

He further deponed,—"In deciding as to whether there was an ample margin, I had recourse to all the knowledge which was then available as to the prospects of agriculture and of rents in that county. I have no doubt that I took all the knowledge that I had at the time into account in deciding upon the loan, and judging of the rental. In regard to the two farms of Whitehill and Blinkbonny, the rental on which I proceeded allowed a considerable deduction on the former rents. Whitehill had been rented at £840, and I took it in the

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following entries regarding the mansion-house and the farms of Whitehill and Blinkbonny :—

No.	Possessions.	Tenants.	Leases.			Rents.				REMARKS.
			Term of Entry.	Duration of Lease.	Term of Expiry.	Money Rent.	Interest.	Total.	Terms when payable.	
1	Mansion-house, policies, and shootings.	In proprietor's occupation.	—	—	—	£ s. D. 200 0 0	—	£ s. D. 200 0 0	—	The mansion-house has not been let for the past four years, and the rent stated is that received during seasons 1874 to 1877, both inclusive, after deduction of allowance for furniture.
*	*	*	*	*	*	*	*	*	*	* *
4	Whitehill,	Proprietor.	—	—	—	840 0 0	—	840 0 0	—	The rent stated for this farm is the rent under the lease to the late tenant, Mr John Craig. As has been already explained, Mr Craig was involved in the failure of the City of Glasgow Bank, and had therefore to request the proprietor to relieve him of the obligations contained in the lease. In consequence of the recent bad seasons, abatements have very generally been given in the district, and the proprietor accordingly has charged himself with only £650 of rent, and has for the last two years returned that sum to the Valuation-roll.
5	Blinkbonny,	George Buckham Young.	26th May 1879.	19 years.	26th May 1898.	757 16 6	—	650 0 0	Martinmas and Whitsunday.	It has been arranged between the proprietor and tenant that the lease shall terminate at Whitsunday 1882, and the rent for the current year is reduced to £650, both parties being at liberty to make an arrangement for the future as they may think proper.

landlord's hands at £650, an abatement of something like 20 or 25 per cent. In regard to Blinkbonny, the difference between the rental under the lease and the rental I estimated was £107, being a deduction of something like 15 per cent. As to the grass parks, it is not the case that there had been a progressive fall in the rental prior to 1881 ; the rents varied. The rents were low in 1881, but we expected them to go up again. The rental assumed in the 'Particulars' was within £2 of the rental actually got in 1880. The burdens on the property—the existing bonds—came to £49,500. I had the particulars of these bonds before me, and knew exactly the interest which was being paid on them. The interest on some of them was 3½, and on others 3¾ and 4 per cent. In considering as to the loan in question, I took the interest on the prior bonds at 4 per cent, which gave £1981. Adding to that the amount of the annuity to Mrs Roy senior, £260, the total annual burden on the estate was £2240. In

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It further appeared from the "Particulars" that the farm of Burnbrae (290 acres) was let for nineteen years from May 1866 at a rent of £540, and the farm of Girrick (463 acres) for twenty-one years from May 1874, at a rent of £660. The acreage of Whitehill farm was 426 acres, and that of Blinkbonny 487. The grass parks were let to various persons, and the rent given in the "Particulars," viz., £468, was given on the average rent of the past ten years.

The public burdens were stated as in the "Particulars" at £147, 11s. 3d., those specified being minister's stipend, poor-rate, school-rate, registration-rate, heritors' assessment, county-rates, statute labour.

It appeared from the proof that had Mr Roy been willing to accept the price, £80,000, or possibly £85,000, might have been obtained for the estate late in 1880 or early in 1881, and that again in 1882 or 1883 there was a chance, which was not taken advantage of, of selling the estate for £80,000. Mr Turnbull, however, was not shewn to have been aware at the time the loan was granted that there had been any offer for the estate before that date.

Mr Molleson, C.A., Edinburgh, was examined for the pursuers, and extracts from his evidence are given below.*

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that way there was upon the rental of 1881, as appearing upon the 'Particulars,' a margin of £900, and taking the actual rates of interest paid, the margin was £1032. I had no doubt as to the existence of that margin, and I had no reason to suppose that it was likely to diminish. Up to 1881 times had varied, some years being good and others bad; people did not at all expect that rents would fall as they have fallen since. I considered that the rental of 1881, making the deductions I did, might fairly be expected to be maintained."

* Mr Molleson deponed,—"On page 6 of the 'Particulars' prepared for the sale of the estate in 1881, I find that the free rental of the estate is brought out at £3327, 17s. 6d. I have examined the 'Particulars,' and in a question of arithmetic the rental, I have no doubt, is correctly stated. An examination of the 'Particulars,' however, satisfies me that that was not a reliable margin in regard to a question of the free revenue that might be considered derivable from the estate, either with a view to a loan or for any other purpose. I produce a statement which I have prepared, shewing wherein I consider the 'Particulars' defective. The rent of the mansion-house is, in my opinion, overstated to the extent of £50. It is stated at £200, which was the rent obtained in 1877, after which it was unlet, and I think £150 was enough to take it at in 1881, considering the fall that had taken place in rents since 1877, and also keeping in view the cost of upkeep of the house, gardens, &c. In making that and the other deductions, I have put myself as far as I could in the position of a man examining the 'Particulars' in 1881. With regard to the rent of Burnbrae, I suggest a reduction of £108, or 20 per cent on the rent stated in the 'Particulars,' in view that the lease had only five years to run, and that the farm would not let again at the same rent. There had been a great fall in rents owing to general causes, and I find that recognised even in the 'Particulars,' where it is stated that 'in consequence of recent bad seasons, abatements have very generally been made in the district.' It is consistent with my experience that deductions were made from estimated rentals in 1881, in considering the value of heritable property. I would not have taken an existing rental under a lease that had run for a considerable period as a basis for lending in 1881, without making a considerable deduction. With regard to the farm of Girrick, I would submit a deduction of 10 per cent upon the £660 stated in the 'Particulars,' in respect that the lease was a more modern one, being dated 1874. I think 1874 was long enough before the depression to require some abatement to be made. Whitehill farm is stated in the 'Particulars' as being in the possession of the proprietor at the estimated annual value of £840. I find it stated, however, that the proprietor had entered it at £650 in the Valuation-roll, and accordingly I would take off the difference and treat it as £650. As to the farm of Blinkbonny, the rental is

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Evidence was produced to shew that other persons acting in a fiduciary capacity had lent money over the estate subsequently to the loan by Mr Turnbull.

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stated in the 'Particulars' at £650, and under the lease it was £757, 10s. 6d. I find from the rent ledger that there was an agreement apparently running along with the lease, commencing at Martinmas 1879, under which a deduction was made for four half years of £103, 18s. 3d. half-yearly, reducing the rent payable for that period to £550. I would take off £100 from the rental stated. For the year after the last abatement there was a rent of £650 paid, but that apparently was an exceptional payment for a particular year, because afterwards it dropped down again to £550, and consequently I view the rental at that time as having been £550. The rent regularly paid under the lease was £550, with the exception of 1881, when it was £650, apparently under an arrangement with a view to a termination of the lease. As regards the grass parks, I find in the 'Particulars' that they are valued on an average of ten years. The rents received in the first five years of that period were in excess of the rents received in the second five years, and I think a much better way of reaching an average would have been to have taken a period sufficiently long, namely, five years, and I have taken the average of the second five years of the ten. I take off the grass parks £54, because the average of the second five years is only £414, as against £468 for the ten years. The public burdens are stated in the 'Particulars' at £147, 11s., being a trifle over 4 per cent on the rental. That is an exceedingly small percentage, and would be enough, in my opinion, to startle anyone. I observe from the books of the estate that total crown taxes paid from February 1880 to February 1881 were £228, 4s. 10d., and from February 1881 to February 1882 £225, 18s. 3d. I consider £147, 11s. is an understatement of the public burdens to the amount of £80. The omission is chiefly the property-tax and the assessed taxes. By the Court.—I think the property-tax is usually put under the head of public burdens; it is a tax you cannot escape. The tenant pays it under schedule A, and deducts it at the subsequent rent collection. Examination continued.—I find also in the 'Particulars' there is nothing allowed for the roads and bridges assessment, which, since Mr Haldane's management commenced, has required £50 or £60 a-year to pay. No doubt that was not chargeable in 1881, but the Act had been passed, and the charge was imminent and before everybody. I think something ought to have been allowed prospectively for that. I find in Mr Haldane's accounts repayments to the tenants in respect of payments by them of property-tax. The property and income-taxes for 1885 amounted to £90, 0s. 3d. The property-taxes were paid by the occupiers,—that is, the tenants—except in the case of Whitehill, which was in the proprietor's hands. By the Court.—I do not know that there is any specific arrangement as to tenants paying property-taxes, but as a matter of practice we constantly receive tax receipts from tenants, and treat them as equivalent to cash in settling with them. Examination continued.—In addition to these burdens I think a lender should have had in view the expenses of management, fire insurance, and repairs, in order to arrive at the actual margin. I estimate these items at £100. I think that is an extremely moderate estimate. The result is that I would reduce the free rental brought out in the 'Particulars' by £748, bringing it down to £2579. I think that is a fair and moderate estimate of the income as shewn by the 'Particulars' when properly criticised. That reduces the surplus to £69. With a margin like that there was no room for a loan of £3000; I should have felt very anxious, indeed, if I had held any of the more recent of the prior loans."

In cross-examination Mr Molleson deponed,—"I don't know the estate of Nenthorn; I have never been there. The criticisms I have made upon the 'Particulars' have been made without any knowledge of the estate. I cannot say whether £200 a-year is a moderate rent or not for the mansion-house of Nenthorn, with the fishing and shooting, but assuming that that was a proper rent in 1877, I think you would not have got so much in 1881. I think rents of places like that dropped considerably between those years. There would

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On 25th January 1888 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the investment on the estate of Nenthorn was

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doubtless be different opinions as to whether the value of property was permanently down in 1881. I don't think it was the opinion of everybody that the depression was only temporary. I think the depression had got so thoroughly developed about 1879 or 1880, that there was a Royal Commission issued for the purpose of inquiring into it. I don't think I said that things were worse in 1874 than in 1866. I suggested a deduction of 20 per cent from the rent of Burnbrae, which was let in 1866, and of 10 per cent from the rent of Girrick, which was let in 1874. (Q.) So that in your view things in 1866 must have been 10 per cent better than in 1874? (A.) Yes. I think things had been going back prior to 1874; I think a rent got in 1866 would probably not have been got in 1874. I don't allow anything for the consideration that before the leases expired times might have mended, and the value of land risen again. I don't think that was a reasonable thing to take into consideration from a lender's point of view. For the year from Whitsunday 1881 to Whitsunday 1882 the rent paid for Blinkbonny was £650, and after that it dropped to £550, until it dropped off altogether. I don't know anything about the arrangement in connection with the lease of Blinkbonny, except what is stated in the 'Particulars' and in the ledger. I don't think a ten years' average gives so good an idea of the value of grass parks as a five years' average, because they have a year to year value, and you would not take a ten years' to find what the rent of a grass park might be expected to average. The rent in 1880 was £466. (Q.) Then why should not the year after have been as good? (A.) Because the average of the five preceding years militated against it. (Q.) If you are to average it, don't you get a more reliable average by taking ten years rather than five? (A.) Not in the case of grass parks. (Q.) What makes them different from any other subject? (A.) Because the average seems to indicate that grass parks were very much upon the wane, and that you are forced back to bring it up to a big average for rather a remote period in the history of grass parks, whereas, if you took the modern history of them as represented by five years, you would be getting a much more useful and reliable average for the purpose. I assume that the average of the preceding five years will be maintained."

Mr Molleson lodged further a statement of deductions which ought to have been made, in his opinion, from the rental in 1881. It was as follows:—

"1. Modification of rents—		
Mansion-house,		£50 0 0
Burnbrae Farm,		108 0 0
Girrick do.,		66 0 0
Whitehill do.,		190 0 0
Blinkbonny do.,		100 0 0
Grass Parks,		54 0 0
		£568 0 0
2. Public burdens, apparently understated by		80 0 0
3. Management, insurance, and repairs not provided for, say		100 0 0
		£748 0 0
The net revenue, as brought out in the printed statement of particulars of the estate, is		3327 0 0
Leaving to meet interests and annuities,		£2579 0 0
The interests paid as at Whitsunday 1881 amounted for the year to	£1950 0 0	
The annuities forming real burdens, actual and contingent, are	560 0 0	
Together,		2510 0 0
Surplus,		£69 0 0"

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not a safe or suitable investment for trust money: Finds that said investment was accepted by the defender as trustee without due inquiry having been made as to the sufficiency and suitability of the security as a security for the investment of trust money, and that the defender has incurred personal responsibility by reason of negligence, whereby loss has accrued to the trust-estate: Finds that the defender is bound to replace the said sum of £3000, he being always entitled to an assignation of the bond in order that he may effect his relief if possible: Therefore finds and declares and decerns against the defender in terms of the conclusions of the summons other than the conclusion for damages."*

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* "OPINION.— . . . The pursuer Mrs Maclean, who sues with her husband's concurrence, has a beneficiary interest in the trust-estate, consisting of £3000, whereof the defender is sole trustee. As regards the sum of £2500, part of this fund, the defender derives his authority from the will of Mrs Maclean's mother, Mrs Soady. As regards the remaining £500, which is part of a sum provided to meet a marriage obligation, the defender has no formal title of administration, but he states that he agreed to act as trustee of this fund to oblige the pursuer, and he does not raise any distinction as to the degree of his responsibility for the two sums which make up the £3000. It is necessary to notice that the defender, who is a Writer to the Signet, has also, with the approval of Mr and Mrs Maclean, undertaken the duties usually performed by a law-agent in relation to the investment of the trust-funds. The case maintained against the defender is that the trust-fund has become irrecoverable by reason of its being lent out on insufficient security under circumstances which amount to negligent administration. It is therefore contended that the defender is under obligation to replace the unpaid capital and interest, subject to a right on his part to an assignment of the security in order that he may work out his own relief or indemnification in the event of the security becoming productive.

"It is always with the greatest reluctance that a Judge must approach a question involving the personal responsibility of a trustee who has been acting in good faith, and except for the purpose of clearly defining the conditions of the question it would be unnecessary to state that such is the character of the present case.

"In the argument before me no imputation was made regarding the professional skill of the defender, or his attention to the interests of his clients. All that is said against him is that he too easily accepted statements put before him regarding the value of the security on which the £3000 was lent, instead of instituting an independent inquiry, and exercising his own judgment on the facts as they would have appeared had proper inquiry been made.

"The money was lent in September 1881 on the security of the estate of Nenthorn, Berwickshire, the property of Mr F. L. Roy. According to the defender's evidence (p. 2, E), 'the prior bonds on the estate amounted to £49,525, and in addition there was a jointure to the widow of the late proprietor, and a contingent jointure to the present Mrs Roy, if she should become a widow. The jointure actually payable was valued at £2700, and the contingent jointure, supposing Mr Roy were to die at the moment, was taken at £5000.' (Mr Roy's life, it is added, was not considered a good life.)

"The sum of these incumbrances, together with the £3000 lent from the trust-estate in question, is £60,225, and the first question is as to the sufficiency of the security. The defender considers that the value of the estate, for the purposes of a security-holder, was £90,000 in September 1881.

"Mr Roy became in 1885 unable to meet his engagements, and granted a trust-deed. Since then it has not been found possible to effect a sale of the estate at a price which will cover the heritable debt affecting it. It is proper to notice that the loan in question is the fifteenth bond over Nenthorn, a circumstance which would naturally suggest to a man of business that the proprietor was gradually eating up his estate, and which ought at all events to have induced caution in making an advance from trust-funds.

"It is not easy to give a definition of what is a proper security for the invest-

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The defender reclaimed to the First Division.

The cause was subsequently appointed to be heard by the Division

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ment of trust-funds. It may, however, be assumed that a security is not shewn to be a good security for trust-funds by proving that other persons were willing to lend on the same security. A prudent man of business, dealing with his own money, may be willing to lend it on doubtful security, either because he is offered a special rate of interest, or even without this inducement, because he is willing to incur some risk rather than leave his money uninvested. Indeed we know that persons of good commercial credit have no difficulty in obtaining money from the banks without security of any kind. But I understand it to be the law that a trustee may only lend the money of the trust on safe security; and the only meaning which I can attach to the rule is that the security must be such as offers reasonable assurance that the principal and interest will be recovered out of the estate in case the obligant should be unable to meet his engagements. It is in all cases desirable that the rental should exceed the annual incumbrance. I do not say that this is essential; because an estate may be entirely in the proprietor's hands, as is the case with many Highland properties, and may yet be a safe security for a first bond.

"I. In a case like the present, looking to the amount of the previous incumbrances and other circumstances, I conceive that the trustee was not justified in lending on 'annual value,' or the prospects of a good price being eventually obtained under a sale, but ought to have seen that the current return in the shape of rents was sufficient to meet the interest on heritable debt.

"On this point the facts are easily stated. The defender founds upon the rental given in a 'statement of particulars,' prepared in 1881 with a view to sale, in other words, an advertisement prepared for general circulation, and intended to call the attention of purchasers of land to the suitability of Nenthorn as a residential and rent-yielding property. According to this paper, I make out the nominal rental to be £3560, and I understand the net rental (according to the same paper) to be £3327. In such a paper it is not to be expected that anything would be said suggesting doubts as to the permanence of the rental. That is a matter which the purchaser is supposed to consider or to find out for himself. The defender, if he had applied his mind to the question, would have seen that under the conditions which existed in 1881 the nominal rental could not possibly be maintained, and that a statement of nominal rental was no true criterion for determining the sufficiency of the security. Mr Molleson, C.A., a witness for the pursuers (Proof, pp. 15 *sqq.*), gives reasons for reducing the nominal rental by the sum of £568. In these reasons I fully concur; and I must add that, as the farm of Whitehill was in the natural possession of the proprietor, I do not consider that the supposed rental of this farm ought to be reckoned at all in an estimate of rental as a security for payment of interest; and for this reason, that it would not be possible for the heritable creditor to make this rental available as a security by means of an action of maills and duties. This is a very material element in the case, because this farm, the profits of which went directly into the proprietor's pocket, is set down in the particulars, or at all events was treated by the defender as a security for interest to the extent of £840 per annum, when, according to the actual mode of management, it was not available as a security for interest at all. This was found out as soon as Mr Roy's affairs became embarrassed; but I think it ought to have been foreseen. On this point of the case I am clearly of opinion that the annual return from Nenthorn in the year 1881 was insufficient to sustain a new loan of £3000, or to provide for the punctual payment of the interest on such a loan.

"II. I have next to consider the question whether the capital value of the estate in 1881 was such as would constitute a safe security. As before observed, the defender estimates its value at £90,000 for sale at that date. It is satisfactorily proved that the price of from £80,000 to £85,000 might have been obtained for it had the proprietor been willing to sell. But, now, this possibility of the proprietor refusing his consent to a voluntary sale is one of the things which a with three consulted Judges, as it raised questions somewhat analogous to those raised in the case of *Rae* v. *Meek* (*infra*, p. 1033).

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postponed bondholder has to consider before advancing his money. It is not said by anyone that Nenthorn, if put up to sale by a bondholder, would have brought £80,000, or anything like that sum. But it seems that Nenthorn is a very desirable residential estate, and it is in evidence that £80,000 might have been got for it by private bargain from a gentleman of fortune who was on the lookout for a residence, and also from a body of trustees who were directed by their trust to purchase lands in the south of Scotland. Therefore the position to be taken by the proprietor was vital to the security, so far as depending on the probability of a sale before the market for heritable property had become still further reduced, as was at least probable in 1881.

"Now, what is Mr Turnbull's opinion of Mr Roy as a gentleman whose co-operation in such a matter was to be depended on? I give it in his own words: —'Mr Roy was a most troublesome individual to deal with, and a man with whom it was most difficult to get on; and unless the estate had been in the management of someone in whom I had confidence, and who I was sure would pay the interest without objection when the term came, I would have recommended my clients not to lend the money, whatever the security was.'

"In point of fact, Mr Roy took up the position that he would not allow the estate to be sold under £100,000, or something near that figure—a very unreasonable position no doubt, but a position for which, I think, the defender would not be altogether unprepared, according to the opinion which he thus frankly expressed in his evidence.

"Apart from this specialty, I must say that amenity value is not the kind of value on which it is proper that trustees should lend, when the chance of obtaining repayment depends on the fancy of a purchaser. In the case of a first mortgage, I do not say that it may not legitimately enter as an element of the margin. The question whether a postponed security should be accepted as a trust investment is a question of circumstances, and here I think that the aggregate of all the circumstances—insufficiency of cash rental, speculative value, large prior incumbrances, and a proprietor difficult to deal with, and verging on embarrassment—ought to have stamped the transaction in the judgment of a professional man as one lying outside the limits of safe investment of trust moneys.

"III. There remains for consideration the question of negligence. If this were a kind of trust investment, prohibited by some positive rule of law, the mere infringement of the rule would create personal liability. But it is not so. The law of Scotland does not, as at present interpreted, prohibit trustees from lending on the security of a second bond. If a second bond may lawfully be taken, I see no reason why a fifteenth bond (which is the present case) may not also be accepted by trustees, always assuming that there is an ample margin. The question is then one of circumstances, in which the law requires a trustee to use his best judgment, assisted where necessary by professional advice; and I am not of opinion that a trustee is personally responsible for the consequence of a mere error of judgment. A man may be appointed a trustee who has neither professional skill nor average ability; and if such a trustee, after due inquiry, and making the best use of the limited faculties which nature has given him, makes an investment of the trust-money which turns out to be unsound, I see no sufficient reason why the loss should be thrown upon him.

"But, in the present case, my opinion is that the defender did not make due inquiry. He is a man of ability and of professional experience, but in this case, from some error or oversight, he just trusted to the statement of particulars of Nenthorn, and agreed to give the loan because that statement shewed an apparent surplus. This is the kind of negligence for which the law holds trustees responsible. I cannot look upon this as a case of misadventure arising from unforeseen causes, because I think that the defender had the means of procuring more reliable information regarding the worth of Nenthorn as a security, and that if

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Argued for the reclaimer;—At the time that the loan was granted there was ample security for the capital, as was shewn by the fact that two offers for the estate were obtained, one prior and one subsequent to the loan, of £80,000 or over; and if land were again to become a marketable commodity very probably that sum would be obtained for the place hereafter. At the date of the loan there was a sufficient margin of rent to cover the interest. The great fall in the value of land had scarcely begun, or at least was not realised even by practical men, at that time.* The insufficiency came entirely from the depreciation of land, to a degree which no one could anticipate. Mr Molleson's evidence was valueless, as he was simply judging the position the defender took up in 1881 in the light of after events. In granting the loan the defender had ample information before him without obtaining a valuation. He not only had the particulars of the estate (from the estimates in which he made considerable deductions as appeared from his evidence), but he had rentals in his possession obtained by him for the purpose of inquiring into the affairs of the estate when he was negotiating former loans. The utmost that could be said against him was that he had made an error in judg-

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he had been fully informed he would not have lent the trust money on the security of that already heavily mortgaged estate.

"No question has been raised as to the computation of damages. The judgment will find the defender accountable for the £3000, he retaining the present security for his personal indemnification."

* See the evidence of Mr John Clay of Kerchester, a member of the Duke of Richmond's Commission on Agriculture in 1880:—"I remember being in London in the summer of 1881 in connection with the Commission, and meeting a gentleman who spoke to me about Nenthorn. He was a Scotch gentleman who had made money, and wished to buy property in Scotland. I spoke to him about Nenthorn and the amenity of it, the fishing water round about, and the locality, and he asked me as a favour if I would see the agents and ascertain if they would entertain an offer. He consulted me as to what price he should offer, and I said £80,000. At the same time I said I did not think it could be got for that, as they were asking £100,000 for it, and, considering its amenity and the fine property, I thought he might go the length of £85,000. He then requested me to see the agents and ask if they would entertain an offer at £85,000. I was to begin by seeing if they would take £80,000. I called upon Mr Tait, but he would not entertain my proposal; he considered the property was so much more valuable than my idea at the time. I said, if he would ask £85,000, I did not think there would be any difficulty in coming to a bargain. I have seen the particulars of the estate which were prepared for the exposure in 1881. Comparing these with my actual knowledge of the property, I am still of opinion that in 1881 the estate was worth at least £80,000. There was no confirmed reduction in the value of land at that time, but landlords were beginning then to recognise that a reduction of ten per cent was required for the bad year of 1877 and the bad year of 1879. The bad year of 1877 was the beginning of the mischief, and after that all the odd years ran bad and all the straight years ran fair, not good. On to the summer of 1881 there was a general hope and belief that the depression would be merely temporary, such as we had seen before; but the collapse came in the back end of 1881, running into 1882. The prospect was pretty fair up to August 1881, when harvest and a wet season came on. Times were very good in 1874, and they continued good till 1876. The highest rate of letting land ran into the spring of 1877, and the fall began after the wet summer and bad harvest and bad winter of that year. Farms were not let higher in 1866 than in 1874—the very reverse. Residential amenity often makes a difference of five or ten years' purchase in the price of an estate. I have known as much as forty-five years' purchase given for an estate which formed a pleasant residence—Otterside, on the borders of Northumberland. Cross.—It was about 1870 when that high price was got."

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ment, and there was no suggestion that he would not have acted in precisely the same way had he been dealing with his own money. The point chiefly pressed by the Lord Ordinary was the fact that a part of the estate being occupied by Mr Roy himself, that part should not have been regarded as a rent-producing subject, or, at all events, as a fit security for a person in a fiduciary capacity to trust to in lending the trust-funds. But there was no authority for any such doctrine. The mansion-house was not let or yielding return, because the proprietor was occupying it, but the lender was entitled to regard it as a lettable subject, if affairs required it, and the rent at which the particulars stated it was the smallest ever got for it. As regarded the farms, in point of fact only one was in the hands of the proprietor, and it was being put to profitable use. A lender was entitled to look to the farm as a rent-producing subject, not perhaps to so great an extent as if it were let, but the defender took that into account and took off £150 in estimating the rental of Whitehill. If the view of the Lord Ordinary were right, no person in a fiduciary capacity could lend money on land or any property in the proprietor's hands, and consequently no person could borrow money from trustees to enable him to farm his own land. To find the defender liable it was necessary to bring his conduct up to negligence; mere error of judgment was not sufficient. This was not a case of a trustee going outside the proper sphere of investment,[1] and that being so, he must be judged according to the general rule that he ought to have used such prudence as he would have exercised in his own affairs. There was here no suggestion that he had done otherwise. It could hardly be said that here the capital was not amply secured as at the date of the loan, and if so, the safety of the income was also secured by the power of bringing the estate to sale.

Argued for the respondents;—The trust here was an alimentary one, and the trustee was therefore bound to look not only for safety of the capital, but for punctual payment of the interest. The fact that this bond was a fifteenth bond shewed that the proprietor was gradually eating up the estate. Further, the loan was entered into at a time of great depression. The depression had not indeed reached its worst, but it was so bad that reductions had to be given on most farms all over the country. Mr Turnbull in lending the money took no advice from any skilled person. He had no valuation specially made, but simply relied on the particulars of sale, which were drawn up to tempt purchasers to buy the estate. The fact that a large part of the estate (and a prospect of much more) was in the hands of the proprietor lessened the security. The landlord could not be expected to make as much out of the farms as a tenant would, and, further, the ordinary diligence could not be used against him. The margin to cover both capital and interest was very small.

At advising,—

LORD JUSTICE-CLERK.—This is a case involving the liability of a trustee under a testamentary trust-deed—a gratuitous trustee—on the ground of improper investment of trust-funds.

The circumstances out of which the question arises may be very shortly stated. The defender Mr Turnbull is the only surviving trustee under the settlement of a Mrs Soady, dated in January 1863. Under that settlement the lady, who died the same year, provided that after the conversion of the estate into money the trustees should invest the sum and pay the interest or annual produce thereof

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[1] Learoyd v. Whiteley, 1887, L. R., 12 App. Cas. 727.

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to the female pursuer, Mrs Maclean, for her lifetime, and afterwards divide the principal in the manner pointed out in the testamentary trust-deed. Mr Turnbull is the only surviving trustee. There were other trustees, but Mr Turnbull has substantially taken the whole management of the trust affairs under the settlement in question. There was also an *inter vivos* trust-deed under which Mr Turnbull has administered a fund of £500.

Mr Turnbull, I need hardly say, is a man of well-known professional ability, and has attained a high position among his brethren, and he was perfectly qualified to discharge the duties of such a trust without any assistance. The charge against him is that he invested £2500 of the testamentary trust-funds and £500 of the *inter vivos* trust-funds in a way which has led to loss—indeed to the loss of the whole sum—and that he is therefore liable to make the money good to the trust-estate. The ground on which this challenge is made is not the ordinary one of want of sufficient skill or knowledge, but that, having the means of sufficient knowledge and undoubtedly possessing sufficient skill, he permitted himself to overlook the most manifest elements of safety in making the investment in question, and that if he had only exercised—I do not say the care of a prudent man in his own affairs—but if he had only exercised the most ordinary prudence, this catastrophe never would have happened.

It is with great regret that I find myself obliged to give effect to that view. One sees quite plainly how the matter drifted into the position in which it ultimately stood. It did so mainly from Mr Turnbull having had his attention directed almost exclusively to another object, and from his exuberant confidence in the knowledge which he himself had of the facts,—a confidence which, as it turned out, was very ill founded.

In the year 1881 Mr Turnbull was a correspondent of Mr Tait, W.S., of Kelso. Mr Tait was factor for Mr Roy of Nenthorn. There was a sum of £2500 invested in Mr Turnbull's name as trustee over a property in the county of Roxburgh, the proprietor of which property had got into difficulties through the City of Glasgow Bank failure. Mr Turnbull bought the estate with that bond upon it. I believe that was a perfectly good security. It so happened that the proprietor of the estate of Nenthorn had got into considerable difficulty about the same time. That estate was exposed for sale in the month of July or August 1881. The position in which Mr Roy and Mr Roy's estate stood financially was a matter that ought to have received the gravest attention on the part of Mr Turnbull. The estate was covered with bonds to the amount of some £50,000. Of these bonds there were fourteen, each of them postponed to the one immediately preceding it. As I have said the difficulties arising out of the restriction of income were so great that in the month of July or August 1881 Mr Roy wished to dispose of his estate to a purchaser. But unfortunately other things also supervened. The farms, or some of them, upon the estate were falling out of lease. One farm—Whitehill—valued at £840 a-year, was upon the hands of the proprietor. Another farm—Blinkbonny—was renounced by the tenant. And these things happened before the events took place in which the present pursuers have an interest.

In July 1881 Mr Tait wrote to Mr Turnbull to say that he wished a loan of over £3000 to be found for Mr Roy, and he suggested that he might apply to the trustees of the late Lord Marjoribanks. Mr Turnbull not thinking it right, and probably in that matter judging properly and wisely, that the bond for £2500 held by himself as trustee should remain as a burden on his own estate,

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paid it up, and with the £500 then uninvested this made a sum of £3000 in his own hands. Accordingly, although he had prepared a bond in favour of the Marjoribanks' trustees, the loan was not made by them, but it was made by Mr Turnbull as Soady's trustee to Mr Roy on the security of his estate of Nenthorn. Now, without going further into the details, I think I have said enough to shew that this was a matter that ought to have had the greatest amount of deliberation. This bond which was ultimately taken in favour of the trustee of Mrs Soady was the fifteenth bond over the estate of Nenthorn. The Lord Ordinary has said, and I agree with him within certain limits, that there is nothing in the law of Scotland contrary to trustees taking a postponed security over landed estate; but when it comes to the fifteenth bond, each bond being postponed to the one before it, that seems to me to be a matter requiring very great thought and inquiry, because an investment of this kind is not an investment for capital only or mainly, but an investment for income. Therefore the main thing to be ascertained, and that all the more when the trustee was acting for alimentary beneficiaries, was to see that the rental or income of the estate was sufficient and left a sufficient margin. On the other hand, times and prices were bad. Land had been going down, and rents were going down, and the whole landed interest was in a state if not of collapse at least of difficulty. In short, it was not quite a good time to take postponed securities. I should say, although that would not be a ground on which I would proceed in this case, that the fact that there were so many prior bonds—bonds prior to that which was taken in this case—was a material element to be taken into consideration by the trustee.

But what was the result of all these difficulties that ought to have been taken into account in this transaction? The estate was exposed without an offer being received for it. Times went on as bad as ever for four years, and indeed down to the present time; but from one source or another interest continued to be paid for four years upon the bonds and then the whole affair collapsed, and in the year 1885 Mr Roy had to put himself under trust. The estates were handed over to Mr Haldane, the accountant. I fancy that from that time to this no more interest has been paid. According to the statement of the pursuers therefore the whole of this trust money, for which responsibility is sought to be fixed on Mr Turnbull, is lost. It does, I think, appear that if a sale could have been effected at a lower sum than £100,000, which was the price asked for the estate, the capital might have been saved. But that was not done. From 1885 therefore until now the estate has remained unsold, and I fancy that as far as the beneficiaries are concerned the money in question is a total loss.

The narrative which I have given, and which I do not think is highly coloured, is a very depressing one. Mr Turnbull had acted as Mr Tait's correspondent in regard to this estate for many years. Mr Turnbull had lent £9000 of the £50,000 that burdened it himself. He knew all about it. But as I have said his attention was not so much directed to the question whether the income which would or ought to reach the beneficiaries under Mrs Soady's trust-deed was perfectly safe, so as even to leave a margin, as to the effect which the transaction would have upon the estate of Nenthorn. It is not a case for saying that a man should exercise the same prudence that he ought to exercise in his own affairs. Knowing Mr Turnbull as I do, I cannot doubt that if the case had been his own he would have acted exactly in the same way. But then he had a confidence in the elasticity of the subject which has turned out to be fallacious. The result was that he did not inquire into the chief matter which he ought to have inquired into, namely, how the rental of the estate stood. We have the information now. Mr Molleson, an accountant, has gone fully into the matter, and he reports that instead of there being a margin of income for this £3000 in question there is none at all. The income will not suffice to pay the whole of the interest on the bonds, and if that is the case it will not suffice to leave a margin, as every such security ought.

That is the whole of the detail as it has been shewn to us. I have failed to see any ground on which Mr Turnbull can escape from liability. I have found no ground, I am sorry to say, on which the claim made in this action can be resisted. In the circumstances, and under the pressure which I have already described, and probably with a too sanguine expectation that the financial condition of landed property would revive and improve, he allowed himself to make this investment, which has had the disastrous result to which I have referred. Mr Turnbull makes no disguise at all about it. He says in his own evidence,—"I made the loan in September 1881 because Mr Roy wanted it, in consequence of his having been unable to sell Nenthorn." Then he says about the loan from Marjoribanks' trustees, that he probably intended to get a loan from the Marjoribanks' trustees, but he cannot recollect that he ever communicated either with them or with the beneficiaries under this trust on the subject of this advance.

Now, I do not wish to detain your Lordships further. I have indicated very shortly the grounds on which I think we must come to the conclusion that the pursuers are entitled to the decree which they seek against Mr Turnbull, to replace the £3000 in question. The pursuers are willing to give an assignation of the security, and possibly, although not probably, it may in the end turn out to be of some value.

LORD MURE.—I have come to the same conclusion as the Lord Justice-Clerk. I do not see my way to differ from the result at which the Lord Ordinary has arrived. There are some of the grounds upon which he seems to have gone with which I am not sure I entirely concur, but it is unnecessary to go into that matter.

It appears to me that in taking securities of this description trustees are bound to look very carefully to the security for the interest as well as to security for the capital. An argument was strongly pressed upon us by the Dean of Faculty founded upon the fact that the value of the estate was quite sufficient to cover this sum and the large sums that had already been lent on the security of the estate. But it seems to me that the existence of those other bonds itself shewed that the trustee was taking a wrong course in investing the money on the security of this estate. If trustees were only bound to have regard to the sufficiency of the security for the capital, the defence that the Dean urged upon us might in certain circumstances be a good defence. But here it was, as has been pointed out, essentially necessary to find security for the interest as well as the capital. The money to be invested formed the whole trust-estate; so that there was no fund available for the benefit of the beneficiaries except the interest on this sum of £3000. Now, looking to the rental of the estate, and to the fact that nearly one-half of the property was in the hands of the proprietor, I do not think that there was here sufficient security for the interest as well as the capital. The admitted rental was about £3100. Then there was an annuity and a contingent annuity as burdens on the estate, which reduced the £3100 very considerably. When in addition you look to the fact that two of the farms were in the hands of the proprietor, who was not a person skilled in farming, there was no reliable security that I can see for the payment of the interest to these beneficiaries in the event especially of the fall in the value of land continuing. Mr Turnbull evidently made a serious mistake, and he must be held responsible for it.

LORD SHAND.—The Lord Ordinary has said in his opinion that it is with great reluctance that he comes to deal with a case of this class in which a gratuitous trustee is sought to be held responsible for want of due care in making an investment. I may say for myself that if I could see any grounds for differing on the facts from the Lord Ordinary I should willingly have done so, but I have come to the conclusion that there are no sufficient reasons for disturbing his Lordship's judgment.

Mr Turnbull, it need hardly be said, acted with the utmost *bona fides*, but it seems to me to be the result of the evidence as a whole that he failed to exercise due care in making the investment complained of. He had himself carried out a number of different loan transactions on the estate of Nenthorn prior to the loan in question, and it may be that as most of these had been of sums of not very large amount, he had not realised that the aggregate burdens on the estate had become so large, and that in the special circumstances into which the estate had gradually come, it was highly imprudent that any further loans should be granted. But whatever it was that misled him, I have reluctantly come to the conclusion that he shewed a want of that care in looking to the material points with reference to the security which any prudent man would have shewn in investing the money of another. The rule to be applied to the case is that the defender was bound to exhibit the reasonable amount of care in arriving at a judgment which a man of ordinary prudence would do in his own affairs. The rule is thus expressed by Lord Watson in the case of *Learoyd* (L. R., 12 App. Cases, at p. 733),—"As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character, but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply."

Mr Roy was confessedly in a position of embarrassment, and this was known to the defender. He had borrowed sum after sum on the security of his estate until it was burdened with upwards of £50,000. There was one annuity then current, the capital value of which was £2700. There was a contingent annuity which might begin to run at any time, and the capital value of which was £5000. That brought up the debt or charges on the estate to nearly £60,000. No fewer than fourteen prior securities existed on the property, and though it may be true that such a number of prior bonds is not of itself conclusive against the propriety of granting a fifteenth loan, still it is such a peculiarity as should lead

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to a very deliberate and careful consideration of all the other circumstances affecting the security. The gradually increasing number of burdens shewed a proprietor running steadily into debt, and the holder of a security postponed to so many others was liable to considerable disadvantages if the earlier loans came to be called up and a new lender should not readily be found. Then it is not to be thrown out of view that the defender was aware that Mr Roy was a difficult man to deal with,—one who if a fair offer were got for the estate might be expected to throw difficulties in the way of its sale.

Again, if you take the annuities into account, as I think they ought to be, the rental, even upon Mr Turnbull's own view, was extremely narrow, and at the best did not shew a sufficient margin. Mr Turnbull took the rental without making certain deductions which a good many witnesses tell us ought to have been made at that time, looking to the agricultural depression, which although of course not nearly so bad as it has since become, was yet sufficiently serious to have led a man of ordinary prudence to make some deductions. But above all the material, and to my mind the determining, consideration is this, that with a rental of £3200 a-year the proprietor had already in his hands a farm of the estimated annual value of £650, and the mansion-house of the value of £250; while another farm of a rent also of £650, the lease of which was then current, was about to fall in, the tenant having renounced the lease as at the succeeding term. That was no doubt subject to a possible rearrangement of terms if the landlord and tenant agreed, but if there was no such arrangement that farm also would fall into the proprietor's hands. So that out of a gross rental of £3200 about £1300 or £1400 would be in the hands of Mr Roy, who had such large burdens already on his estate, and therefore large claims of interest to be met annually from the rental. That gave an element of serious risk to the transaction which should have deterred a man of ordinary prudence acting with reasonable care and not willing to run unusual risks from entering into the transaction. It was maintained that it might be no disadvantage to have even two farms in the hands of the proprietor, and that at least the stock and cropping might be made available by diligence if necessary on the part of the security-holder. To that argument, at all events in this case, I cannot accede in judging of the propriety of the security. Any such view is entirely weakened, if not destroyed, by the circumstance that the proprietor, Mr Roy, was a man of no means whatever, and having no income beyond what his estate afforded. As soon as the farm of Blinkbonny fell in, the return from the estate depended on the proprietor, then in impecunious circumstances, being able to make profit from about half of the estate in his own possession, while if Blinkbonny were again let there was every reason to believe it must be let at a reduced rent.

The circumstance most favourable to the defender is that apparently two opportunities occurred for a sale of the estate—one late in 1880, or early in 1881, when a price of £80,000, or possibly even of £85,000, might have been got; and another in 1882 or 1883, when the trustees of a Mr Grieve seem to have been willing to negotiate for a purchase at a price of about £80,000. The former of these opportunities for a sale occurred some time before the loan in question. It was not known to Mr Turnbull, and was therefore not a circumstance in his view in agreeing to make the loan, but his counsel very properly founded on what is proved as to the proposed negotiations on both occasions as shewing that the property had a value which would much more than cover the burdens, including the additional £3000 in question. The first observation to

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be made on this is that it leaves out of view what would happen if Mr Roy were to decline, as he was likely to do, and did, to sell at these prices. In that case there was a very serious risk that the return from the estate would not meet the interest on the securities, and the defender was, I think, bound to have carefully in view that the regular payment of interest was of vital consequence to his clients. But it was further a matter which a man of ordinary prudence exercising reasonable care should have taken into view that Mr Roy was a gentleman not likely to act on sound advice in the sale of the estate, but would in all likelihood insist on holding it for an extravagant price, acting on a speculative view very unfavourable to the security-holders at a time when property was falling in value.

It was strongly pressed upon the Court in the argument for the defender that the utmost that can be imputed to him here was that with full information before him he committed an error of judgment in taking the security, and that his *bona fides* and confidence in the security was such that he would himself have advanced the money had he desired to make an investment.

It may be true that the defender might have taken such an investment for himself, but assuming this to be so, I am humbly of opinion that in doing so he would not in the circumstances which I have stated have acted as a man of ordinary prudence seeking an investment free from unusual risk would do. As Lord Watson observed in the passage above quoted—"A trustee is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. It is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard."

If, again, I had been of opinion that with full information before him the defender merely committed an error of judgment, I should have held that he could not be responsible for the result, provided that it appeared that he had exercised reasonable care in forming a judgment. It appears to me, however, that, looking to the burdened condition of the estate, to the large part of it which was in the proprietor's hands, and to the probability of an additional farm falling in, it would have been a proper and reasonable precaution, which ought not to have been omitted, to have had a report from a man of skill after visiting the estate and examining the farms as to the probability of the rents being maintained. Had this course been followed I think the defender would have been advised in estimating the rental to make allowances or deductions of larger or smaller amounts such as were spoken to by several of the pursuer's witnesses, and his special attention would have been directed to the risk attending the falling in of the lease of Blinkbonny. He acted on his own views without taking any professional assistance, but in doing so I think his responsibility must be judged in the light of the advice which he would in all probability have received had he taken the proper step of consulting a man of skill who had visited and examined the property. There was, I think, a want of due consideration and care in the whole matter which, if given, would have resulted in the defender's resolution not to make the investment. I am, therefore, with regret, of opinion that he is legally responsible for the loss which has been sustained.

Lord Rutherfurd Clark.—I also think that the defender is liable.

Lord Adam concurred.

Lord President.—I am of the same opinion. I wish only to add that this

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was a case in which the trustee was bound to be specially careful about the security being sufficient for the interest of the loan, because the primary purpose of the trust was to secure an alimentary annuity.

LORD YOUNG was absent.

THE COURT adhered.

MAITLAND & LYON, W.S.—ROMANES & SIMSON, W.S.—Agents.

No. 173. July 19, 1888. Macdonald v. Westren.

DONALD MACDONALD, Pursuer (Respondent).—*Low—Adam.*
WILLIAM FRASER, Defender.
PETER WESTREN, Minuter (Appellant).—*D.-F. Mackintosh—C. S. Dickson.*
JAMES H. KERR (William Fraser's Trustee), Respondent.—*Goudy.*

Sale—Sale or return—Bankruptcy of holder of goods on "sale or return."—Where goods are sent by a wholesale dealer to a retail dealer on a contract of "sale or return,"—that is to say, on an agreement that the retail dealer is to purchase, at an agreed-on price, such of the goods as he may sell to customers, but that he may return those unsold to the wholesale dealer, and that the latter may demand their return,—if the retail dealer becomes bankrupt the trustee in his sequestration has no claim to the unsold goods in his possession, which remain the property of the wholesale dealer.

Question, whether goods in the possession of a tenant under a contract of "sale or return" are subject to the landlord's hypothec.

Brown v. *Marr and Barclay*, Jan. 8, 1880, 7 R. 427, *distinguished.*

2D DIVISION. Sheriff of Inverness-shire. I.

ON 3d June 1882 the stock in trade of William Fraser, watchmaker and jeweller, 33 Bridge Street, Inverness, was sequestrated for rent on the petition of Donald Macdonald, his landlord.

On 3d August 1882 Fraser's estates were sequestrated under the Bankruptcy Acts, on his own petition, and James H. Kerr was appointed trustee.

No sale took place under the landlord's petition, the trustee in the sequestration having satisfied the landlord's claims, with exception of a sum of £5, 7s. 8½d., receiving in exchange an assignation to the landlord's right of hypothec.

In February 1885 Peter Westren, a wholesale jeweller in Edinburgh, lodged a minute in the landlord's petition, in which he claimed a number of articles of jewellery, of which the trustee had taken possession, as his property, on the ground (which was not disputed as matter of fact) that he had sent them to Fraser on a contract of "sale or return,"—that is to say, on the footing that he was to buy at an agreed-on price such articles as he might be able to sell to customers, and that those remaining unsold might be returned to, or reclaimed by, the wholesale dealer.

Answers were lodged by Kerr, the trustee, and by Macdonald, the landlord, but the case of the latter need not be further referred to, as Westren agreed to pay him £5, 7s. 8½d., admittedly the whole sum due to him.

The case as between Westren and the trustee, although there were some specialties in the position of the trustee, was in the discussion before the Court taken to raise the question purely whether goods sent by a wholesale trader to a retail dealer on a contract of sale or return, if in possession of the retail dealer unsold at his bankruptcy, pass to the trustee for his creditors, or may be vindicated by the wholesale trader who sent them.

The Sheriff-substitute (Blair), after findings in fact, repelled the claim for Westren and sustained that for the trustee, subject always to the hypothec of the landlord.

Westren appealed, and argued;—The question here was whether goods in possession of a retail dealer on a contract of sale or return, and unsold,

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passed to the trustee for his creditors by virtue of the assignation in bankruptcy. They so passed only if the property in them was with the bankrupt, on the doctrine of *tantum et tale,* and goods with a retail dealer on sale or return remained the property of the sender until the retail dealer sold them to a customer.[1] *Brown* v. *Marr and Barclay*[2] was distinguishable. There the retail dealer pawned the goods which he had on sale or return, and it might well be that the wholesale dealer who had given the retailer possession of the goods should bear the loss arising from the improper use made of that possession.

Argued for the trustee;—Goods on sale or return, if not returned within a reasonable time, became the property of the recipient. That was the law of England.[3] [LORD YOUNG.—Is that not rather "sale on approbation"? "Sale or return" is more of the nature of agency.] *Brown* v. *Marr and Barclay* was to the contrary.

At advising,—

LORD YOUNG.—This case raises a question of some general importance. The question is, whether goods which are sent on a contract of sale or return to a retail dealer such as a jeweller, and are in his shop at the time of his bankruptcy, pass to his creditors, or remain the property of the wholesale merchant who sent them. I am of opinion that they remain the property of the wholesale merchant, and consequently that he is entitled to have them back, notwithstanding the bankruptcy of the retailer dealer.

The contract of sale or return is quite familiar in practice, and I think the Court is far from being unacquainted with it. It is of this character. The jeweller, or other retail dealer, has his shop supplied with goods on the footing that he may deal with them as his own by selling them, in which case he is held to be the purchaser, at a previously agreed-on price, from the wholesale merchant who supplied them, or he may, after keeping them for a longer or shorter period, decline to make them his own, or fail to sell them, in which case he is entitled to send them back as never having been bought by him, and the merchant is entitled to require them to be returned as never having been sold. It is a very special kind of contract, but one which is quite intelligible, looking to the considerations of trade convenience which have led to it. Retail jewellers, even in much larger towns than Inverness, cannot always afford to purchase the stock of expensive jewellery which their trade requires them to have in their shops on view and for sale, should they find customers willing to buy. In these circumstances they resort to wholesale dealers, who allow them to have the jewellery on the footing of sale or return, which is what I have just explained. It was on that footing that the goods were sent here. The property in the goods did not pass merely by the retail dealer receiving them, although the contract was such that the property might have been made to pass at any time, so long as the contract stood, by the retail dealer dealing with the goods as his own, and he would have dealt with them as his own had he sold them to a customer, for by that very contract of sale the property in the goods first passes to him and then to the purchaser from him. It is not very complicated. The contract does not pass the property; the delivery of the goods under the contract does not pass the property; but if the retail dealer sells the goods to a customer then by that very act the property passes first to the retail dealer and then to his customer. I have no idea, however, that if the retail dealer becomes bankrupt without having done anything to appropriate the goods his bankruptcy will pass the property first to himself and then to his creditors. I think that his bankruptcy does not pass the property, and that the goods unsold are not attachable by his creditors. The case of the landlord is governed by different considerations, for goods may be covered by the landlord's hypothec which do not belong in property to the tenant. But I give no opinion on the landlord's right to take goods in his tenant's possession on a contract of sale or return. That question is not before us.

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[1] Bell's Prin. sec. 1315; Bell on Sale, p. 111.

[2] Brown v. Marr and Barclay, Jan. 8, 1880, 7 R. 427.

[3] Benjamin on Sale, 3d edit. p. 592, and cases there cited.

We were referred to the case of *Brown* v. *Marr and Barclay* in 1880 (7 R. 427). I do not think that that case is in point. I have not read it fully, but I have looked at the import of the decision. If there are any observations in it contrary to the view of the law which I have expressed, I am of course obliged to say that I must be regarded as dissenting from these views. On the actual judgment there pronounced I am not prepared to say anything. Whether a retail dealer taking goods on sale or return, by dealing with them in some other way than by selling them may pass the property in them, which was the question in *Brown* v. *Marr and Barclay*, I am not prepared to determine. In that case the recipient pawned them, and I do not think he can be said to have got them on a contract of pawn or return; at the same time there is a good deal to be said for the view that if the wholesale dealer chooses to put the retail dealer into the position of being able to hand them over to a pawnbroker, the wholesale dealer must take the risk. But that is not the question here, and therefore, as I have said, the case is not in point.

I am of opinion that the judgment of the Sheriff-substitute ought to be recalled, and the claim for Westren, the wholesale jeweller, sustained.

LORD RUTHERFURD CLARK.—I am of the same opinion.

LORD JUSTICE-CLERK.—I concur in the result of Lord Young's opinion, and in the grounds of it. I desire to say, with reference to the case of *Marr and Barclay*, that that decision did not turn on any question of property, but on the necessary inferences arising from the possession of the goods. There the retail jeweller had possession, and he pawned the goods, and we held that as it was through the act of the wholesale merchant in putting him in possession of the goods and allowing him to deal with them as his own that he was enabled to deceive the pawnbroker, the wholesale merchant and not the pawnbroker ought to stand the risk of loss. That does not in the least conflict with anything Lord Young has said, in whose judgment I entirely agree.

LORD CRAIGHILL was absent.

THE COURT pronounced this interlocutor:—"Find in fact that the articles specified in inventory No. 5 of process were delivered by the claimant Peter Westren to the defender, William Fraser, on a contract of sale or return: Find in law that the right of property in the articles specified in the inventory No. 5 of process remains with the claimant Peter Westren: Therefore sustain the appeal: Recall the judgment of the Sheriff-substitute appealed against: Repel the claim of the claimant James H. Kerr: Sustain the claim of the claimant Peter Westren," &c.

MORTON, NEILSON, & SMART, W.S.—PETER MORISON, S.S.C.—
M. M'GREGOR & Co., W.S.—Agents.

JOHN MILLER, Petitioner (Appellant).—*Low—Sym.*
MISS ANNIE STEWART CARMICHAEL, Defender (Respondent).—*Balfour—C. S. Dickson.*

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Miller v. Carmichael.

Property—Superior and Vassal—Restriction on building—Self-contained house.—The proprietor of a piece of ground fronting a street in which the buildings were of various descriptions, feued it by one feu-contract to one person in four building lots, a separate feu-duty being attached to each. The feu-contract prohibited the feuar from erecting or maintaining on the four lots feued any other building than one villa on each lot, and provided that "each of the said villa dwelling-houses shall be detached from the others, and shall be self-contained and occupied by one tenant only." This provision was declared to be a real burden, to be inserted or referred to in any subsequent dispositions or conveyances. A villa for the occupation of a single tenant was thereafter erected on each lot. The villas and lots were subsequently disponed to different persons (the above provision being incorporated in the dispositions).

A petition to the Dean of Guild by one of the disponees for authority to alter his villa by erecting an outside stair for the upper floors and cutting off communication between them and the lower floor was opposed by another disponee. The superior was cited, but did not appear. *Held,* on appeal from the judgment of the Dean of Guild—(1) (following *Buchanan* v. *Marr*, June 7, 1883, 10 R. 936) that the proposed alteration being an alteration which would not preclude the villa being occupied by a single family, it did not involve a contravention of the feu-contract; and (2) *per* Lord Justice-Clerk and Lord Young, that even if there were, the objector was not *in titulo* to object.

2D DIVISION.
Dean of Guild, Greenock.
I.

BY feu-contract, dated 19th March, and recorded 5th April 1880, Sir Michael Shaw Stewart, Baronet, of the first part, feued to Miller & Brown, joiners in Greenock, of the second part, four plots of ground in Finnart Street, Greenock. The feu-contract narrated that it was granted under "the burdens, conditions, provisions, declarations, restrictions, prohibitions, obligations, and others" therein set forth; and *inter alia,* "Third, The only houses, buildings, or erections which shall be competent to the second parties and the survivor of them, and the heirs of the survivor, and their or his foresaids, to erect and maintain on each of the said several pieces of ground, shall be a villa dwelling-house and cellars and washing-house," which villa dwelling-houses were then specifically described. It further provided that "each of the said villa dwelling-houses shall be detached from the others, and shall be self-contained and occupied by one tenant only." Further, that "the second parties shall be bound within twelve months from the last date of the feu-contract to erect, and thereafter in all time coming to maintain on each of the several pieces of ground a villa dwelling-house of the foresaid description. Which conditions, provisions, declarations, restrictions, prohibitions, obligations, feu-duties, casualties, and others specified are created and declared to be real burdens on the said several pieces of ground and others, and real conditions of the feu-right thereto, and as such shall be duly observed, paid, and performed by the second parties, and the survivor of them, and the heirs of the survivor and their and his foresaids, and be inserted and duly referred to in statutory form in every future charter, disposition, conveyance, subfeu-right, and deed of investiture of the said several pieces of ground and others, or any part thereof, under the pain of nullity."

On each of the plots of ground, which were contiguous, self-contained villas were erected, and formed Nos. 74, 76, 78, and 80 Finnart Street. They were built in conformity with the feu-contract, and were each occupied by one tenant only.

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* Decided July 18, 1888.

By disposition, dated 10th and recorded 16th May 1881, Miller & Brown disponed one of the feus, with the villa thereon, to Miss Annie Stewart Carmichael. The disposition duly referred to the conditions above quoted.

By disposition, dated 5th March and recorded 6th April 1888, Miller & Brown disponed to John Miller, one of their firm, the remaining plots and villas thereon, the conditions above quoted being likewise duly incorporated in the disposition.

On 14th May 1888 Miller presented a petition to the Dean of Guild of Greenock for authority to alter two of his villas by erecting outside stairs to the second floors, and cutting off the internal communication between the first and second floors in each villa.

Miss Carmichael lodged answers, in which she averred,—"The object of the alterations is to enable the petitioner to let each dwelling-house to two tenants or occupiers, the one tenant occupying the main flat and basement or sunk flat and the other tenant the first flat and attics. If the alterations proposed are carried out the villas, which are presently self-contained, and which have always been occupied when let by one tenant or occupier only, will cease to be self-contained villas occupied by one tenant or occupier only, and the number of tenants or occupiers will be doubled. The proposed alterations will otherwise greatly injure the objector's property as a self-contained villa by lowering the rental and otherwise, and the value of her property will be greatly lessened."

The petitioner answered;—"Denied, and explained that the houses in the immediate neighbourhood of those belonging to the petitioner were originally self-contained, but recently certain of these houses have been converted into flats. In particular, the houses Nos. 77 and 79 Finnart Street, immediately opposite the petitioner's property, were many years ago, and before the erection of the petitioner's houses, and the house No. 81 Brisbane Street, about 60 yards distant from the petitioner's houses, has recently, both contrary to the provisions of the feu-contracts of the ground on which they are respectively built, which are in similar terms to those of the petitioner's feu-contract, been so converted, while the house No. 85 Finnart Street, opposite to the petitioner's said properties, has been converted from a self-contained dwelling-house into a shop, dwelling-house, and dairy. Explained further that the houses in Finnart Street and the neighbouring locality are not built of any uniform design, but are of various designs and constructions, some being self-contained villas, others flatted houses occupied by two tenants, and others large tenements of dwelling-houses occupied by several tenants; and that the four villas in question do not form or complete any particular section or portion of Finnart Street."

The respondent stated in reply;—"Counter explanation denied, and statement irrelevant, as the conversion of two self-contained houses on the opposite side of the street into flatted houses in no way affects the rights of the parties under the feu-contract in question. Explained further that the property No. 85 Finnart Street is not opposite to the petitioner's properties but is to the west of same, and that the feu was given off a great many years ago, and is unrestricted."

The petitioner pleaded, *inter alia;*—(2) The respondent has no common interest, *jus quæsitum tertio*, or other right or title entitling her to object, and decree falls to be granted as craved. (4) The character of the locality having been changed, and immediately adjoining properties having been converted into flats, the respondent has no sufficient interest to object.

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The defender pleaded;—(2) The petitioner and objector being entitled to enforce the conditions and restrictions in the said feu-contract *inter se*, the petitioner is not entitled to make the alterations proposed without the consent of the objector, or otherwise the objector having a common interest, *jus quæsitum tertio*, or other right or title to object to the proposed alterations, and having objected to same, the petitioner is not entitled at his own hands to alter the buildings as proposed, and the warrant asked ought not to be granted. (3) The objector having acquired her feu in reliance on the provisions of the said feu-contract being observed as to the whole of the ground therein contained, and as the proposed alterations if made would injuriously affect the objector's property, she is entitled to object to the warrant asked being granted.

The parties by minute admitted the correctness of a plan of the ground and neighbourhood, from which it appeared that many of the houses in the immediate vicinity were tenements accommodating more than one family, and that no uniform style of building was observed, and further, that the superior had given no consent to the proposed alterations beyond what was implied by his accepting citation and not appearing to oppose the application. They renounced further probation.

The Dean of Guild, on 14th June 1888, refused the application.

The petitioner appealed, and argued;—The proposed alteration on his property was not in violation of any right of the defender's. It was an exercise of his right of property, which was not limited by the alleged servitude. It was not consistent with the nature of a right of property to be limited as the defender desired to limit it. The very point had been the subject of opinion in two cases, though the opinions in question were not altogether necessary to the decision in either.[1] The clause founded on by the defender was a limitation on use and not on structure. But (2) the defender had no interest to object. The plan shewed a flatted house just on the other side of the street, and sundry lots of unrestricted ground in the immediate vicinity. It shewed that there was no common plan, and also that the neighbourhood was already given up to shops and flats. To support the objection, however, interest was indispensable.[2] It lay on the defender to shew interest, but even if it lay on the petitioner to disprove it, that had been done. (3) Assuming consideration of the point to be necessary, the pursuer maintained that there was no such mutuality of obligation as would give the defender a *jus quæsitum* in the obligations as to structure contained in the contract with the superior. She could indeed point to certain elements which went so far to shew a *jus quæsitum*. There were similar—indeed identical—restrictions upon the four lots feued in the feu-contract, which was in fact four distinct feu-contracts in one deed. But that, even assuming that the objector had an interest, was insufficient.[2] There must be evidence in the deed that it was intended to create a *jus quæsitum*. But the restrictions in the feu-contract appeared to be intended for the superior's benefit, and his only; and further, there was no community. So small a piece of a street with no common plan did not present the element of community of obligation. There must be a common plan to be appealed to, or some similar circumstance to be found in the deed which would raise the inference that mutuality of obligation was intended.

Argued for defender;—(1) It was an error to say that the matter was one of use alone. The feu-contract, on a just construction of it, treated

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[1] Moir's Trustees v. M'Ewan, July 15, 1882, 7 R. 1141; Buchanan v. Marr, June 7, 1883, 10 R. 936; *cf.* also Fraser v. Downie, June 22, 1877, 4 R. 942.

[2] Hislop v. M'Ritchie's Trustees, 8 R. (H.L.) 95, (Lord Watson, p. 102).

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use as definitive of structure. The decisions referred to by the petitioner did not, assuming their soundness, carry the appellant nearly so far as he maintained. There was not in them the specific stipulation that the feuar was to erect and always maintain a house to be occupied by one tenant only, and suitable only for such occupation. It was not disguised on the other side that the intention was to get rid of this restriction. The competency of the Court enforcing such a restriction on use was well settled.[1] It was not repugnant to a right of property that a restriction on the use of it should exist and be strictly enforced.[2] (2) It lay on the other side to shew that there was no interest. Interest was to be presumed from the fact that the stipulation had been made. It was presumed that a superior had such an interest, and the same principle applied where it was alleged that a co-feuar had a *jus quæsitum tertio.*[3] (3) There was a strong case of mutuality of obligation, and therefore of title, to enforce the obligations *inter se.* Four lots had been given off to the same vassal, one of which he had given off to the respondent under the restrictions imposed on himself, retaining the others, to which the same restrictions applied. That was even a stronger case than if there had been a common feuing plan. The whole was under one title at first, and the defender was taken bound to conform to it. It was in favour of the other feuars, and not of the superior only. There was clear evidence of a common scheme. Four feus were not too small a number to establish a community.

At advising,—

Lord Young.—This is an application to the Dean of Guild of Greenock for authority to make certain alterations on a house in Finnart Street, Greenock, the alterations being of such a character as will enable the house, hitherto occupied as one, to be hereafter occupied as two. The application is opposed by a feuar in the same street and under the same superior, and the ground of her opposition is that there is a condition in the applicant's title from the superior that the house shall be self-contained and occupied by one tenant only.

It appears that the applicant got a feu from the superior of four building stances in Finnart Street, Greenock, adjoining each other, and a condition of the feu was that upon each stance there should be erected a self-contained house, to be occupied by one tenant only. After the houses were built he sold one of them to the respondent, his opponent in the Dean of Guild Court, and just as he held the building stance with that condition in the title, that the house should be self-contained and occupied by one tenant only, so he sold the house to the respondent with the same condition in her title. The alterations which he proposes to make are to be in one of the three other houses, which he kept in his own hands, and the questions to which the objection to the alterations give rise are, in the first place, whether the proposed alteration is in its own nature objectionable, and secondly, if it is, whether the respondent is entitled to object to it.

On the first point it is contended, on the authority of *Buchanan* v. *Marr*, that the proposed alteration is not objectionable in itself as relating to mere use. No structural alteration on the house is proposed—nothing which can interfere with the rights and interests of others—but only an access to the upper story

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[1] Ewing v. Campbell, Nov. 23, 1877, 5 R. 230; Ewing v. Hastie, Jan. 12, 1878, 5 R. 439.

[2] Hislop v. Earl of Zetland, June 12, 1882, 9 R. (H.L.) 40.

[3] Hislop v. M'Ritchie's Trustees, *supra.*

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to enable it to be used separately from the under story. In *Buchanan* v. *Marr* that was held not to be such a change or departure from the conditions of the feu-contract as to entitle even the superior to object to it. This case is very like *Buchanan* v. *Marr*—indeed so like that I am unable to distinguish it—and that being so, I do not think it would be right or becoming in us to go back on a judgment deliberately pronounced so recently. There is here use merely.

There is however another ground on which it is said that this objection cannot be sustained, and that is that this lady is not in right of it. She says she is, because she says that she was made one of a community of four feuars by the applicant, who got a feu of the whole four houses himself, and sold one of them to her. That is a very small community, and I do not think that the doctrine of community, as inferring a right in the feuars to enforce in their own interest a condition intended primarily in the interest of the superior, has ever been extended to a case of that kind. Where you have a street or a square laid out in accordance with a feuing plan, and there is a reference in all the feu-contracts to the plan, and to the same rules and conditions of building, then you have such a community. All the feuars are bound not only in a question with the superior, but between themselves, to follow that plan, and observe these rules and conditions. But here you have one of the largest and most important streets in Greenock, where there is almost every variety of building, and almost every variety of use, and in that street you have four houses, as to which the superior has said that they must be self-contained and let to one tenant only. The superior does not mean to enforce that obligation, he does not here seek to do so at all events, but the respondent comes forward and says she has a community of interest, which entitles her to object to the applicant converting his dwelling-house into two. I think that she has no title to object.

On the whole matter, I am of opinion, in the first place, on the authority of *Buchanan* v. *Marr*, that the objection is not tenable in itself, and secondly, I think, for the reasons I have last mentioned, that the respondent has no title to make it. I should therefore propose to your Lordships to recall the Dean of Guild's interlocutor, and to remit to him to proceed.

LORD RUTHERFURD CLARK.—I am also of opinion that the Dean of Guild's interlocutor should be recalled. I proceed, and proceed entirely, on the case of *Buchanan*, from which I cannot distinguish the present. I do not give any opinion on the other ground.

LORD JUSTICE-CLERK.—I have come to the same result as Lord Young.

LORD CRAIGHILL was absent.

THE COURT recalled the Dean of Guild's interlocutor, and remitted to him to proceed.

W. B. RAINNIE, S.S.C.—SMITH & MASON, S.S.C.—Agents.

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THE LORD ADVOCATE, Informant (Respondent).—*Sol.-Gen. Robertson—Kennedy.*

JOSEPH CROOKSHANKS, Defendant (Reclaimer).—*C. S. Dickson—M'Clure.*

Excise and Customs—Removal of uncustomed goods—Seizure of conveyance—Knowledge on part of owner—Customs Laws Consolidation Act, 1876 (39 *and* 40 *Vict. c.* 36), *sec.* 202.—The Customs Laws Consolidation Act, 1876, sec. 202, enacts,—"All ships, boats, carriages, or other conveyances, together with all

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horses and other animals and things made use of in the importation, landing, removal, or conveyance of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Acts shall be forfeited." *Held* that the mere use of a conveyance or of horses for the unlawful purpose infers the statutory forfeiture irrespective of the knowledge or consent of the owner thereof.

Observed that the protection which is given to an innocent owner is by appeal to the Commissioners of Customs, who are authorised by sec. 209 of the Consolidation Act, 1876, to give up penalties and forfeited articles.

Exchequer Cause.
1st Division.
Lord Fraser.
M.

On 26th March 1888 a cab and horse belonging to Joseph Crookshanks, coach proprietor, Greenock, was seized by the custom-house officials, near Gourock.

On 15th April an appraisement of seizure was lodged before the Lord Ordinary in Exchequer Causes (Fraser), in which the cab and horse were appraised at £45.

On 1st May Crookshanks, as owner of the articles seized, lodged a claim for them before the Lord Ordinary.

On 21st May the following information was lodged in process by the Lord Advocate:—"I, the Right Honourable John Hay Athol Macdonald, Her Majesty's Advocate, on behalf of Her Majesty, inform the Court,—That Richard Lympaney, station officer, Coastguard Station, Gourock, and Edward Butcher and William Howie, both coastguardsmen, on or about the 26th day of March, in the year 1888, at or near Lavan Point, near Gourock, in the county of Renfrew, did seize and arrest to the use of Her Majesty, as forfeited, or liable to forfeiture, the four-wheeled cab and horse described in the appraisement of seizure No. 1 of process, and which are now claimed by Joseph Crookshanks, coach proprietor, Greenock, in respect—First Count.—That on or about the 26th day of March 1888, at or near Lavan Point, near Gourock, in the county of Renfrew, the said cab and horse were made use of by John Smith, cabman, Greenock, presently a prisoner awaiting trial in the prison of Edinburgh, or other person or persons to Her Majesty's Advocate unknown, in the importation, landing, removal, or conveyance of 343 pounds weight, or thereby, of manufactured tobacco, or other uncustomed, prohibited, or restricted goods, liable to forfeiture under the Customs Acts, contrary to section 202 of the Customs Consolidation Act, 1876 (39 and 40 Victoria, cap. 36), whereby the said cab and horse became forfeited or liable to forfeiture."* He therefore prayed the Court to adjudge the cab and horse to be forfeited, and to condemn the same accordingly.

Crookshanks lodged the following defences:—"Not known, and not admitted, that the horse and cab in question were made use of in the importation, landing, removal, or conveyance of manufactured tobacco, or other uncustomed, prohibited, or restricted goods liable to forfeiture under the Customs Acts. Explained that upon said 26th March 1888 a horse and cab were ordered of the present claimant Joseph Crookshanks, who is a cab and carriage-hirer and funeral undertaker in a large way of business, in the ordinary course of his said business, by Walter Walker, coachman to John Macdougall, Esq., Rosemount, Greenock, and the horse and cab which form the subject of the present claim were in accordance with said order despatched on the night of the said 26th March 1888 from the claimant's premises in charge of John Smith, night coachman in the

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* Sec. 202 of the Customs Consolidation Act, 1876, enacts,—"All ships, boats, carriages, or other conveyances, together with all horses and other animals and things made use of in the importation, landing, removal, or conveyance of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Acts shall be forfeited."

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claimant's service. This was done in good faith, and in the usual course of business, and the destination and particular use to which said horse and cab were to be put were unknown to the claimant. It is further explained that the said John Smith had been in the claimant's employment for about seven years, and the claimant had every reason to believe, from the opinion he had formed of his honesty and trustworthiness, that the horse and cab intrusted to his charge would not be used except in the legitimate exercise of the claimant's said occupation. The said John Smith was, on 30th May 1888, tried before the Honourable Lord Fraser and a special jury, on an information at the instance of the Lord Advocate for Her Majesty's interest, on a charge of being knowingly concerned in carrying, removing, depositing, or concealing, or dealing with certain uncustomed goods, to wit, the said 343 pounds of tobacco, when the jury unanimously found for the defender."

The Lord Advocate pleaded;—(1) The defences being irrelevant, except in so far as denying that the said horse and cab were made use of as libelled, should be repelled except to that extent. (2) The defender's third plea being unsound in law should be repelled.

The defendant pleaded, *inter alia;*—(1) The information being irrelevant should be dismissed. (3) *Separatim,* The subjects seized having been made use of in the matter libelled, without the knowledge or responsibility of the claimant, he should be assoilzied from the declaratory conclusions of said information and the consequent penalty.

On 5th July the Lord Ordinary pronounced this interlocutor:— "Repels the first and third pleas in law stated for the claimant Joseph Crookshanks: Allows to the Lord Advocate a proof of his averment that the cab and horse mentioned in the information were made use of in the importation, landing, removal, or conveyance of 343 pounds weight or thereby of manufactured tobacco, or other uncustomed, prohibited, or restricted goods liable to forfeiture, and to the claimant a conjunct probation." *

The defendant reclaimed, and argued;—The question came to be one of relevancy. To make the complaint relevant, it was necessary to add a statement that the cab and horse were in the owner's knowledge, or that of his servant, used for this illegal purpose. No doubt there was no provision to that effect in the statute, but the literal construction must lead to

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* "OPINION.—The offence in this case was the using a cab for the conveyance of uncustomed goods. It is not necessary that the prosecutor should prove, in order that that cab shall be forfeited, that the owner of it knowingly lent his cab for the carriage of such goods. The fact that it was used for that purpose by his servant, or by the person to whom he hired it out, is all that requires to be proved. There are certain offences for which penalties are imposed by the customs laws, in which the *scienter* on the part of the offender must be proved, but this is not one of them. That a person may be convicted of an offence under the excise or custom laws committed by a servant against his master's knowledge,—nay, against his positive injunctions,—is settled in various cases, such as in *Advocate-General* v. *Matheson* in 1852 before a full bench of the Court of Exchequer, as reported in Douglas' Manual, p. 256, and in *Advocate-General* v. *Grant* (20th July 1853, 15 D. 980). I therefore repel the first and third pleas stated by the defender. And the only matter for investigation is, as to whether the cab belonging to the defender was used for the carriage of uncustomed goods. Of course the rule as to liability to forfeiture cannot be carried to an extreme. A conviction, for example, could not be obtained against an omnibus proprietor into whose omnibus a person carrying uncustomed goods had entered without the knowledge of the conductor that his passenger had on his person goods of that description. But that is not the present case, which is the employment of the cab for the sole purpose of carriage of the goods, and if that be proved it is enough."

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great hardship, and so far as the record shewed would do so in this case. In the present case the owner was put in a dilemma. If he refused to take a passenger in the ordinary course of his business he was liable to a fine, and if he did take a passenger with luggage he had no power to search the luggage, and might quite unwittingly be liable to forfeiture of his cab when the luggage was searched by the customs officers, who had the power to do so. The Act, if literally read, thus placed a restriction on the exercise of a lawful trade. In the case of the *Advocate-General* v. *Grant*, cited by the Lord Ordinary, the Judges seemed to have thought that an averment of knowledge was requisite.

Argued for the Lord Advocate;—This was not an action against a person for penalties where the person might or might not be innocent, but the mere statement of the fact that the conveyance had been illegally used was sufficient to entitle the Crown to seize it. The Act was peremptory, and there was no hint that an averment of knowledge should be made. But even on the question of hardship the Legislature had kept in view the case of owners whose conveyances were used without their knowledge, because by the 209th section of the Act the Commissioners of Customs might direct the restoration of seized articles, whether forfeiture had been ordered or not. Further, the person whose conveyance had been seized had a right of recourse against the wrongdoer.[1] The cases cited by the Lord Ordinary had nothing to do with the present case, as they were cases where an action for penalties was directed against a person. They should not be looked at in the case, and any argument founded on them and on the opinions therein delivered was irrelevant. This section had been in force and acted on for two centuries, and was only re-enacted by the Consolidation Act of 1876.[2] If some such enactment were not in force it would be impossible in the great majority of cases even to make a seizure, as the owner of a conveyance would take care that there was no proof of knowledge on his part when it was used for an illegal purpose.

LORD PRESIDENT.—This is a proceeding *in rem*, and the sole object of it is to give effect to the forfeiture of a cab and horse. The success of the application of course must depend on the terms of the statute providing for forfeiture. The words of section 202 of the statute are that "all ships, boats, carriages, or other conveyances, together with all horses and other animals and things made use of in the importation, landing, removal, or conveyance of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Acts, shall be forfeited." Now, these words admit of no construction but one. If certain things,—among others cabs and horses,—are used to convey uncustomed goods, the statute provides that they shall be forfeited. It is not necessary to make any allegation against any person to the effect that he has committed an illegal act. The mere fact that the cab and horse have been used in the particular manner referred to in the statute is a sufficient ground for forfeiture. Now, the Information here alleges that certain officers of Her Majesty's Customs did seize and arrest the cab and horse described in the appraisement of seizure, and which are now claimed by Crookshanks; and the charge is to the effect that "on the 26th day of March 1888, at or near Lavan Point, near Gourock, in the county of Renfrew, the said cab and horse were made use of by John Smith, cabman,

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[1] Blewit v. Hill, Nov. 9, 1810, 13 East, 10.

[2] Queen v. Bishop, Feb. 28, 1880, L. R., 5 Q. B. D. 259; Act 21 Geo. III. cap. 39, sec. 2; Attorney-General v. Nostead, July 22, 1816, 3 Price, 97.

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Greenock, presently a prisoner awaiting trial in the prison of Edinburgh, or other person or persons to Her Majesty's Advocate unknown, in the importation, landing, removal, or conveyance of 343 pounds weight or thereby of manufactured tobacco, or other uncustomed, prohibited, or restricted goods liable to forfeiture under the Customs Acts, contrary to section 202 of the Customs Consolidation Act, 1876 (39 and 40 Vict. cap. 36), whereby the said cab and horse became forfeited or liable to forfeiture." The words of the count correspond precisely with the words of the statute. That being so, it is not possible to say that the charge is not relevant under the statute. No doubt it may be said that there is great hardship in certain cases, and in some cases it may be so great that the officers charged with the administration of this branch of the law will not go on to enforce the provisions of the statute. We, however, have to administer the statute according to its strict terms, and if we find the charge corresponding precisely to the words of the statute, is it to be listened to for a moment that the Lord Advocate is not entitled to prove the allegations which he has made and if he proves them to obtain the forfeitures he has claimed under the statute? I do not think there is anything more to be said. I agree with the Solicitor-General that the cases of proceedings to enforce penalties against persons have very little to do with this question. Most of these cases have to do with the particular words of the statutes under which the proceedings are taken. Some of these require guilty knowledge, others do not. Here the penalty follows on the fact that the goods have been used in a particular way, and no question of innocence on the part of anyone arises. Accordingly the reclaiming note must be refused.

LORD MURE.—I see no alternative but to hold that this action is relevant. The words of the statute are quite explicit, and nothing whatever is said there about an averment of knowledge.

The statute is very strict, and I cannot help saying that this is on the face of it about as hard a case as could well be, for I see that the servant took up this tobacco in the street in the ordinary course of his duty, and having been tried before a jury for a breach of the Customs Acts he was unanimously acquitted, and yet the Crown goes on with this case.

LORD SHAND.—The words of the statute founded on are plain and unambiguous, all vehicles "made use of" in the conveyance of uncustomed goods shall be liable to forfeiture. The argument for the reclaimer is, that the Court shall read into the statute, after the words "made use of," the words "with the knowledge of the owner of the illegal use thereof," or some similar words, requiring proof of guilty knowledge on the part of the owner as a condition of forfeiture of the vehicle. But there are no such terms in the statute, and from beginning to end of the clause I see nothing to indicate by way of implication or inference that anything of the kind was intended. There has been nothing pointed to from beginning to end of the statute itself which could lead to the idea that by implication, necessary or even slight, the guilty knowledge of the owner or of his servants was to be made a condition of the forfeiture of the vehicle used. Indeed, the only way in which it appears to me that an argument has been rendered possible in the case,—and we have had an able argument,—has been by those references which have been made to the general principles of equity and justice which appear to me to have no place in interpreting the unambiguous language of the statute. And, therefore, I agree with your Lordship in thinking that this complaint is relevant, and also that the defence set up cannot be allowed to go to proof. If the Crown can shew that the reclaimer's horse and cab were *de facto* used for the illegal purpose alleged, they were entitled to seize them as forfeited.

I do not agree in thinking that this is necessarily a case of hardship. If such words were inserted in the statute as the defender seeks to have introduced, the result, as it appears to me, would be that it would be impossible in probably ninety out of a hundred cases to give the check or remedy of forfeiture which it is the purpose of the Legislature to provide in order to prevent smuggling. The illegal proceedings of the smuggler are always conducted with the greatest secrecy, and a person about to allow his ship or his cab to be used in this way, if forfeiture were made to depend on his guilty knowledge, would take very good care to avoid having knowledge, and certainly would take care that there should be no means of proving his knowledge of the use which was to be made of his property. Accordingly, to avoid this evil, and yet to provide the sharp and ready remedy of forfeiture, proof of illegal use has been made sufficient.

On the other hand, however, seeing that this is so, the Legislature have as a protection to the subject placed the administration of the statute in the hands of a public department subject to the control of Parliament, and while, on the one hand, section 202 is enacted in order to obtain convictions, and to authorise forfeitures which are necessary for Exchequer purposes, on the other hand we find a clause (section 209) which expressly enables the Commissioners of Customs in the administration of the statute, even if they obtain a conviction or a forfeiture of property, to give up penalties and forfeited articles, and thus in the end to decline to avail themselves of the legal proceedings which they may have thought fit to take. That is the protection which the Legislature has provided as a counterpart to the sharp remedies of penalties and forfeitures which the statute gives for the sake of securing that the revenue of the country shall not be diminished by smuggling.

In regard to what has fallen from Lord Mure as to this being a case of hardship, I shall only say that this refers to a matter which has no doubt been well considered by those who are in the administration of this department, and by the Lord Advocate, and I express no opinion upon it. It may be that they have good reason to know the knowledge of this cab-proprietor of the use to which his horse and cab were put, though the statute does not make it a condition of the forfeiture that this shall be proved. We have no means whatever of knowing how this stands, and I express no opinion about it further than this, that if Crookshanks can satisfy the department of his complete ignorance and freedom from blame, he will have a favourable case for an appeal to the Commissioners to exercise the powers given to them by section 209 of the statute.

Lord Adam.—We cannot dispose of this case on a consideration of general principles of justice as we are asked to do. We have to construe the terms of an Act of Parliament, and on that point I have no doubt or difficulty that forfeiture must follow.

No doubt it would be easy to figure endless cases of hardship under this section, but the answer to that is that the Legislature has provided a public body which will see that there is no hardship really done in any case.

Whether this is a hard case I give no opinion whatever. We do not know the facts, and therefore I say nothing upon the subject.

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Lord Advocate v. Crookshanks.

THE COURT adhered.

R. PRINGLE, W.S.—SMITH & MASON, S.S.C.—Agents.

ANDREW ROBERTSON, Pursuer (Respondent).—*Rhind—A. S. D. Thomson.*
MARGARET STALKER OR ROBERTSON, Defender (Reclaimer).—
J. C. Thomson—Watt.

No. 176.

July 19, 1888.
Robertson v. Robertson.

Husband and Wife—Divorce—Alleged condonation pending reclaiming note against decree of divorce—Process.—A husband brought an action for divorce against his wife, founding on several alleged acts of adultery. The Lord Ordinary granted divorce, holding one of the alleged acts of adultery, but one only, to be proved. The defender reclaimed, and at the hearing moved to be allowed to aver, and to prove, that the pursuer had, after the date of the Lord Ordinary's interlocutor, condoned the adultery (assuming it to have been committed) by resuming cohabitation with her. The Court were of *opinion* that so long as the Lord Ordinary's interlocutor granting divorce stood, the plea of condonation was excluded, but having on a consideration of the evidence come to the conclusion that the act of adultery which the Lord Ordinary *held* to be proved was not proved, they recalled the Lord Ordinary's interlocutor, and, without expressing any opinion regarding the other acts of alleged adultery, *allowed* the defender to plead, and to lead evidence of, condonation.

Husband and Wife—Proof—Divorce—Condonation.—In an action of divorce on the ground of adultery, while it is competent to lead evidence of misconduct on the part of the defender prior to condonation in order to shew the character of the defender's subsequent actings, which are admitted or proved as facts, but are in themselves capable of being regarded in different lights, it is not competent to refer to such previous misconduct as evidence of the facts themselves.

Collins v. *Collins*, May 16, 1882, 9 R. 785, Dec. 1, 1882, 10 R. 250, aff. Feb. 18, 1884, 11 R. (H.L.) 19, *commented on.*

Husband and Wife—Proof—Divorce—Evidence of young child.—In a proof in an action for divorce on the ground of adultery, the Lord Ordinary rejected the evidence of a boy nearly seven years of age, "in respect of his tender years and of the nature of the case." *Opinion* that the evidence had rightly been rejected.

2D DIVISION.
Lord Trayner.
M.

ON 1st November 1887 Andrew Robertson brought an action against his wife Margaret Stalker or Robertson for divorce on the ground of adultery alleged to have been committed with various men named.

The defender denied the alleged adultery.

At the proof on 13th December the pursuer led evidence in support of his averments of adultery, and the defender led counter evidence.

The pursuer put in two letters written by the defender, admitting adultery on earlier occasions, which he had condoned. The defender admitted writing the letters, but denied the adultery.

The proof was adjourned till 10th January 1888, on which date the pursuer was allowed to open up his record in order to make an additional averment, and the defender to answer it, and the proof was further adjourned till 13th January.

The following was the additional averment and answer:—(Cond. 11) "The defender committed adultery in a cab belonging to and driven by John Doull, . . . in or about the month of September last, whilst being driven round the Queen's Drive, Edinburgh, with a man other than

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the pursuer, whose name and designation are unknown to, and cannot be discovered by, the pursuer." (Ans. 11) "Denied."

At the adjourned proof Doull, the cabman mentioned in the additional averment, deponed,—" I am a cab-driver, and my cab belongs to me. . . . I know the parties to this case. I at one time lived in St Patrick Square, below where they lived. I know Mrs Robertson quite well by sight. (Shewn defender)—That is the lady. I remember a man hiring my cab at the Register House on one occasion in September last. I do not know the man, and could not identify him. The defender was with him. It was between six and seven o'clock in the evening. The man hired my cab for an hour's drive, but he did not say where. He went into the cab, as did also Mrs Robertson. The two were alone in the cab. I took them round the Queen's Drive." He then deponed that in going up the hill towards Dunsappie he got off his box in order to relieve his horse, and walked by the side of the cab, when he saw the defender and the man in the act of connection. He further deponed that he mentioned the matter to a man named Fitzpatrick, through whom it came to the knowledge of the pursuer's agent. Fitzpatrick and the agent were examined and corroborated this last statement. There was no other evidence for the pursuer regarding the alleged act of adultery in Doull's cab.

The defender was further examined for herself, and denied the alleged adultery in Doull's cab. She stated that she had never been round the Queen's Drive in a cab in her life. "I certainly was never driven in Doull's cab round the Queen's Drive. Cross.—I know Doull by sight. I have known him in that way for about three years I think. He lived in the same stair where I lived."

The Lord Ordinary (Trayner) on 13th January 1888 granted decree of divorce, finding that she had " committed adultery with a man other than the pursuer, whose name and designation are unknown to the pursuer, as libelled."

There was no note or opinion appended to the Lord Ordinary's interlocutor, but it was admitted that the Lord Ordinary expressed the opinion that he held that the alleged adultery in Doull's cab was proved, and that the acts of adultery averred in the record as originally framed were not proved.

The defender reclaimed.

At the hearing on March 14th the defender stated that the pursuer had since the date of the Lord Ordinary's interlocutor resumed cohabitation with her, and had thereby condoned the adultery on which he founded (assuming that there had been adultery, which the defender denied), and she moved the Court to be allowed to open up the record in order to aver this condonation, and for a proof of the averment when added to the record.

Lord Young pointed out that the first matter to be considered was whether the Lord Ordinary's interlocutor was well founded, for if the Court affirmed that interlocutor, holding the adultery on which the Lord Ordinary had proceeded to be proved, the date of the divorce would be the date of the Lord Ordinary's interlocutor, and consequently the plea of condonation would be excluded; but if the Court recalled that interlocutor, holding the adultery on which the Lord Ordinary had proceeded not to be proved, should the Court be of opinion that any of the other acts of alleged adultery were proved, then it would be open to the defender to plead condonation.

The defender then argued that the Lord Ordinary's interlocutor was ill founded. It affirmed an act of adultery on the uncorroborated testimony of Doull, the cabman. The defender denied that she had ever been in Doull's cab on the Queen's Drive.

Argued for the pursuer;—Doull's evidence was no doubt the only direct evidence of the act of adultery to which he spoke, but it was corroborated in the first place by the evidence of acts of adultery which the pursuer had condoned, and secondly by the evidence adduced in support of the other acts of alleged adultery, which, even if it did not prove any of those acts of adultery, shewed sufficiently the character of the defender. That was competent evidence.[1]

The pursuer argued, further, that the evidence of a boy named Robert Macdonald, whom he had tendered as a witness in support of one of the other acts of adultery, had been incompetently rejected by the Lord Ordinary, and that he ought now to be allowed to examine him.*

LORD YOUNG.—A difficulty was suggested at an early stage of the debate in consequence of the defender's allegation that cohabitation had been resumed standing the decree of divorce by the Lord Ordinary. With the view of avoiding, if possible, the argumentative difficulties thence arising, counsel for the reclaimer was invited to open on the reclaiming note and to state the grounds on which he maintained that the Lord Ordinary's judgment was not well founded. That he accordingly did, and his statement was answered by the respondent.

The Lord Ordinary, by the interlocutor under review, has found an act of adultery to be proved which was not libelled nor stated in the record as originally framed at all, nor known to the pursuer when the action was raised, but was added to the record after the evidence relating to the acts of adultery which were libelled had been led, and in respect of that act has found the defender guilty of adultery, and granted decree of divorce against her accordingly. I think the first question for us to consider is whether that interlocutor is well founded.

Now, on looking at the evidence, it appears that the fact so affirmed by the Lord Ordinary, and on which alone his decree is based, stands on the unsupported testimony of a single witness—a cabman—who says that he took the defender and a man round the Queen's Drive in his cab in September last, and that having got down in order to relieve his horse when going up the hill to Dunsappie, he looked into the cab and saw them having connection. The defender is examined with reference to this, and she entirely denies the whole story, stating that she never drove round the Queen's Drive in her life. The cabman is quite distinct that she was the woman—he knew her before, he says—but who the man was he did not and does not now know. His story is quite distinct, but it is not corroborated. Mr Thomson argued that by way of corroboration he was entitled to refer to evidence of the defender's conduct otherwise, and, in particular, to her admissions of acts of adultery condoned, and also to evidence of acts which she does not admit, and which were held not proved by the Lord Ordinary; and he referred to the case of *Collins*, 9 R. 785, and in

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[1] Collins v. Collins, May 16, 1882, 9 R. 785, Dec. 1, 1882, 10 R. 250, aff. Feb. 18, 1884, 11 R. (H.L.) 19.

* The record of the proof on this matter bore:—"Pursuer's counsel tendered Robert Macdonald, nearly seven years of age, as a witness. In respect of the witness' tender years, and of the nature of the case, the Lord Ordinary refused to examine him."

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the House of Lords, 11 R. (H.L.) 19, as shewing that condoned acts of adultery may competently be referred to as evidence of acts which are not condoned. I remember the case, and I adhere to the views which I there held, and I think expressed, that such evidence may legitimately be referred to as interpreting the woman's conduct on other occasions, when that conduct may be regarded as guilty or innocent according to circumstances. Walking alone in a park with a man, or sitting with him, if she is a virtuous woman, would not give rise even to a momentary suspicion, but if she is a vicious woman, given to going about with men, it would be quite otherwise. Therefore, to interpret conduct of this sort, such evidence—evidence of the woman's previous conduct and habits—is quite legitimate. But the question here is not as to the character of her conduct in the cab, but whether there is evidence which we can regard as sufficient that she was in the cab at all with this man, and evidence of acts of condoned adultery or of previous conduct of a doubtful character can have no bearing as evidence of that fact. It stands therefore on the uncorroborated testimony of the cabman, and, differing from the Lord Ordinary, I am of opinion that the adultery which that testimony, if sufficiently corroborated, would have established, has not been proved. Accordingly I think the Lord Ordinary's interlocutor ought to be recalled.

That being so, we have to consider whether the evidence which the Lord Ordinary rejected as insufficient to establish the acts of adultery on the other occasions referred to on record is sufficient to establish one or more of these acts. For myself I should be slow to interfere with the judgment of the Lord Ordinary, rejecting that evidence as insufficient, but the interlocutor of the Lord Ordinary affirming the fact of adultery on a particular occasion, and granting decree of divorce accordingly, having been recalled, we cannot, in face of the averments as to condonation which are now made, enter into an inquiry as to the sufficiency or insufficiency of the evidence of the other acts of alleged adultery, without allowing the new matter to be added to the case. I should therefore propose, if your Lordships agree with me, to recall the interlocutor of the Lord Ordinary, and to allow the defender to add the statement she proposes to the record, and the pursuer to make such answer as he thinks fit, and that having been done, to allow a proof.

LORD RUTHERFURD CLARK.—I agree.

LORD JUSTICE-CLERK.—In the present state of the record I think it right to say no more than that I concur.

LORD YOUNG.—I omitted to mention what I think we all considered, that I do not think we should interfere with the discretion of the Lord Ordinary in refusing to allow the child to be examined. I should certainly have done the same had I been Lord Ordinary.

LORD CRAIGHILL was absent.

THE COURT pronounced this interlocutor:—"Having heard counsel for the parties on the reclaiming note for the defender against Lord Trayner's interlocutor of 13th January 1888, and on the minute for the defender, No. 79 of process [being the averment of condonation], recall the said interlocutor, and allow the pursuer to answer the said minute."

The minute and answer were thereafter added to the record, and a

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proof allowed regarding the alleged condonation, which was taken before Lord Rutherfurd Clark.

On 19th July parties were heard on the whole case.

In the result the Court held that none of the acts of alleged adultery were proved.

THE COURT assoilzied the defender.

ROBERT BROATCH, Solicitor—CLARK & MACDONALD, S.S.C.—Agents.

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Craig v.
Millar.

THOMAS CRAIG, Pursuer (Respondent).—*D.-F. Mackintosh—Shaw.*
GAVIN BELL MILLAR, Defender (Reclaimer).—*Asher—J. C. Thomson —Ure.*

Lease—Landlord and Tenant—Subject of lease—Implied obligation—Breach of contract.—Certain premises in a densely populated part of Glasgow, known as "Graham's Lodging House," were let on lease for seven years. After four years of the lease had run, the landlord, who owned an adjacent block of buildings, converted it into and started a rival lodging-house. There was no express condition in the lease against his so doing. The tenant brought an action of damages against the landlord on the ground that the landlord's actings were in violation of the good faith of the contract.

Held after a proof, by a majority of the whole Court (*diss.* Lord Lee), that the lease in favour of the pursuer implied no obligation on the part of the landlord not to set up a rival establishment.

Opinions that such a restriction could not be implied from the circumstances in which a lease was granted. *Opinions contra per* Lord Lee and Lord Fraser.

Observations on the case of *Campbell* v. *Watt*, Hume's Dec. 788.

1ST DIVISION.
Lord Lee.
(Whole Court).
B.

BY lease dated January 1883, Gavin Bell Millar, sole partner of the firm of W. & G. Millar, warehousemen, Glasgow, let to Thomas Craig certain subjects, which were described as being "All and Whole these premises, situated in Graeme Street, Watson Street, and M'Pherson Street, Glasgow, as presently occupied as Graham's Lodging House," for seven years from Whitsunday 1883. The rent stipulated in the lease was £400 per annum, and the tenant paid in addition the price of certain wooden partitions and other fixtures on the premises. Millar was taken bound to maintain the subjects of lease in good tenantable order and condition; and "whatever repairs, alterations, fittings, decorations or others may be necessary or desirable for the second party's" (the tenant's) "occupancy of the premises, shall be made at his own expense, but he shall not be entitled to make any alterations on the premises let without the express consent of the first party; declaring that the first party shall, at the termination of the lease, if required by the second party, purchase from him at a valuation the bunks or sleeping-berths to be erected and fitted up by the second party." The landlord was further taken bound to maintain the tenant in the peaceable possession and occupation of the premises.

The premises in question, which continued to be used as a lodging-house, and consisted of three flats, containing 300 beds, were part of a block of buildings which were bounded on the south by Gallowgate, on the west by High Street, on the east by Watson Street, and on the north by Graeme Street,—a cross street called M'Pherson Street separating them from another block of buildings fronting Watson Street, in which were premises also owned by W. & G. Millar, and occupied by them as furniture and carpet stores in connection with their business.

In September 1886 Millar converted these stores into a lodging-house, called the Watson Street Home, and fitted them up with 512 beds, and let them at a rent of £1000 per annum to a man named Robert Burns.

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Craig thereupon brought this action against Gavin Bell Millar, claiming £4000 of damages, and pleading—(1) The defender Gavin Bell Millar's actings in converting the said warehouse premises into, and opening the Watson Street Home or lodging-house as condescended on, being in violation and breach of the good faith of the contract made between the defenders and the pursuer, the pursuer is entitled to reparation, as concluded for. (2) The pursuer is, in the circumstances condescended on, justly entitled to reparation for the loss, injury, and damage caused or to be caused to him by the said actings of the defenders, and decree in his favour, as concluded for, falls accordingly to be pronounced.

He averred, *inter alia;*—(Cond. 4) "At the time when the pursuer entered into said lease there was no rival house in the neighbourhood. Had there been any such the pursuer would not have leased the defenders' premises. . . . The pursuer put up fittings and made certain improvements and alterations at a cost of upwards of £1000. He devoted his whole energies towards improving the business, and under his own and his wife's superintendence it has been carried on with profit by the pursuer until the business was interfered with and seriously damaged by the defender, Gavin Bell Millar, as after mentioned. The premises tenanted by the pursuer were specially fitted up, and the contract of lease entered into by both parties in order to supply the demand for accommodation of the kind referred to in said quarter of the city. Being well conducted by the pursuer the business soon shewed a considerable profit, and this came to the knowledge of the defender Gavin Bell Millar. He then resolved, in breach of the good faith of the pursuer's contract with him, to transform a part of the warehouse in which the business of W. & G. Millar was carried on, and of which he is proprietor, into a common lodging-house, with the express view of securing the custom, or a great part thereof, which was being obtained in the same block of buildings by the pursuer." . . . (Cond. 6) "The opening of the said Watson Street lodging-house by the defender the said Gavin Bell Millar was a violation and breach of the said contract with the pursuer. Owing to the proximity of said house to that of the pursuer, and to there not being a demand for two such immense establishments, the pursuer's business has greatly suffered, and, so far as he can judge, it will be impossible for him to continue to carry it on. As already mentioned, the pursuer's business had yielded large profit prior to defenders' said interference therewith. Not only is this profit no longer earned, but the pursuer's drawings have already decreased to such an extent that, assuming they should not continue further to decrease, he is making a loss at the rate of nearly £600 a-year. This is entirely owing to the defenders' said actings as above mentioned. The damages claimed are a moderate estimate of the loss thus occasioned which the pursuer has sustained and will sustain before his lease terminates. The defenders have declined to make him any compensation for this loss."

The defender in answer "denied that at the time when the pursuer entered into his lease there was no rival house in the neighbourhood; that the defenders took any resolution in breach of the good faith of their contract with the pursuer; and that they transformed their warehouse into a lodging-house with the express view of securing the pursuer's custom." He further stated that, in answer to the pursuer's representations, he had offered to relieve him of his lease, or to fit up his premises in the same style as the new premises, provided he paid interest on the cost of the alterations, but that both offers had been declined.

He pleaded;—(1) The pursuer's statements are irrelevant, and insuffi-

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cient to support his pleas. (2) The defender having committed no breach of contract is entitled to absolvitor, with expenses.

The Lord Ordinary (Lee) on 16th February 1887 allowed a proof before answer,* and on 5th March following, the First Division upon a reclaiming note adhered to that interlocutor.

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* "OPINION.—This is an action of damages at the instance of the tenant of a common lodging-house against his landlord, for injury by the latter setting up a rival establishment to the prejudice of his tenant, and contrary to the good faith of the lease.

"The allegation is that the defenders, after letting the premises to the pursuer at a high rent, for a period of seven years, and for the purposes of a common lodging-house, have converted a neighbouring tenement belonging to them into a similar lodging-house, with the view of intercepting the custom to which the pursuer (as in a question between him and his landlord) was entitled to trust. If the pursuer's statements are true, the defenders have acted in bad faith, and have endeavoured to conceal or disguise the character in which they are connected with the rival establishment, by means of a nominal and fictitious lease to a third party, who works the business for their behoof, and undertakes to pay them a nominal rent of £1000 a-year.

"It is pleaded that the action is irrelevant, and that, in the absence of any stipulation to the contrary in the contract of lease, the proprietor was entitled to make any use he pleased of the neighbouring tenements belonging to him.

"My opinion is that the action cannot be thrown out as irrelevant. The relation of landlord and tenant involves on both sides important obligations, which are not necessarily made matter of express agreement; and I think that, on the part of the landlord, it is not doubtful that he is bound, not merely to give the tenant peaceable possession and occupation, and to maintain him therein, but also to refrain from doing anything which is calculated to disturb him in using the subjects for the purpose for which they were let.

"It is true that in the case of *Laurent* v. *The Lord Advocate* (7 M. 607) it was held that a neighbouring proprietor is not liable for injury caused to his neighbour by lawful operations *in suo*, unless negligently, recklessly, or unskilfully executed. But the question there, according to the issue adjusted, was not between landlord and tenant. Lord Deas' view was held to be excluded by the terms of the issue. In the case of *Miller* v. *Renton* (13 R. 309) it was not doubted that one who has let premises for occupation as a hotel will be liable in damages caused by the landlord to his tenant by operations in an adjoining tenement calculated to disturb the tenant's occupancy of the subjects for the purposes for which they were let. The result in that case was that the landlord was found liable in damages for disturbance caused by operations on his neighbouring tenement.

"But another example, very near to the present case, of the obligations which may be implied in a lease, is to be found in the case of *Smith* v. *Cameron*, referred to in the case of that name reported in 6 R. 1107.† In that case Lord

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† The case of *Catherine Smith*, lessee and tenant of the Chevalier Hotel, Fort-William, v. *John Cameron*, proprietor of said hotel, and also of the hotel known as the "West End Hotel," Fort-William, and *Donald M'Intosh*, lessee of the last-mentioned hotel, is reported upon another point, of date 28th June 1879, 6 R. 1107.

Upon the merits of the case the interlocutor of the Lord Ordinary (Craighill), dated 25th March 1879, which was not reclaimed against, fully sets forth the facts. His Lordship had, on 12th November 1878, pronounced an interlocutor allowing a proof, which on a reclaiming note had been adhered to by the First Division on 30th November.

The subsequent interlocutor of 25th March 1879 was as follows:—"The Lord Ordinary having heard parties' procurators on the closed record, productions, and proof, and having considered the debate and whole process, in the first place, as regards the case against the defender, John Cameron, finds, as

It was proved that in the beginning of 1886, and while the pursuer's lease had still four years to run, the defender spoke to the pursuer about

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Craighill gave the lessee of the Chevalier Hotel, Fort-William, £500 of damages against her landlord, on the ground that, contrary to the good faith of his contract with her, he had opened a rival hotel in the place. The opinion of the Court in the case of *Campbell* v. *Watt*, reported in Hume's Decisions (p. 788), is also in point, as shewing that there are restraints which are natural incidents to a lease, and among these that the landlord of an inn should not set up a rival establishment of the same kind to the prejudice of his tenant. I think, therefore, that it is a question of circumstances, whether that which has been done by the defender in the present case is contrary to the good faith of his agreement with the pursuer, and that there must be inquiry.

"With regard to the import of the English cases upon the effect of a sale of goodwill, I hesitate to express any opinion, and I think it unnecessary to do so. But I may say that, in any view of them, they shew that a contract of that nature may imply some restraints upon the vendor which are not made matter of express stipulation. They seem to recognise the principle that one who sells goodwill 'shall not be permitted to derogate from his own grant.' I cannot find that they support the defenders' arguments that the action should be thrown out without inquiry."

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matters of fact (1) that after communications between the pursuer and defender relative to the Chevalier Hotel, Fort-William, of which at the time defender was occupant and owner, the pursuer took a lease of that hotel from the defender for a period of ten years from Whitsunday 1876, subject to a break in her favour at the end of the first five, at a yearly rent of £310, which, if not a high, was at anyrate a full rent for the premises; (2) that the pursuer entered on possession at Whitsunday 1876, and since then the business of this hotel has been carried on by the pursuer, who has kept up the character of the house as a 'first-class' hotel; (3) that early in June 1878 a new hotel, since known as the West End Hotel, was opened in Fort-William by the defender Donald M'Intosh, who, in November 1877, had contracted with the proprietor, the other defender, the said John Cameron, for a lease thereof for seven years from Whitsunday 1878, in premises which, before the building was altered and enlarged by the last-named defender, was the parish school of Kilmallie; (4) that the West End Hotel, which is within 200 yards of the Chevalier Hotel, occupies a conspicuous situation, and one convenient for travellers, and between the time when it was opened, which, as aforesaid, was early in June 1878, and the 7th September following, which is near to the close of the tourist season, the number of sleepers in the said hotel was 543, the number of sleepers in the Chevalier Hotel during the year 1878 being 890; (5) that of the said number who slept in the West End Hotel, one-half at least may, on reasonable computation, be regarded as travellers who would have gone to and who would have been accommodated in the Chevalier Hotel had the former not been established, there being no other house so directly in rivalry with the latter as the West End Hotel; (6) that the average sum paid by each sleeper in such a hotel as the Chevalier Hotel or West End Hotel is about 10s.; that the average profit to the landlord is one-half the visitor's bill; and that the loss caused to the pursuer by the opening of the West End Hotel, as represented by the facts last particularised, approaches to £70 in the tourist season of 1878; (7) that the season of 1878 may, as regards the effect of the competition of the West End Hotel with the Chevalier Hotel, be fairly taken to exhibit the result of that competition during all the future years of the pursuer's tenancy of the latter hotel, and consequently the loss suffered and to be suffered by the pursuer during the eight years of her lease to run from Whitsunday 1878, should she so long continue in the tenancy, may be stated, and will not be overstated, at the sum of £500; (8) that the premises which now form the West End Hotel were purchased by the defender the said John Cameron in October 1875, and one of the purposes which he desired to accomplish by this acquisition was to prevent them from falling into the hands of another bidder at the roup, by whom, as the defender had been

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his intended conversion of the other subjects, and that the latter remonstrated, and declined to become the tenant of, or to enter into any arrange-

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informed, they were to be converted into a hotel had he become the purchaser; (9) that in January, February, and March 1876, when the parties were in communication as to the pursuer becoming tenant of the Chevalier Hotel, when the parties came to terms for a lease, and when the formal lease was signed, the defender, though it was in his mind that the premises which he had recently acquired as aforesaid might be converted into and let or used as a hotel, said nothing on this subject to the pursuer, who in consequence became tenant of the Chevalier Hotel as aforesaid, ignorant and unsuspicious of the probability or possibility of such a competition; and (10) that the letting for the purposes of a hotel of the premises known now as the West End Hotel by the defender was a violation of the good faith of the contract previously entered into with the pursuer: Finds, as matter of law, the facts being as above set forth, that the defender is liable to the pursuer in reparation of the loss caused as aforesaid to the pursuer in the premises; therefore repels the defences: Ordains the said defender John Cameron to make payment to the pursuer of the said sum of £500 sterling, by equal yearly instalments, beginning payment of the first of these instalments as at Martinmas 1878, the second at Martinmas 1879, and so forth, making payment yearly thereafter during the pursuer's tenancy of the Chevalier Hotel under the said lease, but no longer, with interest at the rate of five per centum per annum from the date of payment of each instalment until paid, and decerns: In the second place, as regards the case against the defender Donald M'Intosh, finds, as matter of fact, that there was no privity of contract between him and the pursuer, and that in being tenant of the West End Hotel he did not violate any obligation, express or implied, contracted with or in relation to the pursuer: Finds, as matter of law, the fact being as above set forth, that the said defender is entitled to be assoilzied from the conclusions of the summons for interdict, and from any of the other conclusions by which he is or might be affected; therefore assoilzies the said defender, but finds, for the reasons set forth in the subjoined note, no expenses due to him by the pursuer, and decerns: Finds the defender the said John Cameron liable to the pursuer in the expenses of process, including those incurred in the Inner-House on the reclaiming note presented by the defenders against the interlocutor of 12th November last: Allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and to report.

"NOTE.—If the facts be as they have been found by the Lord Ordinary, there is he thinks both principle and authority in the law of Scotland for the judgment which has been pronounced. The decision in *Campbell* v. *Watt*, reported by Hume, p. 788, appears to be a decision on the very question which has now been determined. A single decision, indeed, is not conclusive evidence of the law, but that quoted has often been referred to as an authority, and certainly there is no subsequent decision nor dictum by which its soundness has been impugned. Apart from this consideration, the Lord Ordinary is of opinion that, assuming the setting up of the West End Hotel to have involved a violation on the part of the defender Cameron of the good faith of his contract with the pursuer, there can hardly be discovered a way of escape from the conclusion that, for the breach of what in this view must be regarded as an implied condition of the lease to the pursuer, reparation must be awarded.

"The amount to which the pursuer is entitled depends upon the evidence; and the sum for which decree has been given is, the Lord Ordinary thinks, reasonable, and certainly not extravagant reparation, according to the facts which, in his view of the matter, have been established.

"The reasons for which the defender, Donald M'Intosh, though assoilzied, has not been allowed expenses, are, that he has throughout made common cause with his landlord, the other defender; and that, as a consequence, he has failed on both of the pleas which, on his behalf as well as on behalf of the defender Cameron, have been set forth on the record."

The above judgment was acquiesced in.

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ments regarding, them. Accordingly the defender entered into a lease of the second premises with a man named Robert Burns, at a rent nominally of £1000, it being arranged that the whole proceeds of the business should be received by a cashier nominated by the defender and applied—with the exception of a salary of £150 to Burns—(1) in extinction of the defender's claim for furnishings, and (2) after payment of that debt as profit to be paid in equal shares to the defender and Burns.

In view of the decision ultimately pronounced by the Court, it is unnecessary to refer to the evidence further than it will appear from the Lord Ordinary's judgment, from the arguments as stated in the minutes of debate for the parties, which are summarised below, and from the opinions of the Judges.

On 28th June 1887 the Lord Ordinary (Lee) pronounced this interlocutor:—" Finds (1) That in 1883 the defender let to the pursuer certain premises in Graeme Street of Glasgow, known as 'Graham's Lodging House,' for seven years from Whitsunday 1883, at a rent of £400 per annum, in terms of the lease No. 176 of process, stipulating that the price of the wooden partitions and others should be paid for in half-yearly instalments of £30 each, and that whatever repairs, alterations, or fittings should be necessary or desirable for the pursuer's occupancy should be made at his own expense, and that he should not be entitled to make alterations on the premises let without the express consent of the defender, but declaring that the defender at the termination of the lease should, if required by the pursuer, purchase from him the bunks or sleeping berths to be erected by him; (2) That for the five years previous to Whitsunday 1883, and from the time when the tenement was erected by the defender, the said premises had been occupied as a common lodging-house, and during the three years ending 31st May 1886 the said premises continued to be well frequented, and yielded an average profit of £520 per annum or thereby; (3) That in the spring of 1886 the defender, being also proprietor of an adjoining tenement, previously occupied as a warehouse, converted it into a common lodging-house of the same kind, fitted it up with 512 beds, and made arrangements for its occupation as such for a period of five years from Whitsunday 1886, in terms of the lease No. 173 of process, entered into between him and Robert Burns, formerly a manager of one of the Corporation lodging-houses; (4) That by these arrangements the defender established a new lodging-house in which he had a personal and pecuniary interest, in conflict with the pursuer's interests as his tenant in the establishment in Graeme Street, and thus entered personally into competition with his tenant in the business of a lodging-house keeper, regardless of the interests and remonstrances of the pursuer; (5) That the institution by the defender of this new home or common lodging-house, which was opened about 13th September 1886, had the effect of diminishing the receipts of the pursuer from his establishment, during the eight months ending 13th May 1887, to the extent of not less than £220, as compared with an average of the corresponding periods of eight months in the previous years of the lease, and has thus been to the loss, injury, and damage of the pursuer; (6) That the defender's said arrangements were contrary to the good faith of the contract of lease between him and the pursuer, and in breach of the implied obligations incident to said contract; and finds in law that the defender is liable to the pursuer in damages: Assesses the damages at the sum of £1000 sterling: Ordains the defender to make payment to the pursuer of said sum by four equal yearly instalments of £250, beginning as at Whitsunday 1887, and so on yearly at each term of Whitsunday until the expiry of the pursuer's lease, with interest on each instalment from the date of payment at the rate of five per

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cent per annum until paid, and decerns: Finds the pursuer entitled to expenses," &c.*

The defender reclaimed.

After counsel had been heard on the reclaiming note, the Court "in respect of the general importance of the question involved," appointed the parties "to prepare, print, and box to the Judges of this Division, and of the Second Division, and to the permanent Lords Ordinary, mutual minutes of debate, in order to the opinion of the whole Judges being obtained on the question raised by the record."

The defender and reclaimer in his minute of debate argued as follows:—The pursuer, who complained of the violation of an implied stipulation of the lease, must formulate the implied stipulation. Was it a prohibition against occupancy as a lodging-house imposed as a negative servitude upon other buildings owned by the defender at the date of the lease? and, if so, did the servitude apply to all property in the neighbourhood owned by the defender? and within what limits was it enforceable? Or was the stipulation of the nature of a personal restriction binding only on the defender? Such considerations shewed the difficulties of the pursuer's case. If his contention were well-founded the value of his lease would, to a large extent, depend on the amount of other property which the landlord might have in the neighbourhood, for third parties might set up any number of rival establishments and injure his rights. And yet there would be nothing in the lease itself to indicate what the tenant's position in this respect was. It was impossible to suppose that so important and valuable a right —if it existed—should be left to implication, or that no consideration should be given for it. Further, was the stipulation to be implied only in the case of premises let for inns or lodging-houses, and was it to be implied irrespective of locality, *e.g.*, equally in country districts and in a city? It

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* "OPINION.—I have no hesitation in finding that the proof establishes the facts set forth in the interlocutor now pronounced. The most material of them are extracted from the evidence afforded by the defender himself, and by the lease entered into with his tenant Burns.

"In this state of the facts, I am of opinion that the cases of *Campbell* v. *Watt* (Hume's Dec. p. 788), and *Smith* v. *Cameron* (referred to in 6 R. 1107), are direct authorities against the defender's conduct.

"The contention that the defender was entitled to act as he did because his lease to the pursuer contained no express stipulation to the contrary is not supported by any principle known to the law of Scotland, which, as I had occasion to observe in my opinion of 16th February, recognises some obligations as incident to the relation of landlord and tenant, without express stipulation.

"The defender's idea that he did all that he was called upon to do, in offering to the pursuer to take his premises off his hands, is a mistake. It involves the fallacy that he was entitled to force the pursuer either to throw up his lease and his business or to acquiesce in the defender's conduct in setting up a rival establishment of the same kind, and practically next door. It is not possible, in my opinion, to reconcile the aims and interests of the defender in his new business of a common lodging-house keeper (for such he practically became by his arrangements with Burns) with the obligations arising out of his position as the pursuer's landlord.

"In fixing the amount of damages, I think it impossible to doubt that the results shewn by the eight months ending 13th May indicate a loss of not less than £250 per annum for the last four years of the pursuer's lease, and that the defender cannot complain of the damage being assessed at once, although it has only been in part realised. I have therefore followed substantially the judgment of Lord Craighill in the case of *Smith* v. *Cameron*."

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was absurd to say that it extended to the case of a shop in a trading locality, yet the same principle would apply there.

The following facts were proved which negatived the pursuer's statement that when he entered into his lease there was no rival establishment in the neighbourhood. (1) At that date there were numerous lodging-houses in the central district of Glasgow, one within 230 yards of the pursuer's house containing 160 beds, and another within 550 yards containing 284 beds. (2) When the defender's house was opened there were 70 fewer lodging-houses in the central district than when the pursuer's lease commenced, and there was accommodation for 1390 fewer persons; and (3) They all derived their custom not from the immediately surrounding locality, but from more or less distant quarters of the city. If therefore there was an implied restraint such as was contended for, its limits must be co-extensive with the city. The Court would not give effect to a proposition which involved such results, and upon general grounds therefore, apart from authority, the defender maintained that the alleged implied stipulation could not be read into the contract.

With regard to the pursuer's contention that the case was concluded in his favour by authority, the defender maintained that the case of *Campbell* v. *Watt*,[1] even assuming it to have been well decided, did not apply. The principal subject let there was an inn, and the tenant was taken bound to spend £200 in building. There was a smithy in the neighbourhood, at which liquor had been in use to be sold, and in regard to which the landlord expressly obliged himself in the lease of the inn to take the tenant bound "not to sell liquor of any kind to the prejudice of the tenant" of the inn. The inn had been the regular half-way house on the main road from Glasgow to Greenock, but a few years after the commencement of the lease the line of road was altered, and a new inn was erected upon the new road, the custom being thereby withdrawn from the old inn, which was now some way off the road. The tenant of the old inn succeeded in getting an abatement of her rent to the extent of £70 a-year in respect of damage by loss of custom, the real ground of judgment being that there was such a measure of sterility in the subject of the lease as to warrant that result. There was there an express stipulation that the only building in the neighbourhood of the subject let which could possibly be used as a rival house should not be so used. The circumstances of the case therefore justified the Court in holding that the restraint contended for was a "natural incident" of the tack.

But further than that, the judgment in that case was not one which the Court would now follow. The case was decided in 1795, and it had not been followed by any authoritative judgment since that date. In *Davie* v. *Stark*,[2] cited on the other side, there was an express condition in the lease that the landlord should not let a shop in the adjoining property, also belonging to him, to anyone engaged in the same business as his tenant. That condition was violated, and the only question of law was whether the tenant could competently set off his claim for damages against the landlord's claim for rent. *Watt's* case was not referred to in the judgment except by Lord Ormidale, and that only for the purpose of supporting the view that a separate action for damages at the instance of the tenant was not necessary. The case of *Smith* v. *Cameron* (reported in foot-note, *ante*, p. 1007), was a decision in the Outer-House by Lord Craighill, which was not submitted to review, and it was not therefore authoritative, even assuming its applicability to the present case. But the circumstances there were very different, and more nearly approximated to those found in *Campbell* v. *Watt.*

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[1] Hume's Decisions, 788.

[2] Davie v. Stark, July 18, 1876, 3 R. 1114.

On general principles the decision in *Campbell* v. *Watt* was open to question. If there was eviction or partial eviction from the subject-matter of a lease, without the tenant's fault, he was entitled to relief. But a diminution of return was very different. Of that the tenant took the risk, and unless it could be shewn that the landlord's acts were in themselves improper—in short, that there was delict on his part—the tenant had no remedy.[1] The pursuer founded upon a passage in Erskine's Institutes (ii. 6, 43), where it was laid down that "where the insufficiency arises from the inconsiderate or culpable act of the landlord," the latter must not only lose his rent, but also pay damages. But that passage related exclusively to the "tack of a dwelling-house," and dealt with the obligation on the landlord to deliver the subject in a habitable condition. Here the complaint was not of the insufficiency of the subject let, but of the diminution of business.

In illustration of the legal principles applicable to the case, aid might be derived from a consideration of the legal consequences which would have followed if the defender had sold to the pursuer the goodwill of the business carried on in Graham's Lodging House. The pursuer at least could not carry his rights further, and it was more natural to imply such an obligation as was here contended for in a contract of sale of the goodwill of a business than in a mere contract of location of the premises in which a business was carried on. In a contract of sale of the goodwill, the pursuer could have prevented the defender starting a rival establishment and holding it out to the public as the same business as he had sold, but he could not have prevented the defender from starting a similar business next door the very day after the sale. These two propositions were settled by a train of authorities in the English Courts, extending from the year 1810 down to 1884.[2] Lord Eldon had defined goodwill as being "nothing more than the probability that the old customers will resort to the old place."[2] The only proposition which remained in doubt on the English authorities was whether, having sold the goodwill of the business, the seller was thereafter entitled to start a rival business and solicit the old customers,[3] but there was no question of that kind here. The pursuer disputed the applicability of these cases, because of "the continuing relationship," which he argued distinguished the contract of lease from that of sale. But that distinction was one of words, and not of substance. It might very well be that the contract of sale was a continuing contract, and it could not in any case be maintained that the obligations incumbent on the seller would differ according as the price was paid in full or by instalments. Besides, in two of the English cases above quoted, the relation of landlord and tenant subsisted between the parties. Although there had been no decisions in Scotland as to the

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[1] Stair, i. 15, 2; Slowan v. Hawthorn, 1765, M. 16,052; Chalmers v. Wilson, 1769, M. 16,060; Laurent v. The Lord Advocate, March 6, 1869, 7 Macph. 607, 41 Scot. Jur. 329.

[2] Cruttwell v. Lye, 1810, 17 Vesey's Reps. 335 (Lord Chancellor Eldon, 346); Churton v. Douglas, March 1859, 28 L. J. Chanc. 841 (Vice-Chanc. Wood, p. 845).

[3] Pearson v. Pearson, July 1884, L. R., 27 Chanc. Div. 145 (Lord Justice Baggallay, p. 152, Lord Justice Cotton, p. 155, Lord Justice Lindley, p. 159); Leggott v. Barrett, July 1880, L. R., 15 Chanc. Div. 306 (Lord Justice James, p. 309); Hudson v. Osborne, 1869, 39 L. J., Chanc. 79; Labouchere v. Dawson, Jan. 1872, L. R., 13 Eq. 322; Ginesi v. Cooper, March 1880, L. R., 14 Chanc. Div. 596.

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mutual rights and obligations of seller and purchaser resulting from a sale of goodwill, the legal principles applicable were the same in Scotland as in England. The pursuer's position could not be better than that of a purchaser of goodwill; indeed it was worse, for in this case he had neither bought nor paid for the goodwill.

Even assuming the defender had committed a breach of contract, the Lord Ordinary had proceeded on a wrong principle in assessing the damages at £1000 payable in four yearly instalments. The breach of contract—if committed at all—was a continuing breach, and was not committed once for all. The effect of the opening of the defender's premises might be temporary and transitory, and, indeed, it was proved to be so. It was therefore wrong to assess the damages for the future as well as for the past. The case was in marked contrast in this respect to that of *Stevenson.*[1] The defender had not, as alleged by the pursuer, consented to the form of the award of damages adopted by the Lord Ordinary. There was no proof that the decrease in the number of lodgers complained of by the pursuer was due to the opposition of the Watson Street Home. On the question of the amount of damage the defender maintained (1) that damages could be awarded only for the period prior to the date of the proof, and (2) that the sum ought to be very much less than the Lord Ordinary's estimate.

The pursuer in his minute of debate argued as follows;—The question was whether a landlord, who has let on lease for a term of years premises occupied as a common lodging-house with an established business, for the purpose of that business being continued there, is entitled, during the currency of the lease, to set up for his own behoof, side by side with the premises so let, a rival establishment in the same line of business.

It was clear from the proof led in the case that the demand for lodging-house accommodation in the central district of Glasgow was more than fully supplied by the existing houses—including "Graham's Lodging House," or the "Central Home." The supply of lodging-houses had been taken in hand by the municipal authorities, under whom many "Model Lodging Houses" had been erected and were being conducted in many parts of the city, but none nearer than 555 yards from the pursuer's premises. There could be no reasonable anticipation on the pursuer's part of any fresh competition,—particularly at the instance of his landlord, who had done what he would certainly not have done if the premises had been possessed by himself in place of through his tenant. By the pursuer's lease the premises were let as a lodging-house, and the landlord had a veto upon any alterations which would make them fit for anything else. The pursuer expended about £200 upon the subjects, and under his management the business was increasingly successful until interfered with by the defender's action. In September 1886 that success was interfered with by the opening of the larger lodging-house under the nominal management of Burns—who in reality was the mere hand of the defender. The defender's home contained 512 beds, the pursuer's only 332, and the former was specially designed and fitted up with superior attractions and conveniences,—from baths to a brilliantly lighted concert-room,—and everything was done to attract the pursuer's customers to the new premises. That the defender was in reality the only person interested in these was clear from the terms of the lease between him and Burns,—his alleged tenant,—under which the drawings were all to go to the defender, and Burns was to receive only a salary. The true view of the relations

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[1] Stevenson v. Pontifex & Wood, Dec. 7, 1887, 15 R. 125.

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between Burns and the defender had been taken by the Lord Ordinary in the finding in his interlocutor of the 28th June 1887. Directly the new business was started the pursuer's receipts fell off. In the succeeding year it was proved that the pursuer's lodgers were fewer than in the preceding year by 16,003. The defender's establishment, on the other hand, was full from November 1886 onwards. The loss which the pursuer had thereby suffered had been assessed by the Lord Ordinary, sitting as a jury, at £250 per annum, which was largely within the mark of actual loss as shewn by past experience, and it had been rightly so assessed. The sum was awarded in reality as a lump sum—payment of which was to be made in yearly instalments, so as to form an abatement from the rent. The defender had made no objection to that course at the time, and the matter was one entirely within the discretion of the Court.

But the question between the parties was, whether damages could or could not be awarded, and the pursuer submitted that this question should be answered in the affirmative, both on the ground of authority and on that of equity and reason. If there ever were cases in which a landlord could be held liable for inflicting damage on his tenant by breach of implied conditions, this was one. It was not necessary for a decision in the pursuer's favour that the Court should hold that a landlord would in all circumstances be liable for setting up in the same line of business as his tenant. But here the competition was personal, it was in immediate proximity, it was also unexpected, and uncalled for by local needs. It was in a business which was special, and with a tenant to whom the subjects were let for a special purpose, and who was prevented from turning them to any other purpose. The principle of the judgment in *Campbell* v. *Watt*[1] was directly applicable. The arguments for the landlord in that case—as reported by Hume—were precisely those presented by the defender in this case, and the circumstances, although not so strongly pointing to liability on the part of the landlord, were in many respects similar. It was also to be remarked that the landlord there was a singular successor in the estate, and that he offered to relieve the pursuer of her tack. The Court held that "the restraint in question was a natural incident of a tack of such a subject; and, whether conditional or not, it was in the *bona fides* of the transaction that the landlord should not set up a rival inn to the prejudice of his own tenant in the old one." That decision had never been questioned, and it did not in any sense depend upon the specialties founded on by the defender. On the contrary, it had been followed and approved.[2] The case of *Laurent* v. *The Lord Advocate*[3] was not an authority against that view, because, in the words of the Lord President in that case, it "raised no question as between landlord and tenant for breach of the contract of lease."

The defender, in support of his contention, betook himself to the law of England upon the subject of sales of goodwill. On that subject the law of England was in a state of uncertainty.[4] Besides, the analogy was a false one, and there was a clear distinction between a contract of sale and a contract of lease. The former was a single transaction, complete and concluded. The latter was a continuing relation, with obligations prestable by the one party against the other from the date of entry under the lease until its ish. A truer analogy was to be found in the law of partnership. Like partners, both landlord and tenant were alike interested in the success of the undertaking for which the subjects were let. In the law of partnership a partner could not, "openly or secretly, lawfully carry on for his own benefit any business in rivalry with the firm to which he belongs."[1] So the obligation incumbent upon the landlord, when the subjects became insufficient during the currency of the lease "from the inconsiderate or culpable act of the landlord," was, in the words of Mr Erskine,[2] "to make up to the tenant the full loss which he has suffered through his fault." Here the landlord had made the tenant's subjects unprofitable for the purpose for which they were let, and he could not be permitted to derogate from his own grant without repairing the wrong he had caused. It was of no consequence how the injury was done, if it was done in point of fact, and if it was direct and material, as was the case here.

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[1] Hume's Decns. 788.

[2] Davie v. Stark, 3 R. 1114; Smith v. Cameron, reported on a subsidiary question, June 28, 1879, 6 R. 1107, and *ante*, p. 1007.

[3] Laurent v. The Lord Advocate, March 6, 1869, 7 Macph. 607.

[4] Genesi v. Cooper & Co., L. R., 14 Chanc. Div. 596 (Jessel, M.R., p. 598); Pearson v. Pearson, L. R., 27 Chanc. Div. 145.

The following were the opinions of the consulted Judges:—

LORD JUSTICE-CLERK.—I am unable to concur in the views of the Lord Ordinary. I have failed to discover in the record or the evidence any ground on which the conclusion reached can be supported.

The action is one brought by the tenant of an urban lodging-house against his landlord, not on account of anything relating to his own contract of lease, but solely on account of the use which his landlord has chosen to make of other premises belonging to him. The pursuer does not say that he has any interest, proprietary or otherwise, in these premises; but he complains that, as the object of his own contract of lease was that he should use the premises let to him as a lodging-house, his landlord came under an implied obligation not to establish, or aid in establishing, any similar institution in the immediate vicinity. He says that, by the lease of this second tenement, the defender has violated the condition on which the first was let, and that in consequence his business has been seriously injured, for which he is entitled to reparation from the defender.

It must appear, I think, from this outline, that the defender has done no more than exercise the ordinary rights of property in the ordinary way, and that it is no concern of the pursuer to what use that property has been put, unless the owner of it was under some relative contract with the pursuer, express or implied. That there is no express contract to this effect is admitted. That none such is implied, a little attention to the details will make evident.

The premises let to the pursuer are situate in a block of buildings, the greater part of which was erected by the defender. The locality is one of the most crowded quarters in Glasgow, and these premises are placed on one side of a narrow street by which this block is intersected. Nearly opposite, and on the other side of this street, are the premises which are the subject of this complaint. The lease from the defender to the pursuer is dated in 1883. It describes the premises let as "now occupied by Graham's Lodging House"; and stipulates for a rent of £400, and certain other payments in respect of fixtures in the house. Its term is seven years. The premises were certainly let as a lodging-house, but there was no restriction to this use of them in the lease.

The pursuer's venture was successful. At least he says so, and the statement appears to be true. But in 1886—three years afterwards—the defender thought there was room for a second lodging-house in the same locality, and he accordingly entered into the lease of the premises immediately opposite—of which he was also proprietor, and which he was then occupying—of which the pursuer now complains. Before doing so, he gave the pursuer an opportunity of joining in this enterprise, which he declined to do.

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[1] Lindley on Partnership, i. 579.

[2] Erskine's Insts. ii. 6, 43.

The lease of these other premises, which are let to a person of the name of Burns for five years from 1886, is produced, but it is needless to specify its terms at length, because the pursuer does not seem to have any concern with them. The premises are to be used as a lodging-house, and the defender not only stipulates for rent, but for a share of the profits also. The pursuer complains that this new lodging-house has carried off a large proportion of his custom.

As already said, I find in this narrative nothing alleged against the defender but the exercise of rights which the law allows. By granting a lease of premises within burgh, the owner does not restrict himself as to the use he may himself make of his other property, adjoining or separate. He does not undertake that no other tenant of his within the burgh shall carry on the same trade either in the vicinity or at a distance. The element of competition by other traders does not enter the contract, unless, as in the case of *Davie* (3 R. 1114), to which we are referred, the lessor undertakes an express obligation on that head in the written instrument. Indeed, traders within burgh are always liable to the competition of others in the same line of business. It is their normal condition. So much was this the case in former times, that the separate crafts or trades in crowded communities were generally found to frequent the same localities—partly, it may be, from early municipal regulation, but partly also for general convenience and advantage. Examples of this are familiar even at the present day.

My opinion on the general nature of this demand is not shaken by the case of *Campbell* v. *Watt* (Hume's Decisions, p. 788), on which the pursuer founds. In that case the tenant of an inn, which was a half-way house between Glasgow and Greenock, complained that the highroad having been altered by Act of Parliament, the inn had lost its custom; and that the injury to her had been increased by her landlord having built a new inn at the junction of the new with the old road.

The tenant demanded, in an action against her landlord, an abatement of her rent, which the Court allowed.

As far as this judgment proceeded on the loss caused by the diversion of the road, it admits of being supported on the doctrine of sterility, and did not depend on any unfulfilled obligation on the part of the landlord. The real damage was caused, not by any wrong done by the landlord, but by the Act of Parliament.

In so far, however, as the judgment of the Court may be supposed to have been founded on the erection of the new inn, I am of opinion that it was not well founded on principle, and I should not be disposed to follow it. For the same reason, with all respect to the Lord Ordinary in the case of *Smith* v. *Cameron* (6 R. 1107), I feel compelled to come to a different conclusion from that at which, on the authority of the case of *Campbell*, his Lordship arrived. At the same time I am not insensible to the fact that the hostess of the remote half-way house on the Renfrewshire road in the case of *Campbell* had more plausible reason to expect a practical monopoly for her establishment than the pursuer can urge for his lodging-house in the crowded centre of Glasgow.

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The present case rests entirely on the principle of implied contract, which, even if it were not untenable on other grounds, would fail from its hopeless want of precision. It does not admit of definition. It is not represented as absolute, yet no intelligible limitations have been specified or suggested which could render it practically operative.

Neither do the facts admit of any question being raised on the law of "goodwill," as the relation between the parties was solely that of landlord and tenant.

I am of opinion that the Lord Ordinary's interlocutor should be altered, and that the defender should be assoilzied.

Lord Young.—I am of opinion that the record sets forth no breach of contract or actionable wrong committed by the defender, and that therefore the action ought to have been dismissed as irrelevant. The only contract between the parties is the deed of lease produced. The construction of it—that is to say, its legal import and effect—is a question of law for the Court. It seems to be free from ambiguity, and the facts averred suggest none requiring to be cleared by extraneous evidence. I think, therefore, that parole evidence was inadmissible, and ought not to have been allowed. On the construction of the deed, I am clearly of opinion that it imports no obligation or duty on the part of the defender to abstain from opening and keeping a lodging-house in Watson Street.

Lord Rutherfurd Clark.—I concur in the opinion of the Lord Justice-Clerk.

Lord Lee.—The interlocutor of the Court requires the opinions of the Judges "on the question raised by the record."

The principal question raised by the record is, whether it is relevant and sufficient to sustain an action of damages at the instance of a tenant against his landlord, that the latter has acted contrary to and in violation of the good faith of a certain contract of lease in setting up, to the detriment of the tenant's occupation of the subjects of lease for the purpose for which they were let, an opposition establishment for the same kind of business in the same neighbourhood?

In dealing with a question of relevancy, the general rule is to assume the truth of the averments on record. But as the question of relevancy, in my view of the evidence as expressed in the interlocutor under review, is the same as the question raised by the facts (excepting only the amount of damages), it may be understood that my opinion applies to both questions, in so far as both may be held to be included in the remit.

If I refrain from re-examining the evidence, it is because the findings in fact already pronounced sufficiently express my view of the result, and I do not find that the interlocutor authorises me to give a new opinion upon it. If I refer to the evidence at all, it will only be in deference to some of the arguments submitted to the Judges, and for the purpose of considering how far these arguments are relevant to the question raised by the record.

The contract of lease between the pursuer and the defender forms a part of the record. It is maintained on behalf of the defender that the pursuer was not thereby "taken bound to occupy the premises solely for the purpose of a common lodging-house," because there is no express obligation in these words. But the subjects are let to him "as presently occupied as Graham's Lodging House"; he is taken bound to occupy for seven years the subjects so let; he is taken bound to pay, in addition to the rent of £400, the price of the wooden partitions and fittings; and to maintain and uphold the premises, and to leave the same at the end of the lease "in the like good and tenantable order and condition, ordinary wear and tear excepted"; he is forbidden to make not only any structural alterations, but "any alterations" on the premises; and the "bunks or sleeping-berths" to be erected by him, if he requires it, are to be taken by the landlord at the termination of the lease at a valuation.

I am of opinion that under such a lease the common law of Scotland implies an obligation on the tenant to occupy the premises, during the currency of the contract, as a lodging-house; and that, without any stipulation, he is excluded by the law from converting the subjects to any other use. Upon this point, which I hold to be perfectly well settled, it is sufficient to refer to the authorities in Mr Rankine's Treatise on Leases (p. 214), and in Hunter on Landlord and Tenant (3d edition, vol. ii. p. 443), and Ivory's Notes to Erskine (ii. 6, 39). The words in which the doctrine is stated in the case of *Ford* v. *Hillocks* (1808, M. Appx. Tack, No. 17) are these,—"That it would be contrary to the *bona fides* of the contract to permit a tenant to convert the subjects of the lease to a purpose different from and altogether unconnected with that for which rent was stipulated." And Stair (ii. 9, 31), referring to the obligations usually incumbent on the tenant, including the use and occupation of the subjects for the purpose for which they were let, says, "all which are without express provision."

So standing the obligations of the tenant, what are the obligations of the landlord? He is bound by law not only to give the tenant possession, but to maintain and defend him "in the peaceable possession and occupation." What does this imply? I think that it implies that he undertakes to continue to the tenant the occupation of the subjects for the purposes for which they were let, undisturbed by any act of his, or for which he is responsible, and which is calculated to interfere with the tenant's use of them. There are, of course, cases of interference with the tenant's occupation for which the landlord is not responsible (Rankine, p. 202, refers to them). But if the landlord, by his own act, causes serious disturbance of the tenant's use of the premises for the purpose for which they were let (in this case making profit by using them as a common lodging-house), I am of opinion that he is liable not only to suffer abatement of rent, but to make reparation for the damage so caused. Thus it is that Erskine (ii. 6, 43), in treating of the landlord's obligation to uphold, and after stating that "where a subject is let for a particular purpose, the nature of the contract implies that it should be fitted for that purpose," lays it down that although "a slight inconveniency is not to be regarded," "where the insufficiency arises from the inconsiderate or culpable act of the landlord, he not only loses his rent, but must make up to the tenant the full loss which he has suffered through that fault." I think that this principle applies equally to the landlord's obligation to continue to his tenant the peaceable possession of the subjects for the purposes for which they were let; and the case of *Miller* v. *Renton* (13 R. 309), so far as the question with the proprietor was concerned, proceeded entirely upon this ground, viz., that the proprietor's operations upon the lower part of his property interfered with his tenant's occupation of the upper storeys for the purposes of a hotel. There was no express exclusion in that case of the landlord's right to make alterations on the lower flats, either by day or night. The

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question was, whether his operations were so "inconsiderate" towards his tenant (for they were not alleged to be dangerous) as to give the latter a claim of damages for loss of business. The allegations were sustained.

I cannot think that the rights of a landlord, as proprietor of subjects adjacent to a tenement which he has contracted to lease to a tenant, are altogether the same in a question with his tenant as in a question with a third party with whom he has no connection. That point was not decided in the case of *Laurent* v. *The Lord Advocate* (7 M. 607); but I concur in the opinion there expressed upon it by Lord Deas.

Now, what is the allegation in this case? It is not disputed, in the argument for the defender, that the record contains a sufficient allegation of a breach of good faith; and at all events, I think that there is such an allegation, and that, therefore, a proof was properly and necessarily allowed. But it is contended that "no evidence was led by him in support of these averments." If that could have been successfully maintained, I cannot doubt that the principal findings in fact in the interlocutor under review would have been recalled; and in my opinion there would have been an end of the case. For it is of the essence of the pursuer's case that the actings of the defender were contrary to good faith. If they were not contrary to good faith, it is not said that there was any violation of the contract. It is because they were contrary to good faith that they are alleged to have been in breach of contract.

But there are two ways in which a landlord may act contrary to the good faith of his contract of lease, viz.,—(1) by knowingly and wilfully acting to the prejudice of his tenant's rights and interests as such tenant; or (2) by what Erskine refers to as want of due consideration of these rights and interests.

The allegations of the pursuer in the present case, so far as material, and found to be proved by the interlocutor under review, appear to me to go to the former of these modes of breaking faith, and to be as follows:—

At the date of the lease, the defender—whose business was that of a warehouseman—was proprietor of a neighbouring tenement, which he occupied as a warehouse or stores. In the beginning of 1886, and while the lease had still four years to run, the defender proposed to convert his neighbouring tenement into a similar common lodging-house, with some superior attractions; and he spoke to the pursuer on the subject. The pursuer remonstrated with him, and told him that there was "no room for a house of that sort there." The defender does not deny that the pursuer said "that it would ruin him." On 21st April 1886 the defender entered into an arrangement with a person of the name of Robert Burns, the nature of which is shewn by the document No. 173 of process. It is called a "lease"; but the terms of the arrangement shew that the pursuer had grounds for his allegation in condescendence 5 that Burns was merely a nominal tenant, and that the business was truly entered upon and worked for the defender himself. The defender's statement, "Burns is merely my tenant," is contradicted by the document, and was broken down in cross-examination. These proceedings on the part of the defender are alleged to have been in violation of the good faith of the contract; and the way in which they were gone about is said to afford evidence of the breach of faith. The result of them was that the defender—a warehouseman—set up a business as a lodging-house keeper, in the neighbouring tenement, in opposition to or in competition with, his own tenant, and that the pursuer's business immediately suffered very greatly in consequence. The so-called lease to Burns, while it names a rent of £1000 per annum, shews that the whole proceeds of the business so set up were to be received by a cashier nominated by the defender, and were to be held and applied by him—with the exception of a salary of £150 to be paid to Burns—for the purposes (1) of extinction of the defender's claims on account of furniture and plenishings, &c.; and (2) "after the whole of said debt has been paid off and extinguished," of dividing the profits into two equal portions, one of which was to belong to the defender himself.

Was such a proceeding consistent with a fair or reasonable exercise by the defender of his rights as proprietor of the neighbouring tenement, or was it a violation of the good faith of the contract with the pursuer?

My opinion is that it was the latter; and I am unable to find that it was justified by the ordinary rights of a proprietor in the use of his property. The case has no resemblance, in point of fact, to the case of a street or neighbourhood occupied for a particular trade. It is the simple case of a landlord entering upon a new business, quite foreign to his own proper business, in competition with his tenant, and to the prejudice of his tenant in the occupation of subjects which have been let for a special purpose. Accordingly it was found by the interlocutor under review, as matter of fact, that "the defender's said arrangements were contrary to the good faith of the contract of lease between him and the pursuer."

But the interlocutor also found that it was in breach of the implied obligations incident to said contract. This has been referred to as if it had been found only to be a violation of the good faith of the contract because it was in breach of an implied obligation. That is not my view. I think it was a breach of the implied obligations of the contract because it was a breach of good faith.

At the same time, I remain of opinion that the case of *Campbell* v. *Watt*, reported by Baron Hume, is an authority to the effect that such a proceeding, even on the part of a singular successor, was in violation of a restraint which was a natural incident of such a lease. That case, however, is much more difficult, in my opinion, than any that arises here. For the utmost that could be said there against the defender was that he had failed to give due consideration to the contract entered into by his author. There was another specialty in that case, arising out of the fact that, owing to a change in the line of road by authority of an Act of Parliament, the inn which was the subject of lease had ceased to afford accommodation to the district, and had already lost its business by reason of a cause for which the defender was not responsible. Notwithstanding these specialties, the doctrine was laid down and applied that a restraint against erecting another inn at a short distance from the subject of lease was "a natural incident of a tack of such a subject; and that whether conditioned or not, it was in the *bona fides* of the transaction that a landlord should not set up a rival inn to the prejudice of his own tenant in the old one." I concur with the observation of Lord Craighill, in the note to his interlocutor in *Smith* v. *Cameron*, that the decision in *Campbell* v. *Watt* has often been referred to as an authority, and that its soundness has never been impugned; and I think that, if it had been considered of doubtful authority, and if the relevancy of the allegations in this case, and in *Smith* v. *Cameron*, depended on it, the interlocutors allowing proof would not have been affirmed, as they were.

But my opinion is that this case is much stronger against the landlord than the case of the pursuer in *Campbell* v. *Watt*, inasmuch as here the allegation is,

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and the proof shews, that there was not merely inconsiderate action on the part of the landlord, but a deliberate breach of faith.

I therefore remain of opinion that the defender is liable not merely in abatement of rent, but in the damages suffered by his tenant through his violation of the good faith of the contract.

With regard to the question which has been raised as to the assessment of the damages, my view is that this is a case in which the wrong complained of has been done, and that the consequent damage must be measured and recovered in one action. I think that the case of *Stevenson* v. *Pontifex & Wood* (15 R. 125) is an authority for, and not against, assessing the damage once for all in such a case. For the defender does not say that, consistently with his arrangement with Burns, there is any possibility of undoing the wrong, and he does not offer to undo it.

It is therefore necessary to consider whether the damages were excessive. That seems to me to be a pure question of evidence. Considering that the immediate effect of the defender's conduct was a loss of business to the pursuer during the first eight months after the defender's opposition establishment was begun to the amount of £220, I myself see no ground for supposing the sum awarded to be in excess of the loss which must have been caused. But this is a point upon which I should feel bound to concur with the majority of my brethren.

Lord Fraser.—The case for the pursuer is, that what the defender has done is contrary to an implied condition of the contract of location between them; or, as it has been otherwise put, contrary to the good faith of the contract. The doctrine of implied condition in contracts is one that is well illustrated by many decisions in our law. Few contracts contain, in express terms, all the conditions. What is expressly and specially guarded against is *quod sæpius accidit;* and although it is a very common, yet it is not a very good, argument to say that if it had been intended that a particular condition or restriction should be given effect to, that would have been expressed. This argument is much employed in the present case, and I think that it could not have been more improperly used. The pursuer could not have anticipated—so as to provide against it by express covenant—the ground of complaint which is the basis of this claim of damages.

Although I do not agree with the conclusion at which the Lord Ordinary in this case ultimately arrived, there is one remark in the opinion appended to his interlocutor of the 16th of February 1887 with which I entirely agree. He there says,—"I think it is a question of circumstances whether that which has been done by the defender in the present case is contrary to the good faith of his agreement with the pursuer." I am clearly of opinion that no general rule can be laid down, to the effect that when a man lets a portion of his property to another, for a specific purpose, he is entitled, next morning, to let an adjoining property belonging to him, for the purpose of carrying on the same trade, and so creating a rival establishment. I agree with the Lord Ordinary that every case of this kind must be determined according to its own circumstances; and I think it would be a misfortune if we parted with the doctrine of implied condition,—or the giving redress against acts which are contrary to the good faith of the contract, though that redress be not expressly covenanted for.

Now, I consider the judgment in *Campbell* v. *Watt*, and Lord Craighill's judgment in *Smith* v. *Cameron*, to be perfectly reconcilable with the conclusion that I have arrived at—viz., that the pursuer is not entitled to the decree which he here asks. These cases were decided according to their own special circumstances. *Campbell* v. *Watt* was of a very special kind. The tenant in that case obtained a lease of an inn, stables, and a farm,—the farm consisting of various pendicles. She was taken bound to expend a sum not above £300 in building and finishing a house for an inn, upon the lands that were let,—to the satisfaction of the landlord; and for this expenditure she was to receive no interest during the running of the lease, but was only to be compensated at its expiration by the landlord. It appeared, also, that there was a smithy, which according to the custom of the times (as stated in the pleadings), was a place where ales and spirits were sold, and which was the only rival that the inn had for the sale of spirits; and the landlord obliged himself "that in any set of a smithy to be erected by him, he shall take the tenant bound not to sell liquor of any kind to the prejudice of Mrs Watt." Thus there was as clear an implication as could be, that Mrs Watt, the tenant, was to have no competition in the sale of liquors. She was to build a new inn, and the sale of liquors at the smithy was to be prevented; and the argument maintained to the Court was this, that the landlord, by requiring his tenant to build a new inn, and by obliging himself to prevent the competition of sales from the smithy, clearly came under an implied obligation that no establishment should be set up by him in competition with that new inn. There was a further argument submitted to the Court, to the effect that as a singular successor had bought the estate, he was not bound by these obligations of his predecessor; but the case did not turn upon this point. The tenant asked an abatement of rent consequent upon the diminution of custom caused by the landlord having erected a rival establishment; and she got it from the Court. Whether there is any difference between a claim for abatement of rent and a claim for damages is of no importance in my view. The case was one where, according to the express covenants of the lease, there was a plainly implied condition against the act which the landlord perpetrated.

In the pleadings for the tenant two cases are referred to, one of which is not reported, and which is stated thus in the memorial for the tenant:—"In the case of the *Earl of Wemyss* against *Sir Archibald Hope* (12th Feb. 1793), the question depended upon the following clause of a lease: The Earl of Wemyss set to Sir Archibald Hope 'All and Haill the coal and coal seams belonging to the said Earl of Wemyss, lying under and within his lands and estates of Monktonhall and Stonnyhill, in the parish of Inveresk, and also of the lands and barony of Wolmet and the Hill, lying within the parish of Newton and sheriffdom of Edinburgh, excepting always the coal lying within the parks, garden, and inclosures of the said lands and barony of Wolmet, unless the consent of the Earl of Wemyss be first had and obtained thereto.' The question was whether Lord Wemyss was entitled to work the coal which he had reserved from this lease? Your Lordships decided that he was not entitled to work the reserved coal. In that case your Lordships carried the doctrine founded upon the *bona fides* of the contract of location, and which says that the lessor shall do nothing to the prejudice of the lessee, so far as to find that Lord Wemyss was not at liberty to work the coal so excepted from his lease; it being clearly the meaning of the parties, from the very nature of the contract, when they entered into the lease, that the lessee should work the coal let to him; and on the other hand, that the lessor should not set up a rival colliery. The Court, in that case, thought that

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the obligation on the lessor arose from the circumstances of the case, and the *bona fides* that takes place in the contract of location; and in that question, one observation that seemed to have much weight was, that it was perfectly clear that the lessee never would have entered into the bargain at all had he conceived it possible that the proprietor of the reserved coal might, whenever he pleased, erect a new colliery, and perhaps undersell the lessee in the market."

The other case relied upon in *Campbell* v. *Watt* was that of *Graham & Black* v. *Stevenson*, in 1792, reported by Baron Hume (Decisions, p. 781). In that case it appeared that Graham of Netherby let to a tenant an inn at Longtown in the county of Cumberland in England. The tenant occupied the subjects for nine years. He then received notice to quit from the landlord, —the new tenant's entry being at Whitsunday 1787. The innkeeper tenant being thus informed that he must quit possession at Whitsunday 1787, at once applied for and obtained a lease of an inn at the village of Gretna, in Scotland, with entry at Martinmas 1786. He paid his rent for the English inn down to Whitsunday 1787, and he at Martinmas 1786 removed the whole of his family and servants, with his horses, carriages, furniture, and his whole establishment, to Gretna. He took down the sign-post on the English inn, and shut it up, but kept possession of it till Whitsunday 1787. This was a manifest injury to the English inn, because it prevented the resort of business to it as an inn, and so the landlord, with the concurrence of the new tenant, raised an action of damages against the former tenant for the wrong that had been done to the custom of the English inn. There were allegations of a conspiracy on the part of the tenant who removed and other innkeepers to destroy the custom of the English inn, which the Court held not to be proved; but they found damages to the extent of £25 to the new tenant of the English inn: and the reporter states that, "in giving this judgment the Court did not proceed on the charge of combination, which was not sufficiently established, but on the breach of the *bona fides* of the lease, by shutting up the house for several months, to the injury of its business and character as an inn." Certainly the doctrine of *bona fides* was here pushed a very great length indeed, notwithstanding the argument that the removing tenant merely acted in the fair prosecution of his own trade and interest; and that, as he had paid the rent for the English inn up to Whitsunday, the landlord and the new tenant had no right to complain, or to insist upon his continuing to be an English innkeeper.

The advising in the case of *Campbell* v. *Watt* is noted in these terms by Baron Hume on his Session papers: "18th June 1795.—J.-Clk. [Braxfield]. Paction extrinsic to the nature of a lease, such as pactions for retention of rent, are not good against singular successor. But this is a natural paction* [*sic*] to the contract. And I think the *bona fides* of it was to hinder him from building another inn. If had applied in time, I think they might have stopped it; but at anyrate, abatement due." Baron Hume, when he came to write out his report of the case, expanded this advising somewhat; at all events, this seems to me to have been a sound judgment according to the statement of the facts; and the cases of *Wemyss* and *Graham* indicate to what great length the doctrine of implied condition or of good faith in contracts can be carried.

In like manner I am of opinion that the judgment of Lord Craighill in the case of *Smith* v. *Cameron* was a sound judgment. It was determined according

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* Corrected in the report to "incident" (Hume's Decisions, p. 790).

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to its own special circumstances. The landlord lets to his tenant a hotel, at the yearly rent of £310, in the village of Fort-William, "which," says Lord Craighill, "if not a high, was a full rent for the premises." There was no other hotel at the time when the lease was taken in this village. Its season was six weeks in the year; and unless the innkeeper got the whole traffic, it was perfectly manifest, upon the proof led in the case, that he could never pay the stipulated rent. Was the landlord, then, after the lease was concluded, entitled to do as he did—buy the parish schoolhouse (at a distance of 200 yards from the hotel which he had let), and convert it into another hotel, to compete with the tenant who was to pay him the £310 a-year? This seems to be a case where it would be the grossest injustice to refuse to the tenant who was injured by the new rival the redress which he asked; and looking to the amount of damages there given, it must have been considered a sound judgment by those acting for the defender, seeing that it was acquiesced in.

But then, when I come to consider the facts of the present case, I find them totally different. There are no specialties in the lease pointing to restriction upon the landlord's exercise of the right of property on other parts of his houses in Glasgow, as was the case in *Campbell* v. *Watt;* and there is no peculiarity in regard to the locality of the subject let, such as a Highland village, with a very restricted set of customers, and that, too, during a very small part of the year, as in the case of *Smith* v. *Cameron.* The property let to the pursuer is in a central part of the populous city of Glasgow, where there are other rival establishments, according to the proof, all around. There can be no implication here to the effect that the landlord who possesses property in the neighbouring streets in Glasgow, or in other parts of Glasgow, should be prevented from letting them for the same purpose. It would be wholly unreasonable to establish a rule that would sanction such a conclusion with reference to such a case on the one hand, as it would be, on the other, to refuse to enforce the doctrine of fairplay or implied condition, in reference to subjects situated in a locality of a different character, like Fort-William. Further, it cannot be overlooked that in some towns there are whole streets in which one finds only booksellers, and watchmakers, and other tradesmen all dealing in the same articles. If in these streets a person possessed two houses, it would be very hard if, after having let one to a bookseller or a watchmaker, he could not be allowed to let the other to the same kind of tradesman, if, as was very probable, he could get no other kind of tenant to take his shop in such a street.

I am constrained, therefore, to come to the conclusion that the Lord Ordinary's interlocutor ought to be altered, not because I disagree with him as to the legal views that ought to govern such cases as this, but because he has not given full effect to the special circumstances of the locality of the property let.

LORD M'LAREN.—I concur in the opinion of the Lord Justice-Clerk.

LORD KINNEAR.—I concur in the opinion of the Lord Justice-Clerk.

LORD TRAYNER.—I am of opinion that the interlocutor of the Lord Ordinary, now under review, ought to be recalled, and the defender assoilzied from the conclusions of the summons.

I accept as correct the first four findings in fact by the Lord Ordinary, and I demur to the fifth finding only in so far as the word "injury" there used may be held to imply that a wrong was done to the pursuer. I take it as established

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that the pursuer suffered loss and damage to the extent and from the cause stated by the Lord Ordinary; but, in my opinion, such loss was *damnum sine injuria.* The real question in this case is that decided by the Lord Ordinary in his sixth finding, which is in these terms:—"That the defender's said arrangements were contrary to the good faith of the contract of lease between him and the pursuer, and in breach of the implied obligations incident to that contract." From that finding I entirely dissent.

For the sake of clearness, I recapitulate shortly the facts of the case bearing upon this sixth finding. In 1883 the defender let to the pursuer a tenement in Graeme Street, Glasgow, then (and for some time previously) occupied as a common lodging-house, for a period of seven years, at a rent of £400 per annum. The pursuer intended to occupy, and after entering upon possession did occupy, the premises as a common lodging-house, in the knowledge of the defender. In 1886 the defender converted certain premises (of which he had become proprietor), previously used as a warehouse, into a common lodging-house of practically the same kind as that possessed by the pursuer, and has since 1886, either by himself or another tenant (I think it immaterial which), continued to use and occupy it as such. The premises let to the pursuer are separated from those occupied by the defender by a street situated behind the pursuer's premises, the defender's premises alone having a frontage to and entering from that street. Both premises are situated in a densely populated part of Glasgow. The pursuer says these are rival establishments, and I take that to be so, in the sense that they are both common lodging-houses, offering the same kind of accommodation to the same class of people. In these circumstances the Lord Ordinary holds that the defender has acted "contrary to the good faith of the contract of lease between him and the pursuer, and in breach of the implied obligation incident to said contract," and has found the defender liable to the pursuer, not only for the damage which has already resulted from the alleged breach of faith or contract, but also for damage which it is anticipated the pursuer will suffer therefrom during the three years of his lease which have yet to run.

The grounds on which the judgment under review proceeds are that the defender has acted (1) contrary to the good faith of his contract with the pursuer, and (2) in breach of an implied condition of that contract.

If these are intended to be taken as separate and distinct grounds of judgment, I dissent from the first for the reason that a breach of good faith would not of itself afford either a relevant ground of action nor a valid ground of judgment. But I understand the Lord Ordinary's view to be that the defender acted contrary to the good faith of his contract in such a manner as to amount to a breach of an implied condition of that contract. And that implied condition is, that having let the premises in question to the pursuer, to be used and occupied as a common lodging-house, the defender undertook, or was bound, not to let to any other tenant, or to occupy himself, any other property of which he was proprietor as a common lodging-house during the currency of the pursuer's lease. I am of opinion that such a condition is not implied in the contract of lease.

I think it is difficult to find room in the present case for the notion that the parties left any part of their contract to be implied. They entered into a formal lease, which appears to include all the clauses and conditions to be found usually in such a deed. It even expresses conditions which, if not expressed, would have been implied. In these circumstances the ordinary rules of law would exclude the addition to the contract of any condition or obligation not there expressed. The deliberate and formal contract would alone be looked to as containing the extent and limit of the rights and obligations of the parties *hinc inde*. But the difficulty thus suggested becomes even more formidable for the pursuer, when regard is had to the character of the obligation which he seeks now to have added to the contract as an implied condition. For it amounts to a positive restriction on the use to which the defender may put any other property belonging to him in Glasgow. The pursuer tries to get over the difficulty presented by an "implied condition" of so wide and sweeping a range, by putting it in this limited form—that a landlord is not entitled "to set up for his own behoof, side by side with the premises so let, a rival establishment in the same line of business." I have already said that, in my opinion, it is immaterial whether the landlord sets up the rival establishment for his own behoof directly, or sets it up for his own behoof indirectly, by letting his premises to another for the purpose "of a rival establishment in the same line of business." But is the implied condition, which is supposed to be implied by the law as a condition of every lease, limited to the case of setting up rival establishments "side by side"? What authority is there for thus limiting the application of the implied condition? Not *Campbell* v. *Watt*, for there the rival establishments were some distance apart. Does the implied condition not limit or exclude the setting up of such an establishment in the next street, or fifty yards off? If not (as the defender asks), why not? The pursuer says that this is a "legal puzzle,"—a mere echo "of the unsuccessful argument in *Campbell* v. *Watt*," but makes no effort to solve the puzzle. It is easier sometimes to make light of an argument than to answer it. The defender's question is, nevertheless, a very pertinent one, dealing as he is with an alleged obligation which is said to form, by force of law, an implied condition in every contract of lease. He is entitled to know the extent of that obligation which the law imposes upon him without paction; and it is no answer to his question to say that the law will imply an obligation of a certain limited kind in this particular case. If the condition for which the pursuer contends is to be implied at all, I see no ground whatever on which it may be limited to establishments "side by side." It must go the length at least of prohibiting a landlord from letting or occupying his property for a business which may, within reasonable probability, come into competition or rivalry with the business carried on in premises he had previously let. If this, then, is the nature of the implied condition claimed by the pursuer, I think it clear that it is not one of the conditions which the law implies in the contract of lease. The conditions which the law implies as involved in any contract are conditions which the general character of the contract at once suggests. They are the natural, if not the essential, attributes of the contract; they are qualities of the contract in the abstract, for the law implies no conditions in any concrete bargain. Thus, in the contract of lease, the law implies an obligation on the lessor to give the lessee possession of the subjects let at the agreed-on term of entry, and to give the subjects and maintain them in a habitable condition. Without these conditions, undertaken or enforceable, there would be no contract of lease—no relation of landlord and tenant between the parties. There must be possession, and habitable possession. But what is there in the contract of lease, in the abstract, to suggest that the landlord who has given his tenant the subject he has let to him in a habitable

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condition, and fulfilled all his pactional engagements to that tenant, is farther to be restricted in the lawful use and enjoyment, or the most beneficial use, of his other property, simply because that other property happens to be within a certain distance of the premises he had previously let? In my opinion, such a restriction on the use of property is not to be presumed or implied: restrictions on the use of property can only be imposed by law or paction. There is certainly no paction by which the alleged restriction on the pursuer's use of his property has been imposed. Nor is there any general rule of law which prevents a proprietor letting two different properties to different tenants for the same kind of business or occupation in the same town or the same street.

The pursuer, however, urges that the question raised in the present case has been already decided favourably to his claim in the case of *Campbell* v. *Watt*, 18th June 1795 (Hume, 788), and *Smith* v. *Cameron*, decided by Lord Craighill on 25th March 1879. The latter case has not been reported, but a copy of Lord Craighill's judgment has been laid before the Court, from which it appears that, both as regards the facts and the grounds of judgment, that case is not distinguishable from the present. Lord Craighill's judgment was not taken to review, and the decision in *Smith* v. *Cameron* therefore stands upon the opinion of a single Judge. For the reasons already given, I dissent from that judgment.

The case of *Campbell* v. *Watt*, however, stands in a different position; for it appears from the report to have been decided by the whole Court. If that case had not been distinguishable from the present, I should have been humbly of opinion that the judgment there pronounced was erroneous. But I think a careful consideration of the report of *Campbell* v. *Watt* shews that it is distinguishable from the present case in material respects.

The facts in *Campbell* v. *Watt* were simply these: In 1789 the landlord let to the tenant, on a tack for nineteen years, "the farm of Hayfield, the inn, stables, and lands of Crosshill, and fifteen acres of the lands of Classock." The inn "was the established half-way house and regular stage on the road between Glasgow and Greenock." The tenant was taken bound to eject the then tenant of a smithy at Crosshill, and the landlord engaged in return "that in any set of a smithy to be erected by him he shall take the tenant bound not to sell liquor of any kind to the prejudice of Mrs Watt." In 1793 the line of road from Glasgow to Greenock was altered, under the authority of an Act of Parliament, with the result that "the Crosshill inn lost the whole business of the great road from Glasgow to Greenock." The landlord erected a new inn at a point where the new road joined the road from Paisley, and at a distance (as I understand the report) of about a mile from the Crosshill inn. The tenant did not apply for any interdict to stop the building of the new inn, but after it was finished she insisted on getting "an abatement of rent to the extent of £70 a-year, corresponding, as she said, to the damage by her loss as innkeeper at Crosshill." This abatement was refused; and the landlord having given a charge for his rent, the tenant brought a suspension of the charge, in which she also prayed "for an interdict against the use of the new house as an inn during the currency of her tack." The interdict was refused by the Lord Ordinary, "after advising with the Court," but the bill was passed to try the question of abatement of rent. In support of the claim for an abatement of rent the tenant argued (1) That the inn was the principal subject of the tack, and "it is against the *bona fides* of that contract for the landlord to take away or lessen its

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business by erecting a rival inn, especially one so near it"; and (2) That a tenant owed no rent where the subject proves utterly sterile, though owing to accident only, but here the subject became sterile through the act of the landlord. It is not necessary to notice the answers made by the landlord, but the decision of the case is thus reported,—"The Lords were of opinion that Mrs Watt had a good claim of abatement of rent. Observed on the bench—. . . The restraint here in question is a natural incident of a tack of such a subject; and whether conditioned or not, it was in the *bona fides* of the transaction that the landlord should not set up a rival inn to the prejudice of his own tenant in the old one. If Mrs Watt had applied timefully, she might perhaps have obtained an interdict against the new building; but in any event she is entitled to an abatement of rent."

The only thing to be gathered from the report of this case favourable to the contention of the present pursuer is contained in what is said to have been "observed on the bench," and assuming for the moment that these observations were either necessary to the decision of the case, or were expressive of the grounds of judgment, a reason may be found for them which the present case does not present. The landlord in *Campbell* v. *Watt* had expressly bound himself not to let the smithy on Crosshill to any tenant without taking him bound "not to sell liquor of any kind to the prejudice of Mrs Watt." From this express obligation to keep Mrs Watt free from rivalry in the premises in which (presumably) at that time her only rival carried on his competing business, it might reasonably be inferred that the landlord undertook not to permit such rivalry elsewhere, so far as his own acts were concerned. It would not have been reasonable for the landlord, who had given such an express undertaking, to set up a public-house next door to the inn, and defend himself on the ground that it was not "a set of a smithy." This express undertaking (which has no parallel in the present case) might very well be taken into account in judging of what was the real contract between the landlord and tenant.

But whether this was so or not, I think there are other and more material grounds for distinguishing between this case and *Campbell* v. *Watt*. It is not possible to say who made the observations "from the bench," or how many of the Judges concurred in them. But the judgment of the Court was that the tenant had a good claim for "abatement of rent." Now, "abatement of rent" is not a lawyer's mode of expressing "damages on account of a wrong." I take it, therefore, that the Court was dealing with a question of abatement of rent, and not damages. A sufficient ground for the judgment pronounced was found in the admitted sterility of the subject let, and that sterility is attributed in the report of the case (apart from the argument for Mrs Watt) to the change which took place in the public road, and not in the erection of the new inn. No such claim is made by the present pursuer, and the loss which I assume he has established would probably be insufficient to support such a claim, if made. His subject is, on his own shewing, far from being sterile, although it may not yield so much one year as another.

The view that the Court were only deciding a claim of abatement of rent on the ground that the subject let had become sterile is strengthened, in my opinion, by the fact that the interdict craved by Mrs Watt against the continued use of the new inn was refused by the Lord Ordinary, after consultation with the Court. If the landlord was in breach of his contract with the tenant in erecting and carrying on the new inn, he was doing the tenant a wrong—and a continuing wrong. The proper remedy against that is interdict, but interdict was refused. That refusal could not be on account of the abatement of rent awarded (it is not said to what extent that claim was sustained), because such award only represented the injury already sustained, and was therefore no remedy against the continuing wrong. All that was "observed on the bench" in reference to the interdict was that if Mrs Watt "had applied timefully, she might perhaps have obtained an interdict against the new building"—that is, I suppose, against the erection of the new building. But Mrs Watt was quite in time to apply for an interdict against the new inn, so long as her lease was current, if the new inn was a breach of her contract, and therefore a wrong against her. The absence of all reference in the judgment to this undoubted right to interdict a continuing wrong seems, as I have said, to point to the conclusion that the Court was dealing with, or at all events deciding, the question merely of an abatement of rent claimed on the ground of sterility of the subject let, and not a question of damages on account of a wrong. I am therefore of opinion that the decision in the case of *Campbell* v. *Watt* affords no authority in support of the pursuer's present claim.

I would not have assented to the Lord Ordinary's mode of assessing damages in this case, even if I had been of opinion that damages were due. The damage for one year is assessed at £250, and the Lord Ordinary gives the same rate for three years yet to come. How does it appear that any damage will be suffered by the pursuer next year? Notwithstanding the defender's rival establishment, the pursuer's house may not suffer; he may have as many lodgers as he can accommodate. The damage given for future years is a mere speculation, and may turn out to be an erroneous speculation. But damages should not be awarded unless sustained, the pursuer having always his remedy as the damage arises.

At advising,—

LORD PRESIDENT.—I agree with the majority of the consulted Judges.

The premises let to the pursuer by the defender on a lease for seven years had been previously used as a lodging-house by a person of the name of Graham, and was known to the public as "Graham's Lodging House."

There is no question of goodwill in the case, for the pursuer did not acquire or pay for anything in the nature of goodwill either to the landlord or to Graham. He took, however, whatever advantage there might be in the name of the house, by retaining and using the name of "Graham's Lodging House."

The defender was at the date of the lease the owner of another adjacent block of building then occupied as a warehouse, but which was well adapted for occupation as a lodging-house, being, like the premises let to the pursuer, situated in the very centre of the most populous part of the city of Glasgow. These adjacent premises accordingly the defender made arrangements for occupying as a lodging-house in the year 1886, and they have been so occupied ever since.

There is no express condition in the pursuer's lease that the defender shall be restrained or shall abstain during the pursuer's lease from so occupying the adjacent premises; nor is there any expression, so far as I can see, in the pursuer's lease, from which by the remotest inference such a restraint can be shewn to have been in the contemplation of the contracting parties.

But such a condition is said to be implied from the purpose for which the premises were let, and from the whole circumstances surrounding the transaction. The Court allowed the pursuer before answer a proof of the alleged circumstances, and in this perhaps we were too indulgent. For I am rather disposed to think that instead of allowing such proof we ought to have dismissed the action as irrelevant. However that may be, the result of the proof is certainly not favourable to the pursuer's contention.

In the course of the argument the defender very properly challenged the pursuer to formulate the condition which he contends is implied in the lease; for a condition which is implied in a contract must be susceptible of clear and accurate expression. But this challenge has never been met. The Court are thus left to conjecture what is the nature and what are the limits of the restraint on the landlord which is said to be implied, whether the restraint is limited to the block of houses adjacent to the subject of the lease, or extends to other property of the landlord in the same street, or in the same parish, or in the same town, and whether if the defender sells the buildings belonging to him, immediately adjacent or elsewhere, he is under obligation to take the purchaser bound not to occupy the subjects sold as a lodging-house during the currency of the pursuer's lease.

Such an implied condition is in my opinion inconsistent with the free exercise of proprietary rights, would be altogether intolerable in practice, and has no foundation in legal principle.

LORD MURE.—I also concur in the opinion of the majority of the consulted Judges. The only material difficulty which occurred to me in considering the case was in connection with the decision in *Campbell* v. *Watt*, reported by Baron Hume, and recognised by institutional writers, since his reports were published, as supporting the doctrine contended for by the pursuer. The bench which decided that case was a very strong one—Sir Ilay Campbell was Lord President, Lord Braxfield was Lord Justice-Clerk, and Lord Eskgrove was the Lord Ordinary. The decision, moreover, was a unanimous one, and appears to lay down the principle of implied obligation, alleged to have been there given effect to, as applicable to all leases of any similar subject. The course, therefore, which your Lordship took of sending the present case to the whole Court was, I think, a very desirable one; and was the more necessary because Professor Bell in his Principles, sec. 1273, gives the case of *Campbell* v. *Watt* as an authority for the doctrine that "the landlord of an inn is not to set up a rival inn without abating rent"; and I observe that Mr Hunter also takes that view in his work upon Landlord and Tenant (ii. 460).

In these circumstances, we have now the opinions of the majority of the consulted Judges that such an implied condition cannot be read into the lease here in question, and that if such a condition is to be maintained there must be an express stipulation to that effect, as there was in the case of *Davie* to which we were referred at the discussion; and, apart from the decision in the case of *Campbell*, I should have had no great difficulty in coming to the same conclusion. Because it appears to me that if parties mean to insist upon a provision of that kind, it should be specially stipulated for in the lease, and there will then be no difficulty in giving effect to it as was done in the case of *Davie*. The main question, therefore, which we have here to consider is whether the decision in the case of *Campbell* v. *Watt* must be taken to be an authority for the broad proposition contended for by the pursuer. I am of opinion that it ought not to

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be so dealt with, and that upon a ground indicated in the opinions both of Lord Fraser and Lord Trayner, and rested on a clause in the lease in that case by which the landlord undertook "that in any set of a smithy to be erected by him he shall take the tenant bound not to sell liquor of any kind to the prejudice of Mrs Watt." There was thus an express undertaking on the part of Campbell, the landlord, that he would not allow liquor of any kind to be sold at the smithy to the prejudice of the tenant, Mrs Watt; and from this, I think, the Court might very properly infer that there was in that lease an implied obligation on the landlord not to erect any other building which should interfere with the sale of drink or refreshments by Mrs Watt in her inn. But the decision cannot, in my opinion, be held to go further, and there are no provisions in the lease here in question on which any such implied obligation can be rested. This, as it appears to me, is an explanation of the judgment in *Watt's* case which is sufficient to obviate the difficulty which has been felt by Lord Craighill in the case of *Cameron*, and by Lord Lee in this case; and I agree generally in the view which has been taken by your Lordship in your opinion in the present case.

LORD SHAND.—I am of opinion that the judgment of the Lord Ordinary ought to be recalled, and the defender assoilzied from the conclusions of the action.

There is confessedly no express obligation on the part of the landlord to refrain from opening a lodging-house in Glasgow, either in the same neighbourhood or at a distance from the premises which are the subject of the lease. And I can see no ground for holding that the mere granting of a lease, even if the purpose for which the premises are let be expressly stated, implies a restraint on the lessor against letting other premises for the same or a similar purpose, or against the lessor using any property of his own for carrying on the same business as that for which the first lease was granted. If a tenant desires, as a condition of entering into his lease, to have his landlord restrained from engaging in a similar business, or from using or letting other premises for the purposes of a similar business to that in which he is about to engage, he must in my opinion do so by obtaining an express obligation which shall define the nature and extent of the restraint to which the lessor consents, or, at the least, the lease must contain such very special stipulations as infer by necessary implication a restraint on the future action of the lessor, of a nature and extent which admits of no doubt. In the present case there is nothing in the lease which even suggests any such implied obligation.

Accordingly I am of opinion that the pursuer's case fails on the proof, as I think it also does on the relevancy of the statements on record.

In the case of *Smith* v. *Cameron*, decided by Lord Craighill, his Lordship's interlocutor allowing a proof was brought under review of the First Division of the Court on 30th November 1878, when a full argument on the relevancy of the pursuer's averments took place. The question there raised was whether the defender, who had let certain premises as an hotel, had come under an implied obligation not to let other property to which he had right, or might acquire right, also for an hotel. I was strongly of opinion that there was no such obligation implied in or from the lease, and consequently no relevant case, and I expressed myself to that effect, and of the opinion that the interlocutor should be recalled, and the defender assoilzied. The majority of my brethren were

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however of opinion that it was desirable without expressing an opinion on the question of implied contract at that stage, to allow the proof which was "before answer" to go on, and this was the judgment of the Court. I am, of course, now of opinion that the case of *Smith* v. *Cameron* was not well decided, and that the pursuer was not entitled to succeed in obtaining damages as he did by the judgment of Lord Craighill which was allowed to become final. In the present case the interlocutor allowing a proof before answer was also brought under review; but although I thought the pursuer's case bad in law, because the lease raised no such implied obligation as the pursuer maintained, the case of *Smith* v. *Cameron* was a direct authority on the question of procedure, and, therefore, I acquiesced in the affirmance of the order for proof.

As to the case of *Campbell* v. *Watt*, I concur in the observations contained in the opinions of the Lord Justice-Clerk and Lord Trayner, and think there is nothing decided in that case which can support the argument for the pursuer in the present case.

LORD ADAM.—I concur with your Lordship in the chair.

THE COURT pronounced this interlocutor:—" . . . In terms of the opinion of the majority of the whole Judges, recall the interlocutor reclaimed against: Assoilzie the defender, Gavin Bell Millar, from the conclusions of the summons, and decern: Find the said defender entitled to expenses," &c.

MACPHERSON & MACKAY, W.S.—DOVE & LOCKHART, S.S.C.—Agents.

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JANE DONALDSON REID RAE AND ANOTHER, Pursuers (Reclaimers).—
Rhind—A. S. D. Thomson.
JOHN MEEK, Defender (Respondent).—*Asher—G. W. Burnet.*
JOHN MEEK AND OTHERS (Mr and Mrs Rae's Marriage-Contract Trustees), Defenders.
HOTSON & HOWIE AND ANOTHER, Defenders (Respondents).—
D.-F. Mackintosh—Law.

Trust—Investment—Liability of trustees and of law-agent—Title to sue—Beneficiary with contingent interest.—A marriage-contract empowered the trustees acting under it (two of whom were the spouses) to lend on, *inter alia*, heritable securities, or personal securities or obligations, and declared that the trustees should not be answerable "for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." The greater part of the trust-funds were lent by the trustees on the security of buildings in the course of erection, the rents of which, after their completion, turned out to be wholly insufficient to meet the interest on the loan, and the borrower became bankrupt. While both spouses were alive the children of the marriage, whose interest under the contract was during the marriage contingent merely, brought an action against the trustees and the law-agent to the trust, "conjunctly and severally, or severally, or in such other way or manner as should seem just," to have them ordained to restore the money to the trust. The law-agent and one of the trustees lodged defences.

It appeared from a proof that the buildings, which were in Glasgow, were of the nature of a speculation in the particular locality, and that the speculation wholly failed. The proposed loan was (along with others) placed before the trustees at a meeting where the spouses were present, and with it a valuation by an architect which had been obtained by the borrower. This valuation shewed

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an ample margin on the estimated value of the buildings when completed. The trustees obtained no separate valuation, nor did their law-agent suggest the propriety of obtaining one. The loan was agreed to at the meetings at which it was placed before the trustees.

The Court—while unanimously of opinion that the security was one which ought not to have been accepted by trustees—(*diss.* Lord Mure, Lord Shand, and Lord Rutherfurd Clark) *assoilzied* the trustee, and (*diss.* Lord Young) *assoilzied* the law-agent on the following grounds.

The Lord President, Lord Justice-Clerk, and Lord Adam *held* that gratuitous trustees are only liable for such diligence, prudence, and knowledge as they actually possess in the management of their own business, and that, judged by this standard, the evidence shewed there had been no negligence on the part of the trustee.

Lord Young *held* that the trustee was not liable, as he had acted on what he considered the best advice, that of the law-agent.

Lord Mure, Lord Shand, and Lord Rutherfurd Clark were of opinion that gratuitous trustees must shew the same reasonable care that a man of ordinary prudence would exercise in the management of his own business, and that the trustee was liable, as the evidence shewed he had failed in this.

Opinion per the Lord President that the indemnity clause in the marriage-contract protected the trustee—*Opinions contra per* Lords Mure, Shand, and Young.

The Lord President, Lord Justice-Clerk, Lord Shand, Lord Rutherfurd Clark, and Lord Adam, *held* that the pursuers had no title to sue the law-agent, (1) because he was not employed by them, and (2) because they might never become entitled to the trust-estate, and would in that event suffer no damage.

Lords Mure and Shand were of opinion that there was no liability, even assuming a title to sue, because a law-agent is not responsible for the sufficiency of a security, unless there is a special undertaking to that effect, which was not alleged in the present case.

Lord Young was of opinion that as all the parties were before the Court the liability of the law-agent should be determined in the present action, and, on the evidence, that there had been a failure of duty on his part, and that he was liable.

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Lord M'Laren.
I.

(See *Rae* v. *Meek*, June 29, 1886, 13 R. 1036.)

The Rev. Robert Reid Rae, minister of Avondale, was married to Miss Jessie Croil in 1852. By antenuptial contract Mr Rae settled his furniture on his wife, and bound himself to pay the rates to the Ministers' Widows Fund punctually, while she, on her part, conveyed property to the value of £5000 to trustees—"(First) for behoof of the said Jessie Croil herself in liferent during the subsistence of the said marriage, exclusive of her husband's *jus mariti* and powers of administration as aforesaid, and in order that she may by herself, without her husband's concurrence, receive, discharge, use, and dispose of the whole rents, interest, and profits of the said means and estate; and in case of the dissolution of the said marriage by the decease of the said Rev. Robert Reid Rae, for behoof of the said Jessie Croil, and her heirs and assignees whomsoever in fee; (Secondly) In case of the dissolution of the said marriage by the decease of the said Jessie Croil, for behoof of the said Rev. Robert Reid Rae in liferent from and after her decease, so long as he shall survive her, and remain unmarried, and in order that he may, during the said period, receive, discharge, and enjoy the said rents, interest, and profits; and (Lastly) in case of the dissolution of the said marriage by the event last mentioned, and of there being a child or children thereof surviving at the decease or second marriage of the said Rev. Robert Reid Rae, and attaining twenty-one years of age, or (if a daughter or daughters) being married, for behoof of such child or children so surviving, and attaining majority, or (if female) being married, in fee." A power of sale was conferred on the trustees—"They being bound always to invest or reinvest the proceeds of such sales, and all other principal sums to be realised by them, either in the purchase of heritable property, feu-duties, or ground-annuals, or Government or bank stocks, or heritable securities, or even upon such personal securities or obligations as they may approve of as good and sufficient, taking the titles, securities, and obligations always in favour of themselves as trustees for the purposes of these presents." The marriage-contract further declared "that the said trustees shall not be answerable for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases, nor *singuli in solidum*, or for the intromissions of each other or of their factor, but each for his or her actual intromissions only, under deduction of all payments *bona fide* made in fulfilment of the premises."

The trustees who accepted were Mr and Mrs Rae, the latter being a *sine qua non*, Mr Meek of Fortisat, formerly a West India merchant, and the Rev. John Ellis Rae, a brother of Mr Rae.

In January 1874, it became necessary to reinvest £4750 of the £5000 conveyed by Mrs Rae to the marriage-contract trustees, and accordingly on 30th January a meeting of the trustees was held at which all the trustees above named were present together with Mr Hotson of Hotson & Howie, writers, the agents to the trust. The minute of that meeting bore (after setting forth how the £4750 came to require reinvestment),—"It being necessary to reinvest the two sums thus to be received at Whitsunday, it was resolved to look for heritable securities of adequate value, and Mr Hotson was directed to be on the outlook for such, and to report to the trustees any proposals he might receive."

On 5th May 1874 another meeting was held, at which were present Mr and Mrs Rae, Mr Meek and Mr Hotson. The minute bore,—"There were laid before the meeting rentals and valuations of several heritable properties on which loans were wanted, after considering and comparing which, the trustees resolved to make a loan of four thousand five hundred pounds (£4500) to Mr William Anderson, one of the applicants, on the security of buildings in Gallowgate, valued by Mr Burnet, architect, at £6500; provided always that Mr Hotson shall be satisfied with the title, and that such part of the loan shall be deposited in bank, in the joint names of the parties' law-agents, as Mr Burnet shall judge to be sufficient for furnishing the buildings, to be drawn out and paid over to Mr Anderson when Mr Burnet shall, at his expense, report the full completion of the work."

The valuation referred to was a valuation by Mr John Burnet, architect, Glasgow, and had been obtained by Anderson, the applicant for the loan. It was in these terms:—"150 St Vincent Street, Glasgow, 30th April 1874.—Messrs Brownlie & Watson, writers, &c., &c.,—Sirs,—Having carefully examined that property to the eastward of the property at the corner of Gallowgate Street, and the lane leading to Spoutmouth Street, both belonging to Mr William Anderson, I find that it consists of a plot of ground, containing 361 square yards or thereby, having a frontage of 41 feet 9 inches to Gallowgate Street, and is covered with buildings to be occupied as a shop and warehouses. I am of opinion that, when the buildings are finished, papered and painted, ready for occupation, this property will be worth six thousand five hundred pounds stg., say £6500, over and above the annual feu-duty of £191, 19s. 1d.,—I am, Sirs, your obedient servant, JOHN BURNET."

The subject of the proposed security was part of a large block of buildings in the Gallowgate, Glasgow. The buildings were being erected at an outlay of nearly £30,000 on ground obtained from the City Improvement Trustees, and consisted of shops below and warehouses and workshops

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above. Buildings of such a character had never been erected in that part of Glasgow before. The ground-annual, as stated in Mr Burnet's valuation, was £191, 19s. 1d.

The loan was accepted, and a bond and disposition in security for £4500, at 4½ per cent, in favour of the trustees, was granted on 20th May 1874. The money was not all advanced at once, £2800 being retained to await the completion of the buildings. This sum was advanced by instalments on the report of Mr Burnet. The last instalment was paid on 18th October 1875, by which time the buildings had been completed.

Interest at the stipulated rate was paid on the loan till Whitsunday 1878. In January 1879 Anderson, the debtor, was sequestrated. No interest was paid thereafter. The buildings had never been sufficiently let to pay the ground-annual of £191, 19s. 1d., and were for the most part unlet.

In February 1886 Jane Donaldson Reid Rae and Agnes Lloyd Reid Rae, the two surviving children of the marriage of Mr and Mrs Rae, raised an action against their parents, the Rev. J. E. Rae, and Mr Meek, as trustees under the marriage-contract, and also against Hotson & Howie, the law-agents, concluding for declarator "that the defenders are, conjunctly and severally, or severally, or in such other way or manner as to our said Lords shall seem just, bound to make payment to the said John Meek, John Ellis Rae, Robert Reid Rae, and Jessie Croil or Rae, as trustees foresaid, of the sum of £4500 sterling, with interest thereon at the rate of £5 sterling per centum per annum from the date of signeting hereof until payment, or from such other date as to our said Lords shall seem just until payment, the said sum and interest to be applied by the said John Meek, John Ellis Rae, Robert Reid Rae, and Jessie Croil or Rae, as trustees foresaid, in conformity with the purposes of the trust constituted by the said contract of marriage; and the defenders ought and should be decerned and ordained, by decree foresaid, conjunctly and severally, or severally, or in such other way or manner as to our said Lords shall seem just, to make payment to the said John Meek, John Ellis Rae, Robert Reid Rae, and Jessie Croil or Rae, as trustees foresaid, of the said sum of £4500 sterling, with interest thereon at the rate of £5 sterling per centum per annum from the date of signeting hereof until payment, or from such other date as to our said Lords shall seem just, until payment."

The pursuers, after narrating the proceedings down to the acceptance of the loan, and giving a description of the security buildings in substantial accordance with the foregoing narrative (which was borne out by the proof), averred,—(Cond. 7) "The said sum of £4500, and interest thereon, was lost to the trust-estate through the gross negligence and violation of duty of the said trustees who were present at the meeting of the 5th May 1874, and through the gross negligence and want of skill of the said Messrs Hotson & Howie, the agents in the trust. The investment was one which no prudent or reasonable man would ever have made, and there were plenty of good and safe investments to be had for the money. The said Mrs Jessie Croil or Rae and her husband were ignorant of business affairs and of what was a prudent investment, and they relied upon the knowledge and skill and carefulness of Mr Meek and of Messrs Hotson & Howie. It was gross negligence and want of skill on the part of Mr Meek and the latter to allow the trust-funds to be invested on the said subjects, because, *inter alia*, the buildings which it was proposed should be erected were of a purely speculative character, for which there was no demand in the locality, because their value had not been tested by an actual rental, and the defenders had not even before them at the time of granting the loan any estimated rental, and because the feu-duty annually payable was such that no person of prudence would have lent £4500, or any sum, over the buildings subject thereto. The nature of the locality was well known to Mr Meek and the agents. It was impossible, without the grossest negligence, to make an investment which would immediately thereafter result in almost the whole of the trust-estate being lost. The said Hotson & Howie grossly failed in their professional duty by allowing the trustees to invest in such a speculation. It was through their advice and on their instigation that the investment was made. It was their duty, as the professional advisers of the trustees, to have prevented their investing the trust-funds on unbuilt or unlet property, the investment being of such a nature as is never sanctioned by agents for trustees."

Of the trustees Mr Meek alone lodged defences. His answer to the foregoing averment was,—(Answer 7 for defender John Meek) "Denied. The defender acted in the circumstances with all ordinary care and prudence, relying on the advice of competent professional men. At the time when the said advance was made, the security afforded by the said subjects was ample, and it continued so until the failure of the City of Glasgow Bank, as aforesaid, and the consequent depression of trade, and deterioration of all kinds of property in Glasgow, and throughout the country. The loss to the trust-estate is one which the defender could not foresee or prevent, and for which he is not responsible either at common law or under the said antenuptial contract of marriage, which is referred to for its terms, he having acted *in bona fide* for the benefit of the trust-estate, and to the best of his judgment, in authorising the said loan."

Separate defences were lodged for Hotson & Howie and for Hamilton Andrew Hotson, the representative of the Mr Hotson who had had personal charge of the loan negotiation, raising a question of partnership liability which was ultimately not taken into consideration by the Court. Hamilton Andrew Hotson's answer, which raised the general question, was in these terms,—(Ans. 7 for defender Hamilton Andrew Hotson) "Denied that there was any negligence or want of skill on the part of Hotson & Howie. The security was a perfectly eligible one. Full particulars of it and others were laid before, and explained to, the trustees by the agents. The trustees were capable of forming, and acting on, their own judgment, having the guidance of the report of Mr Burnet, an architect in Glasgow of the highest standing. They did exercise their own judgment in the matter, and selected the investment in question. *Quoad ultra* denied."

The pursuers pleaded;—(1) The said principal sum of £4500, and interest thereon since the term of Whitsunday 1878, having been lost through violation of duty and gross recklessness and negligence of the trustees present at the meeting of 5th May 1874, and through the gross negligence and want of skill of their said law-agents, the pursuers are entitled to decree as concluded for. (2) In the circumstances the pursuers are entitled to decree as concluded for, with expenses.

The defender Meek pleaded;—(1) The pursuers have no title to sue. (2) The defender not having been guilty of violation or neglect of duty, as libelled, is entitled to absolvitor, with expenses.

The defender H. A. Hotson pleaded (the pleas for the firm being, on this question, substantially the same);—(1) No title to sue. (2) The pursuers' averments are not relevant. In particular, it is not said that the law-agents were employed by the pursuers, but by the trustees, to whom alone they are answerable. (3) The trustees having, on full in-

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formation and proper advice, selected the investment in question, which was within the powers of the marriage-contract, no liability attaches to the representatives of the law-agents. (4) The security at the time being perfectly sufficient, and forming a safe and suitable investment for the trust-funds, there was no negligence on the part of the law-agents, and their representatives are not liable for any loss that may afterwards have arisen. (5) The loss having arisen through the general depreciation of property from subsequent and unforeseen causes, no liability attaches to the defender.

On 12th June 1886 the Lord Ordinary (M'Laren) dismissed the action.

On a reclaiming note the Second Division recalled the Lord Ordinary's interlocutor, and allowed a proof—(June 29, 1886, 13 R. 1036).

The character of the buildings, as established at the proof, sufficiently appears from the foregoing narrative. The defenders led evidence of experts to shew that the loan was of a sort that was considered prudent in the estimation of people at the time; the pursuers led evidence of a similar character to a contrary effect. The borrower obtained another £10,000 on a postponed catholic security over the whole block.

The defenders sought to shew on the evidence that the details on which Mr Burnet based his valuation were before the trustees at their meeting on 5th May 1874, but the evidence on that point was very obscure. The only parole evidence regarding that meeting was that of Mrs Rae and Mr Meek. Mrs Rae deponed,—"I knew the object of the meeting before I went to it, namely, the investment of the money. I had not been told anything about what the money was to be laid out upon, but we intended that it should all be invested. (Q.) What were you told at the meeting about the investment? (A.) That an investment would be found; it was not found, but would be found. Perhaps it was found by the meeting of 5th of May. (Q.) What else were you told? (A.) That it was a first-class investment—a good investment. (Q.) Who told you that? (A.) Mr Hotson and Mr Meek. (Q.) Were you told anything at that meeting about ground-rent or feu-duty on the property? (A.) No. I was told that the investment was on house property in the Gallowgate of Glasgow. I knew the Gallowgate very little at that time. (Q.) Do you remember your husband saying anything about how the money should be invested? (A.) He said he wished it in a chartered bank. (Q.) Were you told that there was nearly £200 of a ground-annual on the place? (A.) No. I never heard there was any at all. (Q.) Who did you rely on? (A.) Mr Meek. (Q.) Anyone else? (A.) No, he took the management. (Q.) Did you rely on Mr Hotson? (A.) No, I did not think of him. (Q.) Was there any written proposal laid before that meeting about that loan? (A.) Not that I know of. (Q.) Were you told if the buildings on which the money was to be lent were finished or unfinished? (A.) No. (Q.) Was it your belief that they were occupied as dwelling-houses? (A.) That they were there, that they were in existence. (Q.) Did you pay very much attention to the matter? (A.) Yes. (Q.) Had you anything to do with lending money before that? (A.) No. (Q.) Did Mr Meek and Mr Hotson say the investment was a good one more than once? (A.) Yes. (Q.) And you believed them? (A.) Yes."

Mr Meek, who was examined for himself, deponed,—"(Q.) Do you remember discussing Mr Anderson's loan? (A.) I remember that, with respect to the Gallowgate. I was not much pleased with it; but great improvements had been made by the Improvement Trust, and it was becoming a very valuable part of the city. When Mr Anderson's application was laid before us, I pointedly put the question to Mr Hotson whether we were doing right in lending upon a property that was in the course of being built. He answered that there could be no objection on that score—that it was a matter of common, almost daily, occurrence in Glasgow."

The Court after a hearing appointed the cause to be heard before seven Judges.

Argued for the pursuers;—This was a case of the investment of trust-money on a security which had proved to be insufficient or rather worthless—and which those making the investment knew, or ought to have known, to be insufficient. In the first place, the security buildings at the date of the loan were unfinished. They were being erected in a locality in which buildings of the class were an entire novelty. The investment, therefore, was a speculation, and, as it had turned out, an entirely unsuccessful speculation; but whether successful or not, a speculation was not a proper investment for trust-funds. Then no independent valuation was got, the trustees relied only on a valuation obtained by the borrower, and a valuation of such buildings could in the nature of the case be nothing but the merest guess-work—there were no rentals to go upon nor even the rentals of neighbouring buildings of a similar class, there being no such buildings. The valuation too, such as it was, gave no details to the consideration of which the trustees might apply their minds (as it was their duty to do), it was merely a general opinion. There was further a very large ground-annual, and the cost of the buildings was less than the sum lent on them. For the loss thus incurred both sets of defenders were liable, and liable, in this action, to the pursuers.

The trustees were liable. Their liability was established both by the Scots and English authorities. The Scots authorities [1] established these three propositions (*a*) that trustees, who advanced trust-funds on a borrower's valuation alone, were liable, should loss occur through the insufficiency of the security; (*b*) that an indemnity clause, such as that here, would not save them from the consequences of their own negligence; and (*c*) that buildings in course of erection were not a security on which to lend trust-funds. The English authorities were to the same effect.[2] In *Speight* v. *Gaunt*,[3] the trustees were released because they bought through a stockbroker. These authorities also established that trustees could not free themselves merely by consulting a law-agent. They were bound to act as prudent men would in the management of their own affairs,[4] and no doubt therefore they ought to take the advice of law-agents, but that did not relieve them from the necessity of applying their own minds to the management of the trust affairs. Nor was it a good defence to Mr Meek that he thought the children's interest was safe in their parents' hands; he was a trustee, and had duties as such. It might be that he had a remedy by way of relief against the agents; and if he had, the pursuers avoided circuity of action by suing the law-agents also. That was the next point.

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[1] Forsyth, Jan. 28, 1853, 15 D. 345, 25 Scot. Jur. 205; Millar's Factor v. Millar's Trustees, Nov. 2, 1886, 14 R. 22; Wyllie Guild v. Glasgow Educational Endowment Board, July 16, 1887, 14 R. 944.

[2] Jones v. Lewis, June 26, 1849, 3 De G. and S. 471; Waring v. Waring, Dec. 4, 1852, 3 Ir. Chanc. (N. S.) 331; Drosier v. Brereton, Dec. 2, 1851, 15 Beav. 221; Stretton v. Ashmall, Nov. 7, 1854, 3 Drewry, 9; Ingle v. Partridge, Feb. 18, 1865, 34 Beav. 411; Budge v. Gummow, July 20, 1872, L. R., 7 Ch. App. 719; Smethurst v. Hastings, March 11, 1885, L. R., 30 Ch. Div. 490; Olive v. Westerman, June 28, 1886, 34 Ch. Div. 70; Hopgood v. Parkyn, Nov. 21, 1870, L. R., 11 Eq. 74; Learoyd v. Whiteley, Aug. 1, 1887, L. R., 12 App. Cases, 727, per Lord Watson; Smith v. Stoneham, Nov. 13, 1886, Times Law Reports, p. 77; Partington v. Allen, Aug. 6, 1887, *ibid.*, p. 828.

[3] Speight v. Gaunt, Nov. 26, 1883, L. R., 9 App. Cases, 1.

[4] Kennedy v. Kennedy, Dec. 9, 1884, 12 R. 275.

The law-agent was employed by the trustees not for their own protection, but for the protection of the trust-estate, and at its expense; he was therefore liable to the beneficiaries of the trust. By laying the investment before the trustees, the agents guaranteed that it was a good one—one which trustees might take, and sound in itself. Mr Meek deponed that the agent had stated at the second meeting of the trustees that the investment was quite a usual one. Agents had frequently been found liable.[1] There was no objection to suing the law-agent in the same action as the trustees.[2] An application to the Court to have a judicial factor appointed might no doubt have been made, or to have the trustees ordained to raise an action in their own name against the agent, but all the parties interested were before the Court, and thus circuity of action was avoided. The pursuers might not perhaps be entitled to decree against both sets of defenders, but they were not put to their election between them. They were entitled to have the trust-funds restored; it did not matter to them by whom. Though their interest in the trust was merely contingent, they had that right.

Argued for Meek;—The pursuers had no vested interest in the trust. The action was therefore premature, for it was not certain that they would sustain any loss. They had no title to sue. The liability of trustees in regard to investments was always a question of circumstances, though the general canon might be admitted that the measure of their responsibility was that they should act in regard to trust-investments as a man of ordinary prudence would act in the management of his own investments. But here it must be noticed that the trustees had very ample powers of investment. If the object of the spouses, who were themselves to have the main interest in the estate, had been to secure to the trustees all the powers of investment which they as individuals might have had, they could hardly have used more appropriate language; and then there was the clause of indemnification. The proposed investment was laid before the trustees by the family law-agent as a suitable investment; it was accompanied by a valuation by Mr Burnet, a competent man, and it was accepted by Mr and Mrs Rae, the persons primarily interested in its sufficiency, and both of them able to judge for themselves. In such circumstances, did Mr Meek do anything that a man of reasonable prudence would not have done in agreeing to what they thought best for their own interest? It was an easy matter to judge by after events, but there was nothing to shew that at the time of the investment it was one which no prudent man would have made. The trustees were told that there was a demand for such premises, and that the investment was one of daily occurrence. No doubt the premises were not completed and not wholly let, but there was no absolute rule prohibiting trust-money being invested on such premises—if there was, that was law, in regard to which Mr Meek certainly was entitled to rely on the law-agents. To say that such an investment was illegal because it was a speculation was to beg the question. All investments involved more or less risk, and therefore more or less speculation. The question was one of degree. Here there was no reason at the time of the investment to suppose that the premises would remain unlet. The property was roofed, and partially let, and, though not completed at the time of the loan, it was completed before the last payment was made. The investment therefore was an ordinary one on house property in Glasgow, and reasonably safe, according to the views prevailing at the time.

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[1] Graham v. Hunter's Trustees, March 4, 1831, 9 S. 543; Ronaldson v. Drummond & Reid, June 7, 1881, 8 R. 767; Black v. Curror & Cowper, May 27, 1885, 12 R. 990; Oastler v. Dill, Smillie, & Wilson, Oct. 29, 1886, 14 R. 12; Stirling v. Mackenzie, Gardner, & Alexander, Dec. 7, 1886, 14 R. 170; Robertson v. Fleming, May 30, 1861, 4 Macq. App. 167.

[2] Taylor v. Rutherford, March 17, 1888, 15 R. 608.

Argued for the law-agents;—The present defenders were not liable at all; in any case, they were not liable to beneficiaries; even if they were liable to beneficiaries, they were not liable to the pursuers, whose interest as beneficiaries was a contingent interest merely, in an action of damages, as this in substance was; even if thus liable, these defenders were not liable conjunctly and severally with the trustees.

The charge here was a charge of professional negligence. It was not a case in which a law-agent was charged with aiding and abetting trustees in a breach of trust, where he was held as a constructive trustee, and liable jointly and severally along with them.[1] The ground of complaint against the law-agents here was that they had allowed trustees to make an improvident investment. A law-agent might, and frequently did, give advice as to the soundness of an investment, but that did not make him liable as having guaranteed the investment, unless he expressly undertook the duty of selecting the investment.[2] He was bound to exercise due professional care and skill in the matter of title, but beyond that his duty and responsibility, merely as a law-agent, did not go. It had never been held that a law-agent who submitted proposals for investment to his client's judgment incurred professional responsibility for the soundness of the investments, even if he gave his opinion on that matter, whether asked or unasked. *Dicta* there might be to that effect, but they were *obiter*,[3] and in England such liability, apart from express undertaking, had been negatived.[4] The law-agent incurred responsibility only if his advice was wrong in law,—if, for instance, he had advised an investment forbidden by the trust-deed or by the common law regarding trust investments. Possibly, if the investment, though in form within the powers of the trustees, were so bad that no competent law-agent could have advised it, the law-agent might incur responsibility, but it must come up to that, mere imprudence was not enough. If the agent gave his opinion on the soundness of an investment, it was merely his opinion, which the trustees might disregard.

Now, this investment was certainly within the powers of the trustees, which were very wide. It was a heritable security. *Prima facie* therefore a law-agent advising its acceptance committed no breach of his professional duty. It was a security, no doubt, over uncompleted buildings, but the buildings were completed before the whole sum lent was advanced, and no loss was shewn to have arisen by reason of their non-completion. The question, therefore, with the present defenders at anyrate, must be taken exactly as if the buildings had been complete from the first, unless it could be shewn that to advance trust money on the security of unfinished buildings was *ipso facto* illegal, and *Wyllie Guild's*[5] case was appealed to in support of such a rule. That case laid down no general

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[1] Alleyne v. Darcy, June 16, 1854, 4 Ir. Chanc. 199; Barnes v. Barnes, Feb. 12, 1874, L. R., 9 Chanc. App. 244.

[2] Oastler v. Dill, Smillie, & Wilson, *supra;* Smith v. Pococke, Feb. 22, 1854, 23 L. J. Chanc. 545.

[3] Ronaldson v. Drummond & Reid, *supra.*

[4] Chapman v. Chapman, Jan. 20, 1870, L. R., 9 Eq. 276.

[5] Wyllie Guild v. Glasgow Educational Endowment Board, July 16, 1887, 14 R. 944.

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rule affecting trustees at least, for in the first place the buildings never were completed, and secondly the question arose with a judicial factor, whose powers as an officer of Court were very different from trustees' under a deed like the present. *Whiteley's*[1] case in England repudiated the alleged rule. The investment here might possibly have been an imprudent one, but it was really out of the question to say that it was so imprudent as to involve the law-agents in responsibility. It was just such an investment as was matter of everyday business in Glasgow, which no law-agent, at that time, would have thought of objecting to.

But if the law-agents were responsible for having advised an investment so imprudent as to render the trustees liable to the beneficiaries, that did not give the beneficiaries a right of action against the law-agents, inasmuch as the advice which they had given was advice given to the trustees as individuals and not as trustees. The duty of trustees was to exercise a sound discretion in regard to the investment of the trust funds, and that duty they were not entitled to delegate. Matters of title or matters of stockbroking were different, trustees not being, as such, either lawyers or stockbrokers, and such matters, therefore, they might delegate, and were thereby probably freed from responsibility if they took sufficient care in the choice of their lawyer or stockbroker. It followed, therefore, that trustees who pleaded the *culpa* of their lawyer or stockbroker, in answer to the beneficiaries, must sue the lawyer or stockbroker, or give the beneficiaries their instance. In matters which trustees might delegate they were in truth the agents merely of the beneficiaries. On the other hand, if to aid them in the exercise of their discretion as to the choice of investments trustees consulted their lawyer, or anyone else, that might give them a right of action against the lawyer, if they themselves were found liable to the beneficiaries, but whether they sued the lawyer or not was no concern of the beneficiaries. In matters falling within the proper province of trustees all that the beneficiaries had to look to was the personal responsibility and individual discretion of the trustees.

At all events, the present action, directed as it was against both the law-agents and the trustees as jointly and severally liable, was incompetent. If the matter was one properly within the duty of the law-agent to the trust, that might free the trustees; if it was a case for the discretion of the trustees personally, then in suing them the beneficiaries necessarily absolved the law-agents. There was no case in which the beneficiaries were held entitled to sue both the trustees and the agents. If they adopted the delegation to the agents the trustees were free. If they repudiated the action of the trustees in consulting the agents, the agents were free. The liability of the one involved the immunity of the other. The claim against the trustees assumed that they were not entitled to delegate; the claim against the agents assumed that they were.[2] To allow a joint action against both was to put the defenders to an undue disadvantage. They suffered prejudice from the pursuer's being able to take up first the one ground of action—as against the trustees, and then the other—as against the agents. Further, both being defenders, the trustees were unable to cross-examine Meek,[3] whose evidence therefore, could not be looked at as in a question with the agents. The agents if sued by the trustees were entitled to plead all personal exceptions open to them, but of this they were deprived if the beneficiaries had a direct action against them. The beneficiaries had no direct action against

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[1] Learoyd v. Whiteley, Aug. 1, 1887, L. R., 12 App. Cases, 727.

[2] Scarf v. Jardine, June 13, 1882, L. R., 7 App. Cas. 345.

[3] Ayr Road Trustees v. Adams, Dec. 14, 1883, 11 R. 326; Taylor on Evidence, p. 663.

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ordinary debtors to the trust,[1] and there was no reason why they should have such an action against the agents. A judgment in such an action would not be *res judicata* as between the trustees and the agents.

Lastly, the interest of the present beneficiaries was merely a contingent interest. They ought not therefore to be permitted to sue what was in substance an action of damages. They could not qualify present damage, and might never suffer any. Possibly as against the trustees they might have a title to sue, notwithstanding the contingent nature of their interest, for that might give them a title to have the funds restored if the trustees were in fault in losing them, but as against the agents the ground of action was simply breach of contract, and the conclusion was for damages and nothing else.

At advising,—

Lord President.—This is an action against the surviving and accepting trustees under the marriage-contract of the Rev. Robert Reid Rae, and the lady who is now his spouse, and whose maiden name was Miss Jessie Croil. The object of the action is to have a certain sum replaced in the trust which has been lost, as it is said, by the breach of trust or misconduct of the defenders. The action is also directed against the law-agents who acted in the trust, and one of the peculiarities of the case is that the conclusions of the summons are directed against all these defenders, the trustees and also the law-agents "conjunctly and severally, or severally, or in such other way or manner as to our Lords shall seem just."

The surviving and acting trustees, as I understand, are the two spouses (the lady, Mrs Rae, being a *sine qua non*), Mr Meek, and another reverend gentleman, who is described in the marriage-contract as a student of divinity, but who is now, like the truster, a minister of the Church of Scotland.

The provisions of the marriage-contract are simple enough. The intending husband had nothing to settle on his wife but his furniture, and the only other obligation he undertook was to be punctual in the payment of his rates to the Ministers' Widows Fund. But Miss Croil had some fortune of her own which she derived from her father, and it turned out to be £5000.

The lady's fortune is settled in this way. It is given to herself in the first place in liferent. If her husband predeceases her, then it reverts to her in absolute property, and there is an end of the trust. But if she predeceases her husband, then the husband enjoys a liferent of the money, and after his death it goes to their children. These children are the pursuers of the present action.

The case against Mr Hotson,—or against the representative of Mr Hotson,—who was the family solicitor, and the law-agent in the trust, is that he recommended to the trustees a very bad investment for the trust money, which has in consequence been lost, and the contention against him is that he is bound, just as much as the trustees who made the investment, to replace the money which has been lost to the trust-estate.

Now, it appears to me that this action does not lie against Mr Hotson or his representative at the instance of these pursuers. It must be observed that they have no vested right or interest in the trust-estate or any part of it. Their eventual and contingent interest depends on a variety of circumstances. If their mother survives their father, they never will have any interest in the trust funds. They may of course succeed to their mother as her executors if she dies intestate, or she may provide for them in any way she thinks fit, but they can never in the event of her survivance of her husband have any interest in this trust. They must also survive both their parents before they can have any interest in this trust; I think that is the only other contingency on which their right depends. I do not think, therefore, that parties in such a position as the pursuers occupy, and with this sort of right and interest in the trust-estate, have any title to sue the law-agent. The law-agent is employed by the trustees, and of course he is responsible to them for any professional negligence or want of skill which may be shewn in advising them or in conducting the affairs of the trust. That liability arises out of a contract of employment, and it may be that if the trustees were suing the law-agent for liability under that contract of employment, the form of action might be that which we have here —that is to say, a demand in the form of a conclusion that the law-agent should replace the money which had been lost may be a suitable enough form of action. But the position of these pursuers with regard to this law-agent is entirely different. There is no contract of employment between him and them. Therefore the same liability cannot exist as exists on the part of the law-agent to the trustees; it must be a different kind of liability altogether. I doubt whether any liability at all exists, because I think there is no foundation for the law-agent's liability except a contract of employment, and to such a contract of employment in this case the pursuers are not parties.

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[1] Mackay, C. of S. Practice, i. 280, and cases there.

But even suppose it should be held that the law-agent is answerable to these pursuers for any loss or damage which they may have sustained, is this a sort of action that can be maintained? I apprehend not. The only action that would then lie at the instance of the present pursuers would be an action for any loss or damage they themselves have sustained through the breach of trust and the loss of the money. Now, they have sustained no damage, and it is not clear that they ever will sustain any damage. Certainly they will sustain no damage if their mother survives their father, because then they would cease to have any interest in the trust, and they will not sustain any damage if they do not survive both their parents. Still more, should they come to have an interest in this trust-estate, *quomodo constat* that this money may not by that time have been replaced, and so not lost to the trust? It may be replaced by the trustees, or some of them, being found liable to replace this money. It may be replaced—although this is not a very probable contingency—by an improvement in the security. At all events, one thing is perfectly clear, and that is, that the pursuers have as yet suffered no damage, and it is extremely doubtful whether they will suffer any damage by the fault imputed to the law-agent. I am taking it for granted that the fault imputed to the law-agent in this action is professional negligence or fault. It may be doubtful whether it is what it is described as being in the summons or the condescendence, but I am assuming that for the sake of argument in dealing with questions of the law-agent's liability, and I come to the conclusion that this action cannot be maintained against him.

The case against the trustees of course stands in a very different position, because an allegation made by parties interested even eventually under a trust-deed that by the misconduct of the trustees a large portion of the trust-estate has been lost by being invested on a bad security, is *prima facie* a perfectly competent and relevant ground of action. But this case is very peculiar in some of its circumstances. The defenders called are the whole accepting and surviving trustees, but only one of them has appeared to defend the action. Mr and Mrs Reid Rae do not appear at all, and the other reverend gentleman also fails to appear, so that Mr Meek is the only defender. Therefore the case is narrowed to this question, whether Mr Meek is to be made answerable to replace this money.

Now, it must be taken for granted here, I think, in dealing with this question, that this was a very bad security. I do not think anybody can say a word in its favour. The circumstances under which it was taken appear in the minutes of the meetings of the trustees. The money had been invested previously in a different way, but it required to be reinvested. The first minute with which we are concerned bears this (it is dated 30th January 1874):—"It being necessary to reinvest the two sums to be received at Whitsunday, it was resolved to look for heritable securities of adequate value, and Mr Hotson was directed to be on the outlook for such, and to report to the trustees any proposals he might receive." Upon the 5th May Mr Hotson did report accordingly, and the minute of that day's meeting bears:—"There were laid before the meeting rentals and valuations of several heritable properties on which loans were wanted, after considering and comparing which the trustees resolved to make a loan of four thousand five hundred pounds (£4500) to Mr William Anderson, one of the applicants, on the security of buildings in Gallowgate, valued by Mr Burnet, architect, at £6500: Provided always that Mr Hotson shall be satisfied with the title, and that such part of the loan shall be deposited in bank, in the joint names of the parties' law-agents, as Mr Burnet shall judge to be sufficient for finishing the buildings, to be drawn out and paid over to Mr Anderson when Mr Burnet shall, at his expense, report the full completion of the work."

Now, one great objection to a security of this kind is that the work may never be completed. That objection does not occur in the present case. The work was completed, and the money was afterwards paid in terms of this minute. But the failure of the security arose from this, that the erection of buildings of the character of those which were erected in this locality—that is, in the Gallowgate of Glasgow—was in itself a very great risk and an experiment, and turned out to be an entirely unsuccessful experiment. There had never been buildings of that description in that part of the town before. It was thought that they would take the market, but they did not, and the consequence is that this money cannot be recovered.

Mr Meek's share in these proceedings consisted in this, that he was present at the meetings. There were also present, however, the husband and the wife, who were the parties directly and immediately interested in this money and in the investment, and Mr Hotson, the law-agent. The question thus comes to be, whether, if Mr and Mrs Rae, the parties chiefly interested in the money, desired to have this investment, and Mr Hotson advised the trustees to accept it, Mr Meek must nevertheless be held personally answerable for the loss of the money. One cannot help seeing at once that that is a hard position in which to place Mr Meek, and I humbly think that in the circumstances Mr Meek is not liable.

It is said that a trustee must under all circumstances shew in the conduct of trust affairs all the prudence and intelligence that a prudent man would shew in the management of his own affairs. I am not quite sure that that is either a very definite or a very satisfactory statement of the ground of liability of a trus-

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tee—that he has failed to exercise that amount of prudence which a prudent man would use in the conduct of his own affairs—because there are many degrees of prudence. One man is a great deal more prudent than another, and one man is a great deal more intelligent than another, and it must depend a good deal on the prudence and intelligence of the particular trustee whether he is to blame or not. If he brings to the consideration of the question before the trustees all the mental capacity with which he is endowed, can he be expected to do more? I rather think that the rule of liability in such a case is much better stated by Lord Stair than in any of the more recent cases. He says, Stair, i. 12, 10,—"By the nature of the contract, mandators, seeing their undertakings are gratuitous, ought to be but liable for such diligence as they use in their own affairs, and the mandant ought to impute it to himself that he made not choice of a more diligent person, which our custom follows, but still there must be *bona fides.*" Now, if we apply that rule to the present case we must not demand of Mr Meek any more prudence or diligence or knowledge than he actually possesses and uses in the management of his own business. For that purpose we must consider what Mr Meek is.

Mr Meek is a man who has been in business, but who has retired from it a long time ago. He was a West India merchant, but that was forty or fifty years ago. He is now a landed proprietor in Lanarkshire, and not apparently engaged in any business. He was a personal friend of Mr and Mrs Rae, and was induced by them to give them his assistance and advice as a trustee, and I think they must be held to be answerable for making a judicious or injudicious choice in the selection of Mr Meek. That is the view of Lord Stair, and I think it a very sound one. Now, judging from Mr Meek's actings and proceedings in this trust business, and from his evidence, he does not appear to me to be a man of business habits, or a man of great intelligence or great discretion. But he certainly had sense enough to do this. When he saw what kind of security this was that Mr and Mrs Reid Rae wanted to take for the trust-money, he consulted the law-agent, and asked him whether this was a proper kind of security to take, and the advice he got, according to his own statement at least, was that it was quite a common security, and that there was no difficulty about it. There is no contradiction of that statement, and looking to the candour with which Mr Meek's evidence is given throughout his deposition, I think that we are well entitled to take that to be proved as matter of fact.

There is one other consideration that weighs with me with respect to the position of Mr Meek as I have described it, and that is the clause of immunity in the trust-deed. It is very strongly expressed, and I think goes a long way to support the conclusion at which I am disposed to arrive. In the first place, there is a discretion as to the sort of investments which the trustees are to take, and the sort of investment they are to take includes heritable securities, and this is undoubtedly a heritable security, although it is not a good one. There may be very bad heritable securities, and of course the meaning of the clause I am now referring to is not that the trustees have power to take bad heritable securities, but that they are to have power to take heritable securities, and they are to be the judges of how far they are to go in that direction. But then it is declared that the trustees shall not be answerable for "errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." Now, what can be charged against Mr Meek here? You may charge against him certainly that he committed an

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error—an error of judgment, and a very serious error of judgment. You may charge against him also that he was guilty of neglect of diligence; and ~~we~~ you are certainly entitled to charge against him that he has taken an insufficient security. But these are three things for which the trust-deed says that he is not to be answerable. They are just the very things from which he is protected; errors, which means errors of judgment, neglect of diligence, and insufficient security. Can anyone charge anything more against him in this case? I think not. I have not heard anything more against Mr Meek than that he committed an error of judgment, that he neglected to be diligent—that is, prudent—and that the security which he accepted has turned out to be insufficient. If these are the only things which can be charged against him, then is it not plain that according to the very letter of this marriage-contract, he is not to be answerable for these things?

These are the grounds on which I think Mr Meek ought to be assoilzied.

LORD JUSTICE-CLERK.—I concur with your Lordship. The only doubt I have had was with regard to the liability of the law-agent for advising this investment, but on the whole matter I am inclined to think that at all events there is no case relevantly stated on the part of these pursuers against the agent. Therefore, I concur in the result at which your Lordship has arrived on both points.

LORD MURE.—This case is attended with a good deal of difficulty, but after full consideration I have come to the conclusion that the defender Mr Meek is liable to make good to the trust-estate the money that has been lost through the investment in question. I do not think that it was an illegal investment, as contended by the pursuers, in the sense of being beyond the defender's power or authority to make; because the trustees had power to invest in heritable security, and this is an investment of that description. But I think it was an improper investment for a trustee to make of the funds committed to his care, and so imprudent as to subject him in liability for the loss.

In dealing with questions of this kind, the rule according to which the conduct of gratuitous trustees falls to be judged is that they require to exercise the same prudence which a man of ordinary care would take in the management of his affairs. The law was so laid down in this Court by the Lord Justice-Clerk in the case of *Kennedy*, 12 R. 379, after apparently considerable discussion, where his Lordship says that gratuitous trustees are liable only in such diligence as "a man of ordinary prudence would use in his own affairs," and other cases were quoted to a similar effect. The question, therefore, for consideration upon the evidence is whether the defender acted with that prudence in lending the trust-funds in the way he did.

Now, the evidence as to the nature of this investment is very distinct. It was an investment on house property which was in the course of erection when the advance was agreed to. The subject, therefore, which was to yield a rent to pay the interest on the loan, was not in existence when the loan was made, and was not finished for some months after the loan was made—not I think till October 1875, when the last instalment was paid up. It is plain, moreover, upon the evidence, that this was well known to the defender, because it was made matter of arrangement, when the loan was agreed to in the spring of 1874, that a very considerable portion of the money was to be retained by the agent for the trustees, and only to be paid up on certificates from the architect that the work certified had been finished to his satisfaction.

It does not, moreover, appear that at the date of the loan any part of the property had been let, or was capable of being let. There was, therefore, no actually existing rental which could then be relied on; and all that the trustees appear to have had before them were speculative rentals of what the property might probably yield. There was in the next place a ground-annual of £190 payable out of the rents, which had of course precedence to the loan, and it is plain that at the date of the loan there were no rents then fixed which would be available to meet that payment when it fell due. The locality again was not a good one. It was not a part of the town of Glasgow where houses of the same description had been built before; and I see no evidence to instruct that rents were at any time drawn sufficient to meet the amount of the ground-annual.

Such being the nature of the investment, it is to my mind difficult to see from what source, apart from the personal security of the borrower, the interest was to come. There were no rents current, and in cases of this description it is necessary that there should be a reliable security for payment of the interest, as well as of the capital of the loan, which there plainly was not in the present case. The investment, therefore, was in my opinion upon the whole a very bad one. It was a very risky looking affair at best, of a very speculative description, and one which no man of ordinary prudence would, I think, have entered upon in the management of his own affairs; and still less was it one in which a trustee was justified in investing the greater part, if not the whole, of the trust funds committed to his charge.

The defender was evidently very doubtful himself about the security, and says he consulted the agent for the trust as explained in the passage referred to by your Lordship. But I am unable to look upon this as a sufficient justification for what the defender here did, even assuming it to be proved that the agent gave him the answer the defender says he did. The defender was not, as I conceive, warranted in advancing the trust funds upon a security which he himself distrusted because the agent told him that parties were sometimes in use to advance money on questionable securities of a similar description. And when an agent thus gives his client bad advice, that cannot, in my opinion, in such a case, free the client from the responsibility which would otherwise attach to his conduct.

In this matter of the sufficiency of the money value of a security I have always understood that it was the client who was to judge and deal with that question, and not the agent. I think the minutes of the trustees to which your Lordship referred bear that out and proceed on that footing. The first is dated the 30th of January 1874, and it says—"It being necessary to reinvest the two sums thus to be received at Whitsunday, it was resolved to look for heritable securities of adequate value, and Mr Hotson was directed to be on the outlook for such, and to report to the trustees any proposals he might receive. In case the funds, or any part thereof, should not be thus taken up, it was resolved to deposit the uninvested money in the Glasgow branch of the Royal Bank on deposit-receipt in favour of the Messrs Rae and Mr Meek on behalf of the trustees." Then the matter came up again on the 5th of May, and the minute of that meeting bears,—"There were laid before the meeting rentals and valuations of several heritable properties on which loans were wanted, after considering and comparing which"—it was the trustees who did that—"the trustees

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resolved to make a loan of four thousand five hundred pounds (£4500) to Mr William Anderson, one of the applicants, on the security of buildings in the Gallowgate, valued by Mr Burnet, architect, at £6500; provided always that Mr Hotson shall be satisfied with the title." There is thus a clear distinction drawn between what the trustees and their agent were respectively to deal with. I put the question to counsel in the course of the discussion whether, when a party employed his agent to get a security for him, the agent became responsible for the sufficiency in value of the security, and the answer was that unless there was a special arrangement by which the agent undertook that liability he was not responsible; and I did not understand that to be disputed. Judging from what I have seen myself, I think that what is generally done is this. Rentals are laid before the parties making the loan. These rentals shew what is the revenue of the security and what burdens are on it, and what is the margin which is over for payment of the interest on any money that may be advanced, and the agent leaves it to the client to say whether he is satisfied with the value of the security. The agent's responsibility, in my view of it, applies to the title, and to seeing that the security is in that respect a good security for his client to take. That is what the agent has to look after; but in the matter of value it is the client whose money is to be laid out who has to be satisfied. Now, in this case the security before us is plainly one which a trustee ought not to have taken, and the defender having been himself of opinion that the security was at least a doubtful one, it was his duty to have declined it, and so to have protected the trust-estate against the risk of any such loss as that which has here been sustained. As regards the clause of immunity in the trust-deed, I am of opinion that, when the mistake is so flagrant as that which we have here to consider, the clause is not sufficient to protect the trustee, and it has, I think, been substantially so decided in cases of a somewhat similar description.

On the question of the law-agent's liability, I am of opinion that he is not responsible for the loss which has here arisen. What the agent undertakes, as I have already explained, in such an investment, is that the title offered by the borrower is a good one, and that the security will in that respect be duly constituted. But he does not, as I apprehend, undertake to guarantee the sufficiency in value of the security, unless under some special arrangement to that effect.

Now, I do not see anything in the minutes I have referred to which can be held to impose liability on the agent for allowing the trustee to make an advance on what turned out to be an insufficient security, or to shew that the agent undertook any responsibility in that respect; and I do not think any such responsibility arises under the ordinary employment of an agent when an investment is made. The agent is in such a case responsible only for mistakes as to the title, and completion of the security; and unless he is specially employed to see to the value of the security, he does not incur any additional responsibility if the security turns out to be of insufficient value. If the rule were otherwise it would come to this, that agents would in all cases be held to guarantee their clients against such loss as has here occurred; and that is a position in which it seems to me no agents can be expected to place themselves, except under some special arrangement. I never understood that the fee paid to an agent on the advance of money under an heritable security had any relation to the risk that might arise from the security turning out to be of insufficient value. And as it is not alleged in the present case that there has been any mistake made as to the

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LORD SHAND.—In regard to the question of liability of the agents, I concur with your Lordship in thinking that the pursuers of this action have no title to sue; I also concur with my brother Lord Mure in thinking that, even if the pursuers had a good title to maintain the action against the agents, liability against them has not been established.

It appears to me that a law-agent's proper professional duty and obligation is to see that the title to the security which is proposed to be taken shall be in all respects valid and effectual. *Prima facie* I do not think his duty goes further. He may undertake more, and in the course of their employment law-agents often do undertake more, but if nothing more is undertaken, that appears to me to be the limit of the agent's professional duty. In dealing with the question of title to sue, however, I will assume that there was a failure to perform a duty in a matter in which responsibility has arisen to the trustees as representing the beneficiaries, as, for example, in taking a bad title to a heritable security. In that case it appears to me the persons entitled to maintain an action against the law-agents for failure to perform a professional duty are the trustees and not the beneficiaries. The trustees are the employers of the law-agents. The direct relation of employment arises between them, while no such relation exists between the beneficiaries and the law-agents. It is true that the employment which a law-agent undertakes for the benefit of the trust-estate is for the benefit of the beneficiaries, but the persons who are to vindicate the rights of the trust-estate are, in my opinion, the trustees who are vested with the management, and not the beneficiaries. Suppose an agent to fail in professional duty, and loss to be thereby caused, what is the nature of the claim that arises against him? He has committed a breach of duty, or failed to exercise professional skill. The claim against him is one of damages, and the measure of the claim is the loss which he has caused to the estate. Trustees are in a different position, for they may be required to replace money lost by the beneficiaries merely objecting to their taking credit for the amount in their trust accounts. But the law-agent in the case supposed is simply a debtor to the estate in respect of a claim of damages. Can it then be maintained that debtors to trust-estates may be called in actions by any of the beneficiaries who think fit to do so? Persons may owe debts to a trust-estate on a great many grounds. A truster may die having a great many debts owing to him. If the trustees do not think fit to raise an action against the debtors for certain debts, having doubts it may be how far they may be certain of success, is it for a beneficiary or beneficiaries to do so in their own name? I think they have no such right. And I do not think this is a matter of mere form; it is, in my view, a matter of substance, because if the law were otherwise, then the debtors of trust-estates, including amongst them law-agents who may have been employed by the trustees, would be liable to actions at the instance of many different persons—of anyone having a beneficial interest in the trust-estate—requiring them to pay the amount of their debts to the trustees. I think such actions are not competent, and that the only persons who can maintain actions to recover debts due to an executry or trust-estate are the administrators of the estate, the trustees or the executors. A beneficiary could not discharge the liability for a claim due to the trustees, and I do not see that a judgment in an action at the instance of a beneficiary

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could be *res judicata* in a question with the trustees. It appears to me that the law would get into extreme confusion if we were to sanction actions of this kind raised by a beneficiary against one with whom he had no contract. The beneficiary has his rights against the trustees, for the trustees are in direct relation with him because of their having undertaken a trust for his behoof. But if beneficiaries seek to enforce by action a claim of any kind against a debtor to the trust, it appears to me that they must either compel the trustees to raise the question directly in their own names, or get authority to use their names, or get an assignation to the claim, and thereupon sue as assignees.

In my opinion therefore there is no title in this case to sue this action.

But further, I concur with your Lordship in thinking that, as in a question with the agents, this is an action of damages, and as it is clear that the present pursuers are unable to qualify present damage (for it may be that there may be no damage suffered by them at all), that is a second ground for holding that this is an ill-founded action against the agents. I shall only make this additional observation on this branch of the case, that if the agents' liability were sought to be enforced because of their having given bad advice when asked to advise as to whether the trustees would incur personal responsibility in making the investment now complained of, I should hold that this would give rise to a claim personal to the trustees, to be made by them alone, and to which the beneficiaries never could get right, unless the claim was assigned to them by the trustees. So that, looking at the case in any view that can be taken of it, it humbly appears to me that there is no title to sue as against the law-agents.

But I am further of opinion with my brother Lord Mure, and on the grounds he has stated at the close of his opinion, that there is no liability on the part of the agents even if the pursuer had a title to maintain the action. I do not think there is any ground of liability averred in this action, for it is not alleged on record that they were employed to perform any duties beyond the ordinary duties of a law-agent.

It is for the trustees themselves to judge of the propriety of making an investment of the trust-funds, to select the investment or to sanction it, and that duty they are not entitled to devolve either on their law-agent or anyone else whose advice and assistance they may very properly take to enable them to arrive at a sound judgment. The security having been resolved upon, the agent's ordinary professional duty is, as I have already said, to see that a valid title is completed. No other duty or obligation arises from the mere relationship of agent and client, although in the case of trustees I should further be prepared to hold that if an agent is consulted about an investment which the trustees propose to make, and which—being in the knowledge of the terms of the trust-deed—he has reason to think would be beyond the powers committed to them, he is bound to warn them of this. He may undertake further duties. His undertaking may arise either from express employment or from circumstances which shew that it was the understanding of himself and his client that his duties should not be limited merely to seeing to the validity of the title. He may be asked to inquire for and report upon securities for the consideration of his client, and may undertake to do so. This is so often done by law-agents that it might almost be said to be part of their ordinary duties as law-agents, but I do not so regard it, for trustees themselves, or persons with whom they are acquainted, may look out for suitable securities for trust-funds just as an agent may do. Where this duty is undertaken, it is of course incumbent on the agent to give the fullest information he can obtain in regard to the security, and especially to inform his client of any disadvantage or drawback to the security of which he is aware, and which the client may not justly be expected to know, but which it is material that he should know. His duty does not go further or involve any responsibility for the sufficiency of the security. The agent's failure to give full information when he was bound to do so seems to me the true ground of judgment in the case of *Ronaldson* v. *Drummond & Reid*, 8 R. 767, as Lord Fraser has pointed out in his opinion in the case of *Stirling*, 14 R. 177.

Still further, a law-agent may, expressly or by his conduct, undertake not only to report upon securities for the consideration of his client, but to select and take a security for a client who devolves that duty entirely on him, and in this special case, in which the client trusts entirely to him, he becomes of course bound to use all reasonable care that the investment is a safe and proper one. In such a case the law-agent, by agreeing to do all that the client would do for himself, undertakes at the least the whole duties and obligations which devolve upon a trustee making investments of trust-funds. The case of *Oastler*, 14 R. 12, is an illustration of this class of case, for there the lady trusted entirely to her agents to make an investment for her, and in the case of *Black* v. *Curror & Cowper*, 12 R. 990, the law-agents undertook not merely to see to the validity of the title, but to the sufficiency of the security.

In the present case there is no averment of any undertaking under a special employment. All that the agent was asked to do was, in terms of the minute of 30th January 1874, "to be on the outlook for securities, and to report to the trustees any proposals he might receive." Then came the meeting at which the proposals received were reported, and the trustees agreed to take the security in question. Now, the single piece of evidence regarding what occurred at the meeting as presented by the pursuers, beyond the terms of the minute itself, is to be found in the testimony of Mrs Rae. She was examined about what occurred at the meeting, and what she says is this,—"What were you told at the meeting about the investment? (A.) That an investment would be found; it was not found, but would be found. Perhaps it was found by the meeting of the 5th May. (Q.) What else were you told? (A.) That it was a first-class investment—a good investment. (Q.) Who told you that? (A.) Mr Hotson and Mr Meek." She passes from that to say something about the ground-annual, and then this question is put,—"Who did you rely on? (A.) Mr Meek. (Q.) Anyone else? (A.) No, he took the management. (Q.) Did you rely on Mr Hotson? (A.) No, I did not think of him." Now, that is the sole evidence in this case as to the part taken by Mr Hotson, the agent, in the proceedings at the meeting of the 5th May. The pursuers examined Mrs Rae, but not Mr Meek, or anyone else present at the meeting, and what I have read is all that Mrs Rae has to say on the subject. What it amounts to really is, that the law-agent at that meeting, in conversation with the trustees, expressed his opinion that the security was a good one—an opinion which it is not doubted he honestly entertained. I cannot see any ground for holding that this should infer responsibility on his part for the sufficiency of the security. He was asked merely to inquire about securities, and report any proposals to the meeting. He did not undertake to perform the duty of the trustees—to judge of the proposed investment, and to sanction it. That the trustees did for themselves, and having done so, they directed the law-agent to see that a satisfactory title was obtained.

Persons with money to invest frequently consult brokers about their investments. The broker who gets a commission for his trouble on any transaction he carries through is frequently asked for advice, and recommends particular investments. Advice honestly given often turns out bad and results in loss, but it is needless to observe that no one would think of maintaining that the broker was liable in damages. I am unable to distinguish between the two cases—the case of a broker and the case of a law-agent in the position of the agent here. Both are paid for their services, the broker for purchasing the required stock and having the title by transfer completed; the law-agent for attendance at the trustees' meetings, and for completing the title to the security which the trustees decide to take; neither of them undertakes to see to the sufficiency of the investment.

There is a further passage in the proof which the pursuers sought to found upon in regard to the agent's responsibility—I mean the passage in the evidence of Mr Meek, who was examined on his own behalf—which is in these terms—"(Q.) Do you remember discussing Mr Anderson's loan? (A.) I remember that with respect to the Gallowgate. I was not much pleased with it, but great improvements had been made by the Improvement Trust, and it was becoming a very valuable part of the city. When Mr Anderson's application was laid before us I pointedly put the question to Mr Hotson whether we were doing right in lending upon a property that was in the course of being built. He answered that there could be no objection on that score—that it was a matter of common, almost daily, occurrence in Glasgow." Now, in so far as that is of any value in the case it is evidence for Mr Meek, and for Mr Meek alone. The pursuers had closed their case in a question with the law-agent, and any evidence which the pursuers had led upon that matter was in the course of Mrs Rae's deposition. Mr Meek is entitled to the benefit of this evidence as against the pursuers, but it cannot be taken into view in the question between them and the law-agents. It would, I think, be unjust that it should be taken. The evidence was not led by the pursuers, and there was no arrangement that the evidence of Mr Meek should be taken as part of the general evidence in the case as in a question between all the parties. But I am bound to say, further, that even if Mr Meek's evidence were any part of the pursuers' case, it would not affect the conclusion to which I have come. For the question put to Mr Hotson was not put to him as a lawyer—it was not such a question as this, "Are we, the trustees, acting within our powers?" or, "Are we doing anything *ultra vires*, looking to the terms of the trust-deed?" It was simply this, "Are we right in lending on property that is being built—is it a security which your judgment would recommend?" His answer was that there could be no objection on that score—that it was a matter of common, almost daily, occurrence in Glasgow, and there is only too good reason to think that that was the practice. Being invited to give his opinion on the propriety of the investment by the parties present, he did so, but I cannot see that he undertook any responsibility in consequence. It was very well put by the Dean of Faculty that the test of this was, had Mr Hotson any power to control an investment? I quite think that if an illegal investment was proposed—one *ultra vires* of the trustees, because the deed prohibited anything of the kind—Mr Hotson would have been bound as the law-agent to advise the trustees of this, and if he failed to do so might and probably would have incurred responsibility. But if what occurred was simply an expression of opinion as to the quality of the security, as I think it was, then Mr Hotson undertook no responsibility, because he was not charged with the duty of making the investment, and had no control over the trustees in the matter. If indeed the case could be brought up to this, that under the deed a certain class of investment was prohibited, and if the law-agent, as a lawyer, ought to have advised them that the investment was beyond their power, that would have raised a different question. But I do not think that the facts here raise a question of that kind. For these reasons I am of opinion that even if the pursuers had a title to sue the agents, they have not proved any grounds for holding the agents responsible.

But with regard to Mr Meek, I am of opinion with Lord Mure that a case of responsibility has been made out. Your Lordship, I think, said that the investment was a bad one. Lord Mure said he thinks it about as bad as could be, and I am rather of Lord Mure's opinion on that point. In the first place, the subject of the security was an enormous block of buildings in the course of being built, involving an outlay of some £25,000 or £30,000, and the loan was to be given on a part of the buildings which was unfinished. It is true, as your Lordship has observed, that the building ultimately was finished, and no doubt Mr Meek is entitled to the benefit of that circumstance. If the unfinished character of the building had been the only objection to the investment, it was undoubtedly cured in the end. But besides being unfinished, and so of the class of property condemned in the case of *Wyllie Guild*, 14 R. 944, these buildings were necessarily untenanted, and there was a very large amount of space to be filled up before any rental could be drawn from the property. Then there was a ground-annual, amounting to about £200 a-year, forming a preferable burden over that part of the property on which the loan was to be given. It also appears that the trustees lent £4500, while the actual outlay on the building was only about £4000. It further appears, and I think this is the main blot on the investment, that the buildings were erected by Mr Anderson as a speculation. He proposed to open warehouses of a class unknown in that locality, and which were to be tried for the first time to the east of the Cross of Glasgow. Warehouses had never existed there before. The result turned out as might have been anticipated. A great part of the buildings have remained untenanted, and the portion with which we are more immediately concerned has never produced rent enough to cover the ground-annual. It is further to be borne in mind that the transaction was taken up and closed at a single meeting of the trustees, and the only valuation, and that not a detailed valuation, which was laid before the meeting, was one sent in by the proposed borrower, and made by a gentleman who had been employed on his behalf. It was a mere statement of opinion by Mr Burnet, no doubt a man of eminence in his profession. But all the trustees had to go upon was his opinion that the buildings when completed and papered and painted would be worth so much on the assumption that they would then be let. The data on which Mr Burnet proceeded were not given in his report, and no data were asked for or laid before the trustees to enable them to test the value of Mr Burnet's opinion. I think with Lord Mure that, taking all the circumstances I have mentioned into account, the security is one which must be condemned. It is not a security which any prudent man exercising reasonable care would have accepted in the management of his own affairs. The test in this class of cases is, and I think must remain, that a trustee must shew such reasonable care as a man of ordinary prudence would exercise. I think Mr Meek, though acting with complete *bona fides*, entirely failed to shew that care.

The last point to which I have alluded, the general terms of the valuation and the absence of all data to justify it, seem to be sufficient to shew that the investment was made without that reasonable care which a man of ordinary prudence would exercise, and was therefore an investment which the trustees were not warranted in making. In the recent case of *Learoyd*, L. R., 12 App. Cases, Lord Watson said, p. 734,—"If trustees employ a person of competent skill to value a real security, they may, so long as they act in good faith, rely upon the correctness of his valuation. But the ordinary course of business does not justify the employment of a valuator for any other purpose than obtaining the data necessary in order to enable the trustees to judge of the sufficiency of the security offered. They are not in safety to rely upon his bare assurance that the security is sufficient in the absence of detailed information which would enable them to form an opinion, and without forming an opinion for themselves,—at all events if they choose to place reliance upon his opinion without the means of testing its soundness, they cannot, should the security prove defective, escape from personal liability, unless they prove that the security was such as would have been accepted by a trustee of ordinary prudence fully informed of its character, and having in view the principles to which I have already adverted."

If this had been a question with Mr and Mrs Rae as pursuers, I should have seen very good grounds for holding that they could not succeed, for they themselves were parties to the proceedings complained of. But unfortunately for Mr Meek there are other beneficiaries whose interests he as well as Mr and Mrs Rae were bound to protect. Those interests no doubt are contingent, but they exist, and the trustees had a duty to those parties, the present pursuers.

I concur with Lord Mure in thinking that it is no answer in a case of this kind that the trustees consulted a law-agent. I have read the passage in the evidence upon that matter. I think the trustees merely asked the agent as to his view of the value of the security. That was a matter on which he would naturally give his opinion if asked, but without thereby incurring any responsibility if he gave an honest opinion. It will not free the trustees from liability that they acted on the opinion of anyone else, even of their law-agent, in regard to a matter as to which it was for them to judge, and responsibility for which lay with them.

It has been suggested that a new principle for determining the liability of trustees should be adopted—perhaps I am wrong in calling it new, as it is founded on the passage from Lord Stair which your Lordship has read. The suggestion, as I understand it, is that responsibility for improper investments should depend on the capacity of the trustee, so that one trustee, if a person of intelligence and ability, might be held responsible, while another of less business capacity would not be so. If the trustee is able to say, "Well, it is quite true I have made a very bad investment, but I am a very stupid man," it is said that he shall be free from responsibility. I do not think a principle of that kind can receive effect in the administration of the law of trusts. If it were to be introduced now, and made a foundation for legal decision, the issue in each case would come to be, what was the capacity of the trustee? and it is easy to see that this would open up a very curious inquiry, and leave the Court with no settled rules or principles to be applied as cases occurred. We must, I think, keep to the much broader rule, and the only rule which we can proceed upon is that which has been recognised for years, namely, that a trustee shall be responsible if he does not in the transaction challenged shew the reasonable care which a man of ordinary prudence shews in the conduct of his own affairs. On that point I may quote the words of the Lord Chancellor in the case of *Learoyd*, at p. 731,—"I do not think it is true to say that one is entitled to consider the special qualities or degree of intelligence of a particular trustee. Persons who accept that office must be supposed to accept it with the responsibility at all events for a position of ordinary care and prudence."

I have only further to say, in regard to the clause of immunity founded upon, that I do not think it will relieve Mr Meek of responsibility in this case. By that clause it is no doubt declared that the trustees shall not be answerable for "insufficiency of securities." But that surely means "insufficiency of securities" which, when they were taken, had reasonable consideration at the hands of the trustees. As to the other words of the immunity clause, I do not think they can be held to cover the case of taking such a security as was accepted with so little care or consideration in the circumstances already stated.

I am therefore of opinion with Lord Mure that the pursuers are entitled to succeed in this case against Mr Meek—of course subject to this, that so far as Mr and Mrs Rae are concerned, I should reserve any question of liability to them. My strong impression is that there can be no liability to them, and no right on the part of either of them to take any advantage of the money to be paid to the trustees inasmuch as they took the security just as Mr Meek did. Subject to that reservation, I am of opinion that Mr Meek is responsible.

Lord Young.—I think it has been the practice of this Court, and the practice of the Court is the law of the Court, when properly appealed to, to take a beneficent charge of trust interests—I mean interests which are committed to the charge of trustees—of any property in the hands of trustees, and out of the hands of the parties really interested. The case before us is one in which a trust-estate is competently or incompetently brought before the notice of the Court. It is averred and established to the satisfaction of, I think, all your Lordships who have spoken, that this trust-estate has suffered, in the meantime at least, a great loss—a loss to the extent of the whole of it. This trust-estate consists of a capital sum of £4500, and for some years that sum has had no existence. The parties having an interest in that sum come into Court and tell the Court that it has been lost. The action is at the instance of the ultimate fiars. I do not stop at this moment to notice the contingency to which your Lordship referred, and which you quite accurately stated. The right of these fiars, although subject to that contingency, is nevertheless an existing right. They bring an action into Court. They bring into Court in connection with that loss of the trust-fund—its disappearance out of the hands of the trustees—the trustees and the law-agent who was employed by them in that business which led to the loss which they allege. The action is held to be quite well founded. All of your Lordships who have delivered judgment are of opinion that it is a competent action as directed against the trustees. There is therefore nothing in the contingency affecting their right which prevents them in your Lordships' opinion directing their action against the trustees. It is competently directed against them, and in the opinion of two of your Lordships it is well founded against them. I agree with all of you in thinking that the action is competent by these beneficiaries against the trustees.

But I differ from those of you who think that the action is well founded against the trustees. I am of opinion with your Lordship in the chair, and with the Lord Justice-Clerk, that the action is not well founded against the trustees. Only one of the trustees has appeared. Of the other three, two are the parents of the pursuers, and the third trustee is their uncle. These three other trustees have not appeared. But in examining into this trust matter, I take them all into account. I do not think they are in any different position from Mr Meek in this question. I think Mr Meek is not answerable. I do not go upon the protection clause. I go on the fact that he gave his attention to the matter, and consulted and acted on the best—what he thought the best—advice—the advice of the family agent, who was quite properly employed by the trustees in this business. Upon that ground I think the trustees are not answerable. I do not go on the indemnity clause, for which, I think, there would be a great deal to be said but for the decisions. The decisions are very much in the way. In many, almost in all, of the cases in which liability has been held to attach to trustees for neglect, there was an indemnity clause much in the terms of the indemnity clause here, and in the argument in favour of applying that indemnity in favour of the trustees it was always urged that there was an exemption for neglect. Still although there was exemption for neglect, neglect was charged; exemption for error, well error was charged, and under the argument it was urged there was exemption for that. Then as to insufficiency of security, why, the whole case was insufficiency of security whereby money had been lost. The trustees would say as regards that, "I am protected against liability for that." All that has been disregarded in the past decisions of the Court in this country and in England also. Therefore I do not proceed on that protecting clause. I proceed on the other ground. I am of opinion that the trustees here did not incur liability for the loss, because they took the proper course of consulting and acting upon the advice of the family agent in the matter. They put the matter into the hands of the family agent, who undertook the business.

Then, is the action properly directed against the family agent? If he incurred no liability, if his conduct led to no responsibility on his part, of course there is an end of the matter. Nobody can sue him. He performed his contract. But one can hardly say, after the language that has been used, that he performed the duties under his contract in such a manner as to avoid liability for the consequences. I understood your Lordship in the chair to desire to avoid deciding whether he incurred liability or not, and to put the judgment on the ground that he is not liable to the pursuers of this action in this action. I understand that to be the opinion of Lord Moncreiff also. On the other hand, two of your Lordships are for deciding the question of liability, and in the judgment of two of your Lordships there is no liability. In my opinion there is liability, and liability which may be enforced in this action. This action is in no sense an action of damages. It is no more an action of damages against the law-agent than it is an action of damages against the trustees. If it had been an action of damages, the pursuers would have asked that money should be paid into their pockets. That is an action of damages. I never saw an action of damages with any other conclusion than one for payment to the pursuer. I could have well understood such an answer to that as this—"Why, you have suffered no damage. You may never suffer any damage. Your right is contingent, and may never become absolute, or it may become absolute so long hereafter that prosperity may have returned to this part of Glasgow, and everything may have become right by that time." But this is in no sense an action of damages. And I should, besides, be very sorry to see the ends of justice frustrated on a mere question of form of process.

I will begin by assuming liability in order to deal with the views presented by your Lordship from which I dissent. What, I should ask, is the consequence, if there is liability, which I now assume? Let me put a clear case of liability by the agent employed by trustees. He takes a bad title. That is a clear case for liability. There is not a good title to the property over which he lends the trust money. He is therefore liable. What is his liability? Liability in damages? That is not the language which one would employ, although I think if one called it damages that would not affect the result. But that is not accurate language. It does not express the true view of the matter. The liability which an agent incurs in such a way to an individual client is not liability in damages. It is liability to restore the money. The agent does not say—"You are to take the bad article I have given you, and I will make up the deficiency, or any loss that may accrue to you. I will pay you damages." That is not what would be said. What would be said by the injured party would be this —"No, you give me back the money which you had out of my hands, and take my security to yourself." So that it is not damages in any sense. But call it what you will, the liability is to pay the amount of money back into the hands of the client, or, in such a case as the present, into the hands of the trustees. That is the liability. Is it doubtful that if under a contract of employment by trustees to invest the money the agent took a bad title, which I am putting as a specimen case of incurring liability under that employment, the agent's obligation would be to pay the money back into the hands of the trustees—in this case the £4500? That is just the conclusion of this action—that the agent must pay into the hands of the trustees the amount of money that has been lost to the estate for the benefit of whom it may concern. It is ludicrous to speak of it as an action of damages at the instance of beneficiaries who may never receive a sixpence of the money. Their conclusion simply is that this agent shall pay back into the hands of the trustees the money which through his misconduct has been lost. And why, if that misconduct is established, shall that not be? And how shall it be done? Liability is to be enforced somehow. If not in this action, how is it to be done? It is suggested that an application should be made to the Court to appoint a judicial factor, or to compel the trustees to bring an action in their own name against the agent. Is not that the idlest matter of form, merely incurring useless expense and wasting time? Are the facts not all before us? Can we not judge upon these facts whether there is liability or not? Is there any other remedy asked here than would be asked in an action at the instance of the judicial factor or the trustees? There is only the one remedy, and that is what is asked for here. Then why not consider the matter in this action? All the questions connected with this trust are here before us. All the parties who can be interested in those questions are here also—the trustees, the beneficiaries, and the law-agent. There is nobody who has a vestige of interest in those questions who is not before us. The only conclusion which would result from establishing liability is the conclusion which is directed against the defenders in this action. Cannot the question of liability be tried in this action with perfect safety to the legitimate interests of everybody concerned? It certainly can be tried with perfect safety to the legitimate interests of the trustees;

why then can it not be tried with perfect safety to the interests of the law-agent? What risk would he run? How would he be prejudiced by defending his conduct in this action? I put that question repeatedly and got no answer. There is no answer. The agent is exposed to no risk, and there is no danger whatever to his legitimate interests, which are perfectly protected. I think, therefore, on the assumption of liability being established, that we should give effect to the result in this action.

I now come to the question of liability. What was the nature of the investment which was here made? I noted how your Lordship characterised it. Your Lordship said it was very bad—so bad that there was not a word to be said in its favour. Lord Mure characterised it as excessively bad. He used language of condemnation which Lord Shand rendered as "bad as bad could be." That was work done under a contract of employment, and the result is the loss of money. Are we to determine that an agent when he is employed to invest trust money incurs no liability for advising and carrying out an investment in favour of which there is not a word to be said, which is "excessively bad," "as bad as bad can be," and which resulted in the loss of money? Are we to decide that there is no liability incurred by him unless there is an error in the conveyancing? I am not prepared to affirm that. Lord Mure put it tersely when he said that if we decided otherwise it would be making the law-agent guarantee the security, and his fee will not cover that. But two of your Lordships—and Lord Mure is one of them—think that without any fee Mr Meek is to guarantee the security. I do not think it is a case of guaranteeing the security at all. I think it was a case of avoiding making an investment which was so bad that "there is not a word to be said in its favour," which is "as bad as bad can be," and which led to the loss of money,—of the whole of the estate which might come to belong to these beneficiaries. Two of your Lordships would, I think, be of that opinion if it is a case of guarantee at all. For you think Mr Meek is liable. I do not think that that is the law at all, and I should not hold a law-agent responsible upon the ground of guaranteeing a security, but on the ground that the work that he did is capable of being judicially characterised by the language to which I have referred as being used by your Lordships.

Upon these grounds my opinion is that the trustee Mr Meek ought to be assoilzied from the conclusions of the action, but that the action ought to be sustained at the instance of the present pursuers against the law-agent, not for the purpose or to the effect of putting a shilling of money into the pockets of the pursuers or anyone else, but merely for the purpose of making the law-agent do the duties which the Court is at the instance of such parties accustomed to exact—that is, to order the trust-estate to be restored—the money which has been lost through the misconduct of anyone connected with it against whom liability has been established. In this case the money would be put into the hands of the trustees, or we might appoint an officer to receive it, and to administer it for behoof of those whom it might concern.

LORD RUTHERFURD CLARK.—On the question of the liability of the agent, I concur with your Lordship. As regards the liability of the trustees, I concur with Lord Mure and Lord Shand.

LORD ADAM.—I concur with your Lordship in the chair on both points.

THE COURT pronounced this interlocutor:—"Having, along with four

No. 178.

July 20, 1888.
Rae v. Meek.

Judges of the First Division of the Court, heard counsel for the parties on the reclaiming note for the pursuers against Lord M'Laren's interlocutor of 12th June 1886, proof adduced, and the whole cause, in conformity with the opinion of the majority of the Judges present at the hearing, assoilzie the defenders from the conclusions of the action: Find them entitled to expenses," &c.

WILLIAM OFFICER, S.S.C.—J. W. & J. MACKENZIE, W.S.—R. D. KER, W.S.—RONALD & RITCHIE, S.S.C.—Agents.

No. 179.

July 20, 1888.
Paterson v. Paterson.

ROBERT PATERSON PATERSON, First Party.—*G. R. Gillespie.**

ROBERT PATERSON PATERSON AND OTHERS (William Paterson's Trustees), Second Parties.

WILLIAM ALEXANDER ORR PATERSON, Third Party.—*J. C. Thomson—Jameson.*

CHARLES ORR PATERSON AND ANOTHER, Fourth Parties.—*J. C. Thomson—Jameson.*

MRS ANN PATERSON OR SADLIER AND ANOTHER, Fifth Parties.—*J. C. Thomson—Jameson.*

Entail—Money held under trust to purchase and entail lands—Aberdeen Act, 5 Geo. IV. c. 87.—An heir of entail in possession executed a bond of provision in virtue of the powers contained in the Aberdeen Act, providing to his younger children a sum equal to three years' rent of his entailed estates. In addition to the lands under the entail he held also certain sums of money invested under a trust for the purchase of additional lands to be entailed in the same way, or to be applied in payment of children's provisions charged on the entailed estate, in regard to which sums he had "the same powers" as if the money had been already applied in the purchase of such lands. *Held* that the interest of these sums fell to be included with the rent of the entailed estate in calculating the amount due to the younger children under the bond of provision.

Entail—Power of entailer—Aberdeen Act, 5 Geo. IV. c. 87, *sec.* 4—*Division of amount of younger children's provisions.*—An heir of entail executed a bond of provision on the narrative of the Aberdeen Act, whereby he provided £10,000, calculated to be the amount of three years' rents of his entailed estate, to his second son, or in the event of that being held beyond his powers, £9000 to his second son, £600 to his third son, and £400 to his fourth son; or in the event of its being held beyond his powers to give the whole or an unequal portion to his second son, then he provided £10,000 to his whole younger children, five in number, equally. *Held*, by a majority of the whole Court (Lord President, Lord Justice-Clerk, Lords Mure, Shand, Rutherfurd Clark, Adam, Kinnear, and M'Laren), that it was within the powers of the granter to provide the whole amount of the three years' rents to the second son.

Lord Fraser and Lord Trayner *held* that the second alternative provision of £9000 to the second son, £600 to the third, and £400 to the fourth should receive effect.

Lord Young and Lord Lee *held* that under the statute the provision to one child could not exceed one year's free rent, and therefore that the third mode of provision, viz., in favour of the younger children equally, was the only one which could receive effect.

Entail—Patronage compensation—Church Patronage Act, 1874 (37 *and* 38 *Vict. c.* 82), *sec.* 4.—An heir of entail in possession claimed compensation for the value of the patronage of a parish church. He died after receiving one of the four equal statutory instalments. *Held*, on a construction of the Patronage Act, 1874, sec. 4, that the heir succeeding to the entailed estates had no right to any part of the patronage compensation, and that the same was personal to the deceased heir in possession who claimed it, and therefore fell to his executor.

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* After the questions in which the first party had an interest were determined, Mr Thomson and Mr Gillespie represented the fourth and fifth parties and Mr Jameson the third party.

WILLIAM PATERSON of Montgomerie died on 20th October 1886, and was succeeded in the entailed estates by his eldest son, Robert Paterson Paterson.

In January 1887 a special case was presented by the said Robert Paterson Paterson, first party, by the trustees and executors of the deceased William Paterson, second parties, by William Alexander Orr Paterson, the deceased's second son, third party, by Charles Orr Paterson and Henry Edwin Paterson, the deceased's third and fourth sons, fourth parties, and by Mrs Ann Paterson or Sadlier and Mrs Mary Paterson or Campbell, the deceased's daughters, fifth parties.

Three questions were put,—(1) Whether the interest of certain sums of money invested in names of trustees in the Funded Debt of the Glasgow and South-Western Railway Company "fell to be included in calculating the amount due under" a bond of provision to younger children executed by the late William Paterson? (2) As to the respective rights of the younger children under the said bond of provision; and (3) Who was entitled to the several instalments of patronage compensation money to which the deceased had been found entitled under the Church Patronage Act, 1874?

The first and third questions were disposed of by the Second Division, and the second question was, after argument, directed to be laid before the whole Court—(*infra*, p. 1068).

The first question arose in the following circumstances:—William Paterson, formerly attorney-at-law in Jamaica, by his settlement, dated 29th July 1829, directed his trustees to employ a portion of his estate in the purchase of lands to be entailed upon William Paterson, afterwards called William Paterson of Montgomerie, and the heirs-male of his body, whom failing, upon a certain series of heirs. After his death they, by disposition and deed of entail dated in 1849, and recorded in the Register of Tailzies in 1850, entailed the estate of Montgomerie, which they had acquired, upon William Paterson, and the heirs-male of his body, whom failing, upon a certain succession of heirs, "whom all failing, then to the Provost and Magistrates of Kilmarnock and the three ministers of the Low and High Churches in the said town for the time being, and the successors in office of the said Provost, Bailies, and ministers respectively, for ever free of the whole fetters of the entail, but inalienably and upon trust nevertheless to and for the special ends, intents, and purposes after specified."

There remained after the trustees had purchased and entailed Montgomerie a portion amounting to £1080 of the sum to be laid out in purchasing and entailing lands. This sum the trustees deposited in bank.

In 1871 the Glasgow and South-Western Railway Company took under statutory powers a portion of the entailed estate, and deposited in bank the compensation money, a sum of £3722, 5s. 6d.

In 1872 William Paterson of Montgomerie presented a petition for warrant to uplift from bank and acquire in fee-simple these two sums, and to this petition he obtained the consent of his three eldest sons Robert Paterson Paterson, William Alexander Orr Paterson, and Charles Orr Paterson, on the conditions contained in an agreement with them dated in that year, by which he bound himself on receiving payment of the said sums of money to deposit them in bank in name of himself and his three eldest sons, and his son-in-law Mr N. C. Campbell, as trustees to hold the money meantime in trust, on investments of a specified description until a suitable opportunity should arise for the purchase of lands, and then to purchase such lands, and to execute an entail of the lands to be purchased therewith "in favour of the heir of entail in possession of the estate of

Montgomerie, and the other heirs in succession, all in terms of the entail of the estate of Montgomerie; but excluding the provost, bailies, and ministers of the town of Kilmarnock from any interest therein or right of devolution on failure of the heirs of entail; declaring however that the trustees shall be entitled, if they think proper, to apply the said sums, or any portion thereof, in payment *pro tanto* of children's provisions charged upon the rents or fee of the estate of Montgomerie. Until the said sums shall be applied in the purchase of land to be entailed, or in payment of children's provisions, the interest or dividends accruing thereon, to be paid by the trustees to the heir in possession of the estate of Montgomerie, and declaring that the heir of entail in possession of the estate of Montgomerie shall have the same powers in regard to the above-mentioned sums that he would have had if they had been invested in the purchase of lands, and entailed in terms of the Montgomerie entail, according to the present law, or any future Act that may be passed, affecting entails." In this petition the said William Paterson obtained decree in 1872.

The money (£4800) was invested by the trustees under this trust in funded debt of the Glasgow and South-Western Railway Company, until a suitable opportunity for the purchase of lands should arise.

In 1877 the trustees of William Paterson of Jamaica deposited in bank a sum of £3026, being the one-half of the residue of the truster's estate directed to be laid out in purchasing lands to be settled on the heirs entitled to succeed to the Montgomerie estates.

In 1878 William Paterson of Montgomerie presented a petition to acquire in fee-simple this sum of £3026, and he obtained decree in this petition also, having obtained the consent of his three eldest sons on the conditions of an agreement that he should deposit the sum, when warrant should be obtained, in bank in names of him and them to be invested in the meantime in certain investments, and held for the purchase of lands to be added to the Montgomerie estate, and entailed in terms of the Montgomerie entail. The parties bound themselves to execute, when necessary, a formal deed of agreement precisely the same as that with regard to the other sums already acquired in fee-simple, and invested as above explained, "it being always understood that until the said sum is invested in land, and entailed, the heir of entail in possession of the estate of Montgomerie shall have the same control over the said sum and interest thereon as he would have had over the lands and rentals to be purchased and entailed."

This money, after deducting the expense of disentailing, amounted to £2930, and, like the other two sums, was invested in funded debt of the Glasgow and South-Western Railway Company.

A suitable opportunity to acquire lands not having occurred, the moneys still remained so invested down to the date of this special case.

On 4th February 1884 William Paterson of Montgomerie executed a bond of provision in favour of younger children which proceeded on the narrative that the powers given him by the deed of entail of providing for his younger children were inadequate, and that by the Act 5 Geo. IV. c. 87, it is enacted "that it shall and may be lawful to the heir of entail in possession to grant bonds of provision or obligations, binding the succeeding heirs of entail in payment out of the rents or proceeds of the same to the lawful child or children of the person granting such bonds or obligations who shall not succeed to such entailed estate of such sum or sums . . . as to him or her shall seem fit: Provided always that the amount of such provision shall in no case exceed the proportions following of the free yearly value of the said entailed lands and estate,— . . . . that is to say, for one child one year's free rent or value, for two children two years' free rent or value, and for three or more children three years' free rent or value in the whole. . . ." The granter then proceeded to make alternative provisions for younger children to the amount of £10,000, providing that if that sum should be found to exceed three years' free rent or value of said entailed estate, the provision should be restricted. The terms of the bond are more fully given *infra* (p. 1068) on reporting the second question. It is sufficient to state here that the bond contained no reference to the funds held under trust above mentioned, or to the trust-deeds.

The amount of three years' free rent of the estate, along with the interest of the funds above mentioned, amounted to £9451, 6s. 3d.

Robert Paterson Paterson, as heir of entail, maintained that the amount of younger children's provisions created by the bond of provision was limited to three years' rent of the entailed lands of Montgomerie, viz., £8523, 14s. 3d.; that his father, as preceding heir in possession, had no power to include within it three years' interest of the invested money, and that he did not intend to include it, even if he had had the power.

On the other hand, William Alexander Orr Paterson and the other younger children maintained that three years' interest of the money invested in trust till land should be purchased was to be added to the £8523, 14s. 3d., making in all £9451, 6s. 3d., their father having intended, and having been entitled, to deal with that interest in the bond of provision.

The first question was, Does the interest of the foresaid sums of £4800 and £2930 . . . fall to be included in calculating the amount due under the bond of provision?

The third question arose as to sums of compensation paid and payable under the Church Patronage Act, 1874, in respect of the patronage of the parish of Tarbolton, which had been included in the entail of Montgomerie. William Paterson of Montgomerie had presented a petition to the Sheriff of Ayrshire to have the compensation due to him in respect of the operation of the Act determined, and the Sheriff had found, on 16th March 1875, that he was entitled to compensation equal to one year's stipend taken at £383, 14s. 5½d., on the occurrence of a vacancy, by four equal instalments out of the first four years' stipend.*

A vacancy occurred in 1884, and Mr Paterson got payment of the first instalment, and his trustees and executors got the second instalment. A question arose whether Robert Paterson Paterson, as heir of entail, was entitled to the instalments as a *surrogatum* for part of the entailed estate. He maintained that he was, and that his father's executors had no claim to the instalments which they had received or which were still to be received.

The executors maintained that the patronage compensation was personal to the patron claiming it, and that they were not liable to refund the instalments thereof which had been received, and were entitled to those still unpaid.

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* By the 4th section of the Church Patronage (Scotland) Act, 1874, it is enacted that "in all cases in which the patronage of a parish is held either solely or jointly by a private patron, or any guardian or trustee on his behalf, it shall be lawful for him, or for such guardian or trustee, at any time within six months after the passing of this Act, to present a petition to the Sheriff of the county (and when the parish is partly in two or more counties, the petition may be presented to the Sheriff of any one of such counties), praying him to determine the compensation to be paid to such patron in respect of the operation of this Act; but it shall not be incumbent on any such patron, or upon any guardian or trustee for such patron, whether the patronage is held upon a fee-simple title or under a deed of entail, or other limited title, to present such petition; and if no such petition shall be presented within the said period, it shall be held and taken that the claim for such compensation has been renounced, and no claim therefor shall afterwards be competent in any manner of way."

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Argued for the first party;—As to the first question. The interest of the money referred to in this question could not be reckoned as falling within the bond of provision for two reasons,—(1) Because the granter of the bond did not intend that it should, and (2) because the bond was not capable of including it. It was a bond granted under the Aberdeen Act, which gave an heir power to bind his entailed estate, but not to go further and bind money held in the position of the money in question. The granter said in the bond that the subject affected by it was to be three years' free rent or value of the "said entailed estate"—that was the entailed estate of Montgomerie, of which in the narrative he described himself as heir of entail in possession. Now, the money here in question was not part of that estate in a strict sense, nor yet in the sense of being subject to the same destination, for in the entail of Montgomerie existing when, the bond was made the provost, bailies, and ministers of Kilmarnock were called at the end of the destination as heirs of entail, whereas the trust under which the money was invested directed that any entail of lands to be bought with it should be one "excluding the provost, bailies, and ministers of the town of Kilmarnock from any interest therein or right of devolution on failure of the heirs of entail." Again, the trustees under the trust to entail were not bound to purchase lands to be entailed, but were "entitled, if they think proper, to apply the said sums, or any portion thereof, in payment *pro tanto* of children's provisions charged upon the rents or fee of the estate of Montgomerie." It was impossible, in view of this alternative power of application, to say that the money was just in the same position as the entailed estate. These considerations, which depended on matters which were all known to the granter, shewed that he did not intend the money in question to fall under the bond. (2) On the second point he maintained that under the Aberdeen Act itself it was clear that the bond of provision could only apply to lands in the entail. It was argued that sections 26 and 27 of the Rutherfurd Act extended the powers of the heir in possession to money in trust to be entailed, dealing with it as if it were entailed, and that section 8 of the Entail Amendment Act, 1868,* extended the Aberdeen Act to trusts for entails to be executed, but the answer was that already given on the first point, that the trustees were here under no necessity to buy land and entail it at all, if they preferred to pay off children's provisions. In *Callander* v. *Callander*[1] an heir who had power under the entail to make provisions for younger children "only by way of infeftment and locality, or by assignation to the rents," made provisions for them by binding the next heir to pay to trustees a capital sum, and in security of it to infeft them in the whole estate. The Court, though the deed declared that if it should be found to exceed the granter's power it should be reduced *quoad excessum* or the form varied in compliance with the meaning of the entail, refused to reform it, and held it invalid under the entail, and incapable of being sustained under the Aberdeen Act because it bore to be in exercise of the power given by the entail. So, in the earlier case of *Dickson*,[1] where it was held that a bond which had been granted with reference to the deed of entail could not be founded on as a provision under the Aberdeen Act, Lord Brougham said, with respect to the exercise of powers under the Aberdeen Act, that "it is not necessary to set forth in an instrument executing a power that it has been framed in execution of that power, . . . but upon a question as to two powers or faculties, one of them being expressly stated by the party to be the one under which he executes it, I know of no case in which the other power, unthought of by him, had been held to validate the instrument." Both cases were strongly in favour of the first party.

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* This section enacts, *inter alia*, that the Montgomery Act (10 Geo. III. c. 51) and the Aberdeen Act (5 Geo. IV. c. 87) "shall from and after the passing of this Act be applicable to all entails, whether dated before or after 1st August 1848, and to all trusts of whatever date under which land is held for the purpose of being entailed, or by which money or other property, real or personal, is invested in trust for the purpose of purchasing land to be entailed; and the powers conferred by the said two last-mentioned Acts, or either of them, may be exercised with reference to such land, money, or property by the person who, if such land had been entailed in terms of the trust, would be the heir in possession of the entailed land and by the person who, if such money or other property had been invested in the purchase of land to be entailed, would be the heir in possession under the entail to be executed of such purchased land if such entail had been executed."

[1] May 21, 1869, 7 Macph. 777.

Argued for the first party on the third question;—The patronage of Tarbolton was included in the entail, and the compensation for it ought to be the heir's. The Patronage Act, 1874, did not direct the application of the money, but section 26 of the Rutherfurd Act provided what should be done with money derived from the disposal of part of an entailed estate, and gave the heir the same interest in it as in the land. The Patronage Act provided, section 4, that it should not be "incumbent" on a patron or trustee of a patron to present a petition for the fixing of compensation for loss of patronage—a provision not easily explained if the right was only personal and unconnected with the estate itself.

Argued for the second, third, fourth, and fifth parties on the first question;—The power was exercised in virtue of the Aberdeen Act. The agreement to put the money in trust shewed what was the estate over which the granter could under that Act give provisions to younger children. That was its proper function. The matter of his intention was very clear on a consideration of the figures in the deeds. Mr Paterson knew the rental of his own estate, the free rental of which, after proper deductions, was £2841, 4s. 9d., and three years of which was £8523, 14s. 3d., while three years' interest on the deposited money was £927, 12s., giving a total of £9451, 6s. 3d. Now, the provision he made under his powers was one of £10,000, to be restricted, if necessary, so as to bring it within his powers under the Act. It was clear that he wished to use all the powers he had, and it was not to be supposed he would wish to exclude the entailed money, but the contrary. The power given to the trustees in the trust of the money to pay off provisions only shewed the desire that was felt to keep the land and money together, and the reasonableness of calling both the entailed estates. The cases of *Callander* and *Dickson*, quoted by the other side, only shewed that where the heir had done what was inconsistent with his powers it could not receive effect to any extent. The supposed difference between the destination in the entail of the land and in the entail to be made did not really exist. The provost and bailies and ministers of Kilmarnock in the former were not heirs of entail but only in the position of heirs whatsoever at the end of a destination in an entail. But however that might be, the agreement to place the money in trust to be entailed put the money in the same position as entailed estate.

On the third question. The compensation for patronage was truly personal. It might be claimed or not by the patron who was in life during the six months in which the claim could competently be made.

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[1] Dickson v. Dickson, July 3, 1851, 13 D. 1291, 23 Scot. Jur. 612, affd. 1 Macq. 729; Macpherson v. Macpherson, May 24, 1839, 1 D. 794.

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If he chose to claim it he could do so, but it was just a debt payable by instalments.

At advising, on 20th July 1887, with regard to the first and third questions,—

LORD JUSTICE-CLERK.—This case has given us a good deal of anxiety with regard to one of the questions put to us—that, namely, which involves a consideration of the 4th clause of the Aberdeen Act (5 Geo. IV. c. 87). We thought it advisable to consult with other members of the Court, and so an interlocutor was pronounced, appointing the case to be argued before ourselves with the assistance of three of our brethren of the First Division—I mean argued with reference to the second question. We have had the matter under consideration again, and have thought it essential to have the opinion of the whole Court, looking to the important nature of that question. We discharge the former order as regards that hearing, and will now appoint minutes of debate to be prepared and laid before the whole Court.

With regard to the first and third questions, however, we are prepared to give judgment.

The first relates to the interest of certain sums of £4800 and £2930 funded debt of the Glasgow and South-Western Railway Company. The question with regard to these two sums is, whether they fall to be taken into calculation in estimating the amount due under the bond of provision executed by the late William Paterson of Montgomerie as heir of entail of Montgomerie under the Aberdeen Act? I am of opinion that these sums, which were sums directed to be entailed, and which have been invested for the purpose of the purchase of land to be added to the entailed estate, are truly in this question under the Aberdeen Act. By the trust-deed it is declared that the heir of entail "shall have the same powers in regard to the above-mentioned sums that he would have had if they had been invested in the purchase of lands, and entailed in terms of the Montgomerie entail according to the present law, or any future Act that may be passed affecting entails." It seems clear therefore that it was in view to treat these sums as part of the entailed estate. The proceedings in regard to the matter are narrated in the special case, and I do not need to enter into them in detail, but it is quite clear what the conception was upon which the investments have been made. The provision seems to me to be perfectly clear—that until the sum is invested in the purchase of land the heir of entail in possession of Montgomerie shall have the same control over the sum, and the interest upon the sum, as he would have had in lands subject to the entail. It is said that Mr Paterson, who executed the bond under the Aberdeen Act, did not intend—or at all events had not duly carried out the intention—to charge those invested funds as part of the estate of Montgomerie. I am of opinion that it was totally unnecessary that he should do so, because they are part of the estate of Montgomerie, inasmuch as they fall under the same destination as the entailed lands, and the same provisions in regard to fetters affect them as affected the entailed lands. They can, in short, only be considered in the same way as the estate of Montgomerie would have been before this addition—for it truly was an addition—was made to it.

That is the general view I take of the investments. It is consistent with practice and with principle. There are provisions in the Entail Acts—in the

Rutherfurd Act and the subsequent Acts—in regard to money destined to be entailed. We know what these provisions are, and I think that no other result than what I have indicated would be consistent with the principles upon which such investments have hitherto been dealt with.

The third question is one of considerable interest—"Who is entitled to the several instalments of patronage compensation money?" I have formed a clear opinion upon this question, and that opinion is, that the instalments of the price of the patronage of Tarbolton, and in respect of which certain payments of compensation had become due under the Patronage Act, do not form part of the entailed estate, and that there was no obligation on the heir of entail to invest them or purchase with them land to be entailed, and that the subsequent heirs of entail had no interest in them whatever. I gather that not only from the nature of the fund itself and the source of it, but I gather it from the words also of the Church Patronage Act of 1874. It is enacted there that "in all cases in which the patronage of a parish is held either solely or jointly by a private patron, or guardian or trustee on his behalf, it shall be lawful for him, within six months after the passing of this Act, to present a petition to the Sheriff of the county, praying him to determine the compensation"; and then it says that "it shall not be incumbent on any such patron, or upon any guardian or trustee for such patron, whether the patronage is held upon a fee-simple title or under a deed of entail, or other limited title, to present such petition; and if no such petition shall be presented within the said period, it shall be held and taken that the claim for such compensation has been renounced, and no claim therefor shall afterwards be competent in any manner of way." I think it is impossible to contend that the fund was not placed entirely in the discretion of the heir in possession at the date of the passing of the Act, or that it was subject to any fetters at all, or creates any *jus crediti* whatever in the substitute heirs under the destination. I think the heir in possession could at his pleasure renounce the payment altogether, and the mere omission to present a petition within six months is, in my opinion, conclusive once and for all that no such payment was to be made. Therefore I cannot look upon that as a condition of things in favour of the substitute heirs of entail, or as being in any degree affected by the fetters under which the estate is held. Mr Paterson was the patron; he was entitled to present under the Act; and he was entitled to decline to receive compensation both for himself and all that were to succeed to him.

That, generally, is the view that I take upon this matter. The compensation does not come in place of any part of the entailed estate, but is merely to be regarded as a payment made to the party entitled to the next presentation by way of *succedaneum* to himself personally. I think it goes to the executors. Although the instalments are postponed I do not think that makes any difference on the right of the heir in possession at the passing of the Act. I think the instalments vested in him at that date, and that consequently his executors are now in right of them.

LORD YOUNG concurred.

LORD CRAIGHILL.—I. I think the first question ought to be answered in the affirmative. I have felt no difficulty in coming to this conclusion. By the trust-deed, a portion of which is quoted in article 6 of the special case, it is declared that the heir of entail in the possession of the estate of Montgomerie

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"shall have the same powers in regard to the above-mentioned sums that he would have had if they had been invested in the purchase of lands, and entailed in terms of the Montgomerie entail according to the present law, or any future Act that may be passed affecting entails." The effect of this declaration was, as I think, to bring the money in question as much within the powers conferred by the Aberdeen Act as if the lands for the acquisition of which it was held had been actually acquired and had been in possession of the heir of entail. The power to be exercised is not a power conferred by the trust-deed, for according to my reading all that is thereby done is to assimilate the interest of the money to the rent of the land intended to be bought. The power to be exercised, and which was exercised, was that conferred by the Aberdeen Act.

II. The executors of the last heir of entail, who was the party by whom the petition was presented to the Sheriff asking that the value of the patronage of Tarbolton should be fixed under the Church (Scotland) Patronage Act, 1874 (37 and 38 Vict. cap. 82), are the parties who in my opinion are entitled to the unpaid instalments of the patronage compensation money which was fixed by the Sheriff under the powers conferred by the said statute. They are the persons who are now in his right. The right of patronage by the passing of the Act was extinguished, and no longer formed a portion of the entailed estate. There is nothing therefore to which the present heir of entail as such may lay claim, because his rights are limited to property which is within the entail. More than that, the claim of this heir of entail is discountenanced by this consideration, that were he to get the money he would not get it as part of the entailed estate, because he would get it, not to keep for heirs of entail, but to spend it as his own money. Whoever shall succeed in a petition for patronage compensation will get what is absolutely his own, and here those entitled to the compensation money, so far as unpaid, are the heirs *in mobilibus* of the last heir in possession.

LORD RUTHERFURD CLARK concurred.

THIS interlocutor was pronounced:—" The Lords . . . answer the first question in the affirmative . . . answer the third question to the effect that the parties of the second part are entitled to the several instalments of the right of patronage of the parish of Tarbolton: In respect of the importance of the second question appoint the parties to prepare minutes of debate to be . . . . boxed . . . to the Judges of the whole Court for their opinion thereon."

The second question, which was remitted for the opinion of the whole Court, arose on the following clauses in the bond of provision executed by the late William Paterson under the powers conferred by the Aberdeen Act (5 Geo. IV. c. 87),—" Seeing that I am now desirous of granting, by virtue of the powers conferred on heirs of entail by the said statute, a suitable provision to my second son, William Alexander Orr Paterson, not succeeding to the said entailed estate, and that I have made what I considered suitable provision otherwise for my other younger sons, Charles Orr Paterson and Henry Edmund Paterson, and also for my two daughters, Mrs Ann Paterson or Sadlier, and Mrs Mary Paterson or Campbell, therefore I do hereby, in virtue of the foresaid powers contained in the said Statute of 5 Geo. IV. chap. 87, and the subsequent Entail Statutes, and subject to the declarations and restrictions after mentioned, bind and oblige myself, and the heirs of entail succeeding to the foresaid estate of Montgomerie, to content and pay to my said son, William Alexander Orr Paterson, the sum of £10,000 sterling, payable one year after my death, with a fifth part more of penalty in case of failure, and the interest of the said sum at the rate of four per centum from the first term of Whitsunday or Martinmas after my death to the foresaid term of payment, and thereafter during the not-payment thereof. But in the event of its being found to be in excess of my powers to provide the whole of said sum to my said son, William Alexander Orr Paterson (but only in that event), I bind and oblige myself, and the heir of entail succeeding to the foresaid estate of Montgomerie, to content and pay to and among the said William Alexander Orr Paterson, Charles Orr Paterson, and Henry Edmund Paterson, the said sum of £10,000 sterling, payable one year after my death, with a fifth part more of penalty in case of failure, and the interest of the said sum at the rate of four per centum from the first term of Whitsunday or Martinmas after my death, to the foresaid term of payment, and thereafter during the not-payment thereof, and that in the proportion following—*videlicet:* To my son William Alexander Orr Paterson, the sum of £9000 sterling; to my son Charles Orr Paterson, the sum of £600 sterling; and to my son Henry Edmund Paterson, the sum of £400 sterling. Or otherwise, and in the event of its being found to be in excess of my powers either to provide the whole of said sum to my son William Alexander Orr Paterson or to apportion it among my said three sons in manner before mentioned (but in that event only), then to content and pay the said sum of £10,000 sterling, among the said William Alexander Orr Paterson, Charles Orr Paterson, and Henry Edmund Paterson, and Mrs Ann Paterson or Sadlier, and Mrs Mary Paterson or Campbell, in equal proportion, payable also at the term, and with the interest and penalty before provided. Providing also, that if the sum above settled on my said son William Alexander Orr Paterson, or alternatively, in either of the events above mentioned, on my said three sons, or on my said three sons and two daughters, shall be found to exceed three years' free rent or value of said entailed estate, as the amount of the said free rents and values shall be ascertained in the manner pointed out by the said statute, then the said sum or sums, as the case may be, shall be and are hereby proportionally restricted so as to be consistent with the powers conferred by said statute."

The question was,—"Who is the party entitled to the sum due under the said bond of provision—(*a*) The said third party to the whole amount; (*b*) The said third party and his brothers, Charles Orr Paterson and Henry Edmund Paterson, in the proportion stated; or (*c*) The whole younger children equally?"

Argued for the third party, William Alexander Orr Paterson;—On a sound construction of the Aberdeen Act * the granter of a bond under

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* The Aberdeen Act (5 Geo. IV. cap. 87), sec. 4,—"And be it further enacted, That it shall and may be lawful to the heir of entail in possession of any such entailed estate as aforesaid to grant bonds of provision or obligations, binding the succeeding heirs of entail in payment out of the rents or proceeds of the same to the lawful child or lawful children of the person granting such bonds or obligations, who shall not succeed to such entailed estate, of such sum or sums of money, bearing interest from the granter's death, as to him or her shall seem fit: Provided always, that the amount of such provision shall in no case exceed the proportions following of the free yearly rents or free yearly value of the whole of the said entailed lands and estates after deducting the public burdens, liferent provisions, including those to wives or husbands, authorised to be granted by this Act, the yearly interest of debts and provisions, and the

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it might settle a provision on one or more of his younger children as he saw fit. Its object was to empower the heir in possession to provide for children not succeeding to the estate, and it was an absolute power to do so as to the granter "shall seem fit." The heir who did succeed had no right to interfere so long as the burden did not exceed the power. So long as there were three younger children his predecessor's right was absolute. Nor was he obliged to exercise the right in any particular way, or indeed to exercise it at all. Having three younger children he might provide for none of them out of the estate, or for one only, or for two only. The child or children omitted had no right to interfere any more than the child who took the estate. It was obvious that there were good reasons for the Legislature not interfering with the father's discretion. He might have made ample provisions from other funds, or, as in the *Airlie* case,[1] have other entailed estates, and provided for separate children out of separate estates. Since then the children had no *jus crediti* to receive any portion under the Aberdeen Act, they had no title to object if the father used his discretion and exercised his power to the fullest extent in favour of one child. The word "for" in the clause "for one child one year's free rent," and so on, was construed by the other parties as equivalent to the word "to" or "in favour of," but the clause could not be so read. It was "the amount of such provision shall in no case exceed the proportions following . . . that is to say, for one child one year's free rent," &c. The enacting clause gave the heir in possession the power, and the proviso specifying the extent to which the estate might be burdened was merely meant in a question with the next heir only, to make the burden proportional, up to a certain point, to the number of younger children the heir in possession might have. Assuming that in order to justify a provision of three years' free rent it was necessary that three children be benefited, that was done by the alternative clause which gave to William £9000, to Charles £600, and to Henry £400, an apportionment admitted not to be unfair if unequal division were allowed. But it was said that equal division must be made if three years' rental were dealt with at all. The contention was not in itself reasonable, nor in accordance with practice.[2]

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yearly amount of other burdens of what nature soever, affecting or burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof as aforesaid, to the heir of entail in possession: That is to say, for one child, one year's free rent or value; for two children, two years' free rent or value; and for three or more children, three years' free rent or value in the whole: Provided always, that such provision shall, except in the case of the settlement thereof by a marriage-contract, as hereinafter mentioned, be valid and effectual only to such child or children as shall be alive at the death of the grantor, or to the child or children of which the wife of the grantor shall be then pregnant; and upon any such child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished for ever, and shall never be set up as a debt against any succeeding heir."

Sec. 5.—"Provided always, and be it further enacted, That if any child to whom any such provision as aforesaid may be granted shall marry, and that such provision or any part thereof shall, with the consent of the grantor of the same, be settled in the contract made in consideration of the marriage of such child, and such child so marrying shall die before the grantor of such provision, then and in all such cases the provision or any part thereof so settled in consideration of such marriage shall remain and be effectual as if such child had survived the grantor."

[1] Earl of Airlie, July 20, 1852, 14 D. 1063.

[2] 1 Jur. Styles, Heritable Rights, p. 190; Maxwell v. Grierson, Dec. 12, 1843, 6 D., Lord Justice-Clerk, at p. 213, 16 Scot. Jur. 143.

Even if it had been a vested right in the younger children, which was not maintained on the other side, the Apportionment Act[1] would have applied, and the total exclusion of any of the objects of the power would not invalidate the appointment. That Act applied to Scotland,[2] and though the preamble of it referred to "deeds, wills, and other instruments" the enacting words were perfectly general.

II. The matter had been determined by decision, and the view of the third party frequently assumed to be law by the Court. In the case of *Antrobus*[3] the point really left open was as to the extent to which the estate might be burdened, and the point decided was that the defender, the heir in possession, was bound to grant deeds to the extent allowed by the Aberdeen Act, although there might be no fund left for provision for his younger children other than the object of the provision. The case had since been regarded as authority for the proposition that as the father was not bound to exercise the powers vested in him in favour of his younger children, "he was also enabled to exercise that power in favour of one or more as he thought fit."[4] The power of the heir of entail to favour one or more of the children as he thought fit was assumed in the case of *Breadalbane's Trustees.*[5] In the case of *Strathallan*,[6] the judgment of the Court, affirmed by the House of Lords, involved the soundness of this contention. In *Grierson's* case[7] a bond of provision under the Aberdeen Act providing to four of the granter's numerous younger children, "and the survivors and survivor of them" was held to be a bond in the exact terms of the statute. Lastly, in the case of *Campbell*,[8] Lord President M'Neill and Lord Ardmillan (Ordinary) were of opinion that the granter, if he chose to exercise his statutory powers and provide the funds "was under no obligation as to the mode in which he was to divide them." These authorities, even apart from the argument on principle, were conclusive in the third party's favour.

Argued for the fourth and fifth parties;—I. The statute by its fourth and fifth clauses authorised an equal division among the children who should not succeed to the entailed estate, and no other division. The evil the statute was intended to remedy was the inability of proprietors of entailed estates to make proper provisions for their younger children. It must be construed in a liberal manner to effect its purposes of remedying that evil. In so far, however, as it imposed a burden on heirs of entail under which they did not previously lie, it must receive a strict construction. The provision for William Orr Paterson, being "one child," could not exceed one year's free rent, for the statute "provided always that the amount of such provision shall in no case exceed

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[1] Act 37 and 38 Vict. cap. 37.

[2] Mackie v. Mackie's Trustees, July 4, 1885, 12 R. 1230.

[3] Antrobus v. Innes, Nov. 25, 1830, 9 S. 70; and 3 Deas and Anderson's Reps., p. 286.

[4] Sandford on Entails, p. 303.

[5] Marquis of Breadalbane's Trustees v. Marquis of Breadalbane, May 26, 1840, 2 D. 904, (joint opinion of Lord President Hope, Lords Moncreiff and Murray, at p. 917, and opinion of Lord Fullerton, p. 938), 12 Scot. Jur. 456.

[6] Viscountess Strathallan v. Duke of Northumberland, May 20, 1840, 2 D. 840, (Lord Meadowbank, p. 854), 12 Scot. Jur. 436, aff. August 28, 1845, 5 Bell's Appeals, 396.

[7] Dec. 12, 1843, 6 D. 213, Lord Justice-Clerk Hope, pp. 213, 214, Lord Medwyn, p. 216, Lord Moncreiff, p. 219.

[8] Campbell v. Campbell, Dec. 13, 1860, 23 D. 159 (Lord President at p. 163).

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. . . for one child one year's free rent." Supposing the father had not gone on to make further provisions, and the question had been between William and the heir of entail, his elder brother, could the latter have been so burdened? He would have relied on the terms of the statute as shewing that he could not be bound to allow William to carry off more than one year's free rent of the estate. As it happened, in consequence of the alternative provisions of this particular deed, the heir of entail had no interest in the question; but if William's contention were sustained, the decision must apply to a case in which the heir and a younger child who had been given the whole of the younger children's provisions were the sole parties. The statute was intended to enable a father to encroach on the entailed estate for the benefit of the younger children, and any pretended exercise of its powers, except for their direct and personal benefit could not receive effect.[1] The extent of the encroachment was regulated by the number of those to be provided for, a line being drawn at the third child to prevent an unreasonable encroachment on the heir's rights. But if those for whose benefit alone the power was given did not receive the benefit of its exercise, that exercise was not within the statute at all. The second or the third child could not, surely, be entitled to a larger provision because he had several brothers and sisters. It had always been a canon of interpretation of the statute that the benefit of the younger children themselves must be directly provided for. Thus, a provision to grandchildren was not within it. So also in the *Breadalbane* case the Court held a bond which professed to be under the Act, but which made a provision not directly for the younger child herself, but only for her in liferent, the fee passing to her children or, in certain events, to strangers, was ineffectual to bind the heirs of entail.

The alleged authority[2] founded on by the other side consisted merely of *obiter dicta*. The question had never been directly raised and decided. The question there was whether a provision of a liferent to children, with directions to invest the fee and entail it on a series of heirs, fell within the powers of the granter, and the subject of construction was not the Aberdeen Act, but the powers of a particular entail. The opinion of Lord Newton (Ordinary) in the case of *Antrobus* (9 S. 70) did indeed go as far as the contention on the other side could require. But the Inner-House did not countenance that opinion, and the interlocutor did not decide the point. The reasoning of Lord Newton was inconclusive. It was quite true, as his Lordship said, that the younger children had no *jus crediti*, that the father was not bound to give anything by an Aberdeen Act bond to them, or, if he gave them anything, to give all that the Act permitted. But notwithstanding that, it might well be and it was maintained, that he could not exercise his powers for any other object than the object of the statute—the making provision for the younger children. If he omitted in whole or in part to provide for one of them, to that extent he lost his power of burdening the heir, a power given to him by the law on the condition that he must exercise on certain objects. If he chose to provide for one younger child only, he must do so to the extent of one child's share only.

In *Campbell's* case,[3] Lord Ardmillan cited the case of *Antrobus* to shew that the father could apportion as he chose. But for the reasons already shewn that opinion was erroneous, and it was an opinion unnecessary to the decision, for in that case the amount of the provisions had already been ascertained and charged on the estate, and therefore could not be open to dispute. Nor was the point really raised in the case of *Grierson*,[1] where the question was whether the bond was within the statute as being a provision in favour of the child, or without it as being a provision in favour of her issue. The provision giving the whole sum to William was therefore *ultra vires*.

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[1] Breadalbane's Trustees v. Marquis of Breadalbane, May 26, 1840, 2 D. 904.

[2] Viscountess Strathallan v. Duke of Northumberland, May 20, 1840, 2 D. 840, Lord Meadowbank at p. 854, Aug. 28, 1846, 5 Bell's Apps. 396, Lord Lyndhurst, p. 407.

[3] Campbell v. Campbell, Dec. 13, 1860, 23 D. 159.

Further the division must be equal. Where a provision was made to all the members of a class and no rule of division was given, the rule was that the division must be equal, and the considerations already advanced favoured the application of this rule. The younger children were all equally unprovided for out of the entailed estate, and it was for their benefit that the power to make provision was given, there being no suggestion that one was to be better off than another.

If the division was to be equal—and that, it was submitted, was the effect of the statute—it was the granter's will that the whole of his five children should have shares. The granter was not bound indeed, as a condition of exercising his full powers, to give anything to the fourth and fifth younger children at all, for he was entitled to burden the heir with provisions to the extent of three years' rents if these were to be distributed among three children. But he had declared that he would only confine his bounty to his three sons if he had power to give them unequal provisions. This it had been shewn was beyond his power, and therefore the daughters must be admitted to a share.

II. Alternatively, if the amount was not to be equally divided, the father, who made provision of an amount equal to three years' rent, must divide that among three children at least, in such a fashion that none of them should have an illusory share. It was not maintained, if this was to be the rule of division, that the apportionment of £9000 to William, £600 to Charles, and £400 to Henry, was an unfair exercise of the power. The ground on which this alternative claim finally rested was the same as that asserted for the first alternative, viz., that to justify a provision of three years' rents three children at least must be benefited.

It could not be maintained that, given this power of appointment, then by virtue of the Act 37 and 38 Vict. cap. 37, the father had power to disappoint two of the persons who were within the power, and give the whole fund to one. The Act in question applied exclusively to powers conferred by "deeds, wills, and other instruments," and not to a statutory power, particularly if that power was conferred for the very purpose of favouring all the objects of it.

The following opinions were returned,—

Lord President, Lords Mure, Shand, Adam, and Kinnear.—We are of opinion that the third party is entitled to the entire sum contained in the bond of provision, assuming that sum to be not more than three years' rent.

The object of the fourth section of the Aberdeen Act is to relax the fetters of entail, for the purpose of enabling the heir in possession to provide for his younger children; and to the extent to which the fetters are so relaxed, the proprietor of an entailed estate is placed in the same position as if he were unlimited owner. He must exercise his powers in conformity with the conditions of the statute, because, except in so far as the statute relieves him, he is restricted

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[1] Maxwell v. Grierson, 6 D. 203.

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by the fetters of the entail. But in construing these conditions, it is material to observe that the power is given to him alone, and that no corresponding right is given to anyone else. He is at liberty to exercise the power or not as he pleases, and to any extent he pleases, provided only that the provision he makes for a younger child shall not exceed in amount the proportion of the free rents authorised by the statute. So far, we do not understand that there is any controversy between the parties. The only question is, whether in case he has more than one child to provide for, he is restricted by the statute in settling and disposing of a provision, the total amount of which does not exceed the sum with which he is entitled to burden succeeding heirs. We are of opinion that he is not so restricted.

The question depends upon the construction of the proviso for limiting the amount of the provision; and we think the object and effect of that proviso is to determine the proportion which the total amount of the provision must bear to the rental of the estate, and that it has no other effect. We are far from thinking that the question is free from difficulty, or that the words of the proviso, if taken alone, will bear no other construction. But they must be read in connection with the enabling part of the enactment which they are intended to qualify; and when so read, the reasonable construction appears to us to be as we have stated. The statute empowers the heir to make provision for his younger children, subject to this condition, that "such provision shall in no case exceed" certain amounts; and then it proceeds to specify the maximum amount which may be given in each of three several cases: "for one child" the provision shall not exceed a sum equal to one year's rent; for two children two years' rent; and for three or more children three years' rent. We cannot think that the words "for one child," mean for "any one child," whatever be the number of children for whom the heir makes provision. If this had been the intention, it must have been so expressed. But this part of the clause is intended to refer to the case of there being one child only for whom provision has to be made; and accordingly, when the statute goes on to provide for the case of three or more children, it does not contemplate a separate provision for each, the amount of which is to be measured by anything that has gone before, but a total provision for all, the amount of which is not to exceed three years' rent. The statute, in our judgment, merely fixes the measure of the right given to the heir to bind the succeeding heirs in the several cases mentioned. If the heir makes provision for three children, or for four, there is nothing in the statute to require that each of the four shall have no more than a fourth part, or each of the three no more than a third part of three years' rent. The words of the proviso are satisfied if the total amount of the provision, in either case, does not exceed three years' rent. And there is certainly nothing in the purpose or reason of the enactment to import a restriction which is not expressed in terms. It was indispensable, from the nature of the enactment, that the total amount of the burden to be imposed on succeeding heirs should be fixed, and it is very intelligible that it should be fixed with reference to the number of children to be provided for. But it is not to be assumed, in the absence of an express enactment for that purpose, that the Legislature intended to go farther, and to regulate the distribution to any effect, or to deprive the father of a discretion which he alone would have the means for exercising with advantage to his family. And, therefore, if he should think fit to give one-half of the whole provision to one child among four, and to divide the remaining half among the other three, the statute gives no right to any one to take objection to that arrangement. The succeeding heir is not prejudiced, because no greater burden has been laid on him than his predecessor had right to impose; and the younger children are not prejudiced, because they have no right to anything except what their father thinks fit to give them.

But if the heir in possession may give to one child out of three or more more than one-third of the total provision, we think it follows, by parity of reasoning, that he may give him the whole amount, to the exclusion of the others. The excluded children have no title to complain; and the succeeding heir has no more interest in this case than in the former, for the provision, however it may be distributed, does not exceed the statutory amount. It is said that in this case the words of the statute are violated, because a provision from which one child alone takes any direct benefit is not a provision for three or more. But the objection appears to us to rest upon too narrow a construction. If the words were taken alone, a provision "for three children" might very well mean a provision to or in favour of three, and no fewer. But the preposition "for" has a variety of meanings; and the precise force which it ought to receive in the particular case must depend upon the context. Now the statute, as has been seen, does not contemplate the children directly as the subjects of any right which it creates. It empowers the father to make a provision for them, varying in amount according to their number; and it is in a clause for determining the total amount which may be given, in each of three different cases, that the words in question occur. In this connection, the word "for" may fairly be construed as meaning "in respect of," or "in the case of," referring merely to the fact of there being one, two, or more younger children to be provided for, but without implying that each, if there be more than one, is to take a direct and separate interest under the provision.

A different construction would, in our judgment, tend to defeat the purpose of the statute. It is a beneficial provision in favour of heirs of entail. But there may be many cases—and the present case is an example—in which the heir would be prevented from making the best use, or even a just and reasonable use, of his power under the statute, if he were precluded from taking into consideration, in exercising the power, the whole means at his disposal for providing for his younger children, and the different claims or necessities of each. He may think it fitting to give the whole, or the greater portion, of the statutory provision to one child, either because the others have been already provided for, or for other reasons of which he alone can judge; and we think it would be contrary to the policy of the statute that he should be precluded from giving due effect to the considerations which ought to influence a father in the disposal of his means, by any fixed and rigid rule as to the apportionment of the sum with which he is entitled to charge the succeeding heirs of entail.

The true meaning of the enactment, therefore, appears to us to be that the heir in possession may make provision for his younger children, to an amount not exceeding three years' rent, if he have three such children or more to provide for; and that if he does not exceed that amount, he may divide it among them, or give the whole to one, as he thinks fit. And we think this construction is supported by authority of weight. It is true that the question has not been directly decided. But the current of judicial opinion at all events since the case of *Antrobus* is all in this direction. The opinion of Lord Newton in that case may not be technically binding; but it is of high authority, and we believe it to have been generally accepted as a sound exposition of the statute. The point is assumed as clear by the Lord President and Lord Moncreiff in the *Breadalbane* case; and we are satisfied that the practice has been in accordance with their opinion. This is a most valuable aid in the interpretation of a statute; and if the question were otherwise more doubtful than we believe it to be, we should hesitate to disturb a construction which has been accepted by the profession, and acted on for so long a period.

Lord Lee.—As the granter of the bond in question held his estate under the fetters of a strict entail, complete in all the fettering clauses, and containing no reservation of any power to grant provisions to younger children, I think that the question is whether the Statute 5 Geo. IV. cap. 87, authorised him to grant a bond in favour of one of his younger children (there being three or more), binding the succeeding heirs to the extent of three years' free rent, or to any extent exceeding one year's free rent.

It has been suggested that the effect of the statute is very much the same as the effect of a reserved power in the deed of entail, "to provide younger children to three years' free rent" (such as existed in the case of *Viscountess Strathallan*, 2 D. 840, affd. 5 Bell's App. 396), and that therefore, in virtue of the statutory powers, the heir in possession, having three or more younger children, is just in the position of an unlimited proprietor of the estate to the extent of three years' free rent.

If this were a sound view, it would, I think, lead irresistibly to the conclusion that the bond here in question is valid in favour of William Paterson to the full extent of three years' free rent.

But my opinion is that the case of a bond granted under the statute alone (the fetters of the entail being complete and perfect) is altogether different.

The statute is so expressed as to keep up the fetters of the entail excepting in so far as relaxed to the effect of exercising the powers thereby conferred, and these powers are granted "under certain regulations and conditions," which are specified. The powers only enable the heir in possession to bind the succeeding heirs.

In the case, therefore, of a bond granted under the statute, I think that it cannot be said that it is the granter's infeftment as proprietor of the lands that makes it effectual. It is the power granted by the statute; and, in my opinion, its validity and effect must depend upon the question whether it has been executed in terms of the statutory powers. I think that this was settled in *Lady Elizabeth Pringle's* case (*Breadalbane Trustees*, 2 D. 904), and the Judges in the case of *Grierson* v. *Grierson* (6 D. 203) so regarded it. The Lord Justice-Clerk there stated, in distinguishing the two cases, "the bond granted must be in terms of the statute, and the power must be exercised in the form and mode pointed out by the statute. I think that the *Breadalbane* case has fixed that principle of construction."

The distinction between powers reserved in the entail and powers conferred by statute upon heirs in possession holding under the fetters of a strict entail was dwelt upon by Lord Fullerton in the case of *Viscountess Strathallan* (2 D. 840). His opinion contains the following passage at p. 864:—"For in this one most important particular the present case differs from that arising under the settlements executed by Lord Breadalbane. The entail there was complete, and did completely exclude provisions such as that which was granted. The power sought to be exercised was one conferred by special statute, dispensing, to a

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certain extent, with the fetters. It was there powerfully argued that unless the provision was clearly and strictly within the line to which the statute extended the power, it could not be sustained. Here the question arises under a power granted by the entail itself, and a power granted under the express forms of an exception and reservation from the prohibitive and resolutive clauses." Lord Medwyn (at p. 849) draws the distinction not less pointedly. It thus appears that even the Judges in the minority in *Lord Breadalbane's* case recognised the difference of the question under the statute.

While, therefore, the heir in possession may quite truly be said to be free, excepting in so far as he is fettered, I think it not less clearly settled by the decision in *Lady Elizabeth Pringle's* case that, if the fetters of the entail be complete, he cannot exercise the statutory power of burdening succeeding heirs with provisions, otherwise than subject to the "regulations and conditions" of the statute.

This being so, the question is, whether the bond in question is in accordance with these regulations and conditions, and, if so, to what extent?

My opinion is that the statute empowers the heir of entail in possession to grant a bond of provision in favour of one only of several younger children, if he sees fit to do so; but in that case I think that he is subject to the statutory condition that "for one child" the amount of such provision shall not exceed one year's free rent. If he shall desire to grant a bond of provision in favour of three or more younger children, he is empowered to do so, but still subject to the condition that "in no case" shall the amount of such provision exceed, for one child, one year's free rent.

If it had been intended to enable the heir in possession to accumulate the whole provisions authorised to be charged against succeeding heirs upon one of several younger children, I think that the statute would have been differently expressed. It would have been very simple to express it in like manner to the clause in the Strathord entail (*Strathallan* v. *Duke of Northumberland*, 2 D. 840). The fact that it was not so expressed, and that the declared object of the statute is to confer or enlarge, "under certain regulations and conditions," the powers of granting provisions, appears to me to indicate that the proportion to be observed in limiting the amount was intended to be dependent on the number of children to be provided out of the rents of that estate, and not upon the number of children existing. I find nothing in the statute to support the view that the heir was empowered to exercise in favour of one child the whole power conferred upon him for three or more children. My view of the statute is, that it only authorises the succeeding heirs to be burdened with provisions out of the rents of that estate, according to the number of children for whom such provisions shall be granted; and that a provision for one child exceeding one year's free rent is not authorised.

It is suggested that the heir in possession may have other estates, entailed or unentailed, out of which he has provided or may provide for the other children. In that case I think that he should have no difficulty in exercising the power conferred by the statute in conformity to its conditions.

But if it be consistent with a sound construction of the statute that the heir in possession may grant the whole amount of three years' free rent out of one estate to one of his younger children, I think that he must have power to do this in favour of the same child, in the case of each of his entailed estates (however numerous), and in each case to leave his other younger children unprovided. It seems impossible to regard the fact that he may make, or may have made, provision otherwise for his other younger children, as affecting the question whether the bond is valid under the statute to any extent beyond one year's free rent for one child.

If the Legislature had intended that the whole amount of three years' rent might be accumulated upon one of several younger children, and that nobody should have any title to object so long as that amount was not exceeded, I cannot understand why one younger child should not have been allowed, in all cases (whether there be one or many younger children), the full amount of three years' free rent. Why should the heir in possession be authorised to provide one of several younger children with three years' free rent (leaving the others possibly unprovided), and be unauthorised to provide him to the same extent where there are no others to be provided? I think that the provision of the statute "that the amount of such provision shall in no case exceed the proportions following," must receive effect; and that the succeeding heir has an unquestionable right to insist upon it.

My opinion on the whole is that the bond in question is not valid in favour of William A. Orr Paterson, excepting to the extent of one year's free rent, and that the whole amount of three years' free rent (assuming the sums of £600 and £400 with one year's free rent to be less than three years' free rent) can only be made good under the bond against the succeeding heir, by adopting the alternative of dividing it in equal proportions among the whole younger children.

I have only to add, with reference to Lord Newton's opinion in the case of *Antrobus*, that the opinions delivered in the Inner-House seem to me to indicate that the judgment of the Court did not imply any adoption of that part of the Lord Ordinary's opinion which is now founded on, and that I respectfully dissent from it as not consistent with a sound view of the statute.

Lord Fraser.—I concur in the opinion of Lord Trayner.

Lord M'Laren.—I was at first disposed to favour the view represented by the second alternative; but after reading the opinion signed by the Lord President and other Judges, I have come to concur in the results at which they have arrived, and in the main in their reasoning.

To a complete expression of my view, it is only necessary that I should add a few sentences.

The statute empowers the heir to create a fund of provision, to be ascertained by reference to rental; and the amount of the provision "for three or more children" is to be a sum not exceeding "three years' free rent or value in the whole." The words "in the whole," imply that provisions of unequal amounts may be granted to the children who are creditors in the bond, provided their aggregate value does not exceed the ascertained sum based on three years' rent or value.

Now, in general, when a father, or person *in loco parentis*, was empowered to apportion a fund amongst a family, our law (before it was altered by statute) would not permit him to apportion a vanishing share to any member of the family. This, no doubt, would be the logical limit of an unqualified power of apportionment; but the legal limit was that a substantial share must be given to each child.

The limitation of the power, however, presupposes that there is a right on the part of each child to receive a share of the fund; and had the language of the Aberdeen Act been consistent with the view that every one of the younger children is to have a right of participation in the fund, then I should have held that the father could not appoint unsubstantial shares to certain of the children, or give the whole to one child. But the statute is complied with in form and substance by a bond in favour of three children out of a family of six; and as no one child has an antecedent right to say that he or she must be one of the three children in whose favour the bond is to be granted, I infer that no child has a title or interest to complain that vanishing shares are given to any of the objects of the power, or (which is the same thing) that the entire fund is given to one.

LORD TRAYNER.—The bond of provision in question is one granted by an heir of entail in possession, in favour of his younger children, in virtue of the powers conferred on heirs of entail by the Aberdeen Act. By it the granter binds and obliges himself and the heirs of entail succeeding him (1) to pay to William, his second son, the sum of £10,000; or in the event of its being found that to provide the whole of said sum to his said son was in excess of his powers, then (2) to pay the said sum to his sons William, Charles, and Henry in the proportions following—viz., to William £9000, to Charles £600, and to Henry £400; and in the event of that also being found to be in excess of his powers, (3) to pay said sum of £10,000 among his whole younger children (five in number) in equal proportions. The £10,000 thus provided was regarded by the granter as the amount of three years' free rent of the entailed estate, and it is provided that in the event of its being ascertained that said sum exceeded three years' free rent, then "the said sum or sums, as the case may be, shall be and are hereby proportionally restricted, so as to be consistent with the powers conferred by said statute." The question now is, who is entitled to the provision thus made? Is William entitled to the whole £10,000; or, is it divisible in the proportions foresaid between William, Charles, and Henry; or, is it divisible among the whole of the younger children in equal shares?

The solution of the question now to be determined depends largely on the construction to be given to the fourth section of the Aberdeen Act, quoted in the bond of provision. It provides that an heir of entail in possession shall be entitled to grant bonds of provision or obligations binding the succeeding heirs of entail to make payment to the younger children of the granter of the bond "of such sum or sums of money, bearing interest from the granter's death, as to him or her shall seem fit; provided always that the amount of such provision shall in no case exceed the proportions following . . . that is to say, for one child one year's free rent or value, for two children two years' free rent or value, and for three or more children three years' free rent or value in the whole." It does not occur to me that the terms of this clause are ambiguous, or its meaning doubtful. If a provision is made for one younger child, that provision shall not exceed one year's free rent; if for three or more younger children, it shall not exceed three years' rent. The number of younger children which the heir granting the provision may have existing at the date of the bond, or at any other time, does not appear to me to enter into the question. That matter is not taken into account in the statute. The only fact (so far as the number of the younger children is concerned) which requires to be, or can be, considered is, the number of children in whose favour the provision is made. The heir in possession is at liberty to make provision for his younger children out of the rents of the entailed estate, or not, as he pleases. But if he does make such provision, it shall not exceed the proportions specified. If, therefore, having a dozen children, he makes provision merely for one of them, he cannot make that provision in excess of one year's rent; if for three or more of them, three years' rents. Whether, therefore, a bond of provision granted under this statutory authority is valid and effectual or is not so, will depend upon the number of children provided for and the amount of the provision made. Children existing but not provided for are not taken (as I have said) into account by the statute.

This being my view of the statute, it follows, in my opinion, that the first branch of the threefold provision in question cannot be given effect to. It is a provision expressly in favour of one child (William) for a sum exceeding one year's rent; it is, in fact, a provision for one child to the extent of three years' rent, and is therefore not authorised by the statute.

It is maintained on behalf of William that there is authority for holding that this provision in his favour is valid, and reference is made to the opinion of Lord Newton in *Antrobus* v. *Innes*, 25th November 1830 (9 S. 70), and the opinion of the Lords President (Hope), Moncreiff, and Murray in *Breadalbane*, 26th May 1840 (2 D. 917). The opinion of Lord Newton (given in a note to a judgment which was brought under review) undoubtedly favours the contention in support of which it is cited. But it has to be observed, in the first place, that the case in which that opinion was delivered was decided upon grounds that rendered it unnecessary to put any construction on the Aberdeen Act; and in the second place, that the other Judges, when the opinion in question was brought under their notice, expressly refused to take it into consideration, as being unnecessary to the decision of the question before them (3 Deas and Anderson, 286). Lord Newton's opinion, therefore, stands in the position of being *obiter*, and not confirmed, but practically put aside by the Judges who were reviewing his interlocutor. The opinion by the Lord President and others in the *Breadalbane* case was also *obiter;* the question now raised (for the first time directly raised) was not argued before them. They were dealing with a totally different issue. These opinions, therefore, although the opinions of eminent Judges, cannot be accepted as authority in the decision of a question which was not before them, or argued, or considered.

The *Glenlyon* case (2 D. 840) is referred to also as an authority "finding that the heir of entail had power to provide the whole three years' rent to one younger child." No doubt that was the result of the judgment, but the circumstances of that case make the judgment of no authority in the present. That case did not depend upon the Aberdeen Act at all. It was a case where, by the terms of the deed of entail, the heir in possession was authorised "to provide younger or other children besides the heir to three years' free rent," &c. Under that power, and not by virtue of the statute, the heir in possession provided the whole three years' rents to one younger child, and the provision was held good, because the power given under the entail was held practically to exempt the three years' rents from the fetters of the entail, and to leave the heir in possession the power of dealing with them as if he had been proprietor in fee-simple. How little that case bears, as authority, upon the present may be gathered from the following passage in the opinion of Lord Meadowbank (2 D. 856):—"In conclusion, I beg leave to observe that it does not appear to me that much light can be thrown upon this case by a reference to that of the *Trustees of the Mar-*

quess of Breadalbane and *Lady E. Pringle*, the one arising in a clause under a deed of entail, and the other under the provisions of an Act of Parliament, to each of which respectively very different rules of construction are to be applied. In the case of construing powers conferred by a tailzie, the principle unquestionably is to give that interpretation which is most calculated for leaving the heir in possession free and unfettered; while powers conferred by statute cannot be extended beyond what the terms employed plainly and distinctly import, and are subjected to a more strict and rigid construction."

I am of opinion that there is no authority for holding that under any reasonable construction of the Aberdeen Act a bond of provision solely in favour of one child can exceed the amount of one year's free rent. If there was any authority to that effect, it would appear to me to be in direct conflict with the higher authority of the Act itself.

The second branch of the provision in question stands in a different position. It is a provision in favour of three children of the granter, although that provision is distributed in unequal shares. This inequality in the distribution of the provision is made the ground of objection to it. It is said on behalf of the whole younger children (except William) that "if the granter is to exercise his full power under the statute, he must give to each of the younger children an equal share of the provision." The answer to that objection seems to me to be that the statute imposes no such obligation on the granter of the provision; it makes no reference whatever to the distribution or division of the provision which it authorises to be made. It does not require the heir in possession to make any provision for younger children; it confers on the younger children no right to demand any provision; it confers on them no right which would entitle them to question the legality or the propriety of any such provision, no matter in what terms it is conceived. The succeeding heir has a right to challenge the provision if made otherwise than as according to statute; but in my opinion no one except the succeeding heir can make such challenge, and he only on the ground I have stated. The succeeding heir in the present case takes no objection to the validity of this branch of the provision, and rightly so, in my opinion. Being a provision in favour of three younger children, to the extent of three years' rents (for I assume meantime that the £10,000 does not exceed the sum of three years' rents), he has no interest to object. Even if any objection were offered to this branch of the provision on the ground of unequal distribution, by children having an interest and title to object, in my opinion the objection should be repelled. (1) If the heir in possession has made a provision authorised by the statute, it is not to be subjected to any limitation which the statute does not impose. The statute imposes no restriction or limitation on the heir making the provision beyond this, that it shall for a certain number of children not exceed a certain sum. How that sum is to be divided the statute does not say. It must therefore be left to the heir making the provision to say how it is to be divided. Nobody else can do so; the succeeding heir cannot do so, nor can the younger children, whether partly benefited by, or entirely excluded from, the provision. (2) When the provision has been made, the amount of that provision is practically set free from the entail restrictions, and may be dealt with by the heir making the provision as a fund of which he is proprietor in fee-simple, and he may dispose of it as he pleases, provided he benefits none but younger children, that being a limitation imposed upon his power by the statute. "The effect of the statute in this particular is to place the entailed

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proprietor in regard to provisions in terms of the statute exactly on the same footing as if to that extent the rents of the entailed estate formed part of his unlimited property"—(per Lord Fullarton in the *Breadalbane* case). (3) The same doctrine is recognised in the cases of *Grierson* (6 D. 203), and *Campbell* (23 D. 159).

It has been suggested that the second branch of the provision in question is not one provision for three children, but constitutes in fact three bonds—one in favour of William, one for Charles, and one for Henry—and that the provision for William is not in conformity with the statute, in respect it exceeds one year's rent. I am not able to adopt this view. I take the bond in question to be what it professes to be, and what I think it truly is—namely, one bond of provision in favour of three younger children, the amount in which is not disconform to the statute, in respect that for the three children the provision made does not exceed the statutory limit of three years' rent. That one child may take more than another under that bond does not, in my opinion, make the bond disconform to the statute, which does not provide that in no case shall one child get more than one year's rent. It provides that the rents of the entailed estate shall not be burdened beyond a certain amount as a provision for a certain number of children, but nowhere provides what each or any child's share shall be. If the bond is otherwise conform to statute, the resulting interests under that bond will not make it disconform. This again is an objection which no one interested in the provision has any title or interest to maintain. The succeeding heir cannot object, for the rents of the estate have not been burdened beyond what the statute allows—three years' rents for three children. And accordingly the heir now in possession is not maintaining this objection. Nor can the younger children (Charles and Henry) object on this ground, for they had no right to any provision whatever, and therefore they cannot object that the provision actually made for them is not so large as it might have been had their father been disposed to make it larger.

On the whole matter, I am of opinion that the parties entitled to the sum due under the bond of provision in question are William, Charles, and Henry Paterson, in the proportions of £9000 to William, £600 to Charles, and £400 to Henry. If it be ascertained that the sum of £10,000 exceeds the amount of three years' free rent, the sums payable to William, Charles, and Henry respectively will suffer proportionate abatement.

At advising,—

Lord Justice-Clerk.—I concur in the opinions of the Lord President and the other Judges who agree with him.

Lord Young.—I am not able to concur in that opinion. It ends with a sentence which struck me a good deal—that "if the question were otherwise more doubtful than we believe it to be, we should hesitate to disturb a construction which has been accepted by the profession, and acted on for so long a period." I am not at all aware that the construction which these learned Judges put upon the statute has been "accepted by the profession and acted on for so long a period." I know of no evidence of that at all. The present case seems to afford some evidence to the contrary. For, in the first place, this deed, prepared I do not know by whom, but I assume by an experienced conveyancer, presents three alternatives, the maker of the deed, with the advice of his agent who prepared it, being doubtful as to the construction of the statute. He presents the alternatives in the order in which he prefers them, but there is no indication there that there is a construction which has been accepted by the profession and acted on for a long period. After providing three years' rent to one son, he goes on—"But in the event of its being found to be in excess of my powers" to do that, then he does something else. And then again, "or otherwise, and in the event of its being found to be in excess of my powers either to provide the whole of the said sum," and so on, then he does something else. There is no indication there of a construction which has been accepted by the profession and acted on for a long period. Then, if I look to the judicial opinions here, I find five of the learned Judges, and your Lordship now concurring with them will make six, who say that any one of these alternatives is as good as another. That is the opinion of six of the learned Judges. Two of the learned Judges—Lord Fraser, and Lord Trayner—are of an opinion contrary to that of the six learned Judges whom I have first referred to, that the construction of the statute upon which the first alternative proceeds is quite erroneous and untenable—that is to say, they think the construction to be quite erroneous and untenable which has been accepted by the profession and acted on for so long a period. Then another learned Judge—Lord Lee, with whom I happen to agree,—thinks the construction on which the first alternative proceeds is inadmissible, and that the only alternative proceeding on an admissible construction of the statute is the last.

Well, there is a variety of opinion as to the construction of the statute on the bench, as well as in the profession, as shewn by the deed before us; and I must therefore think that the construction is a fair question to be put to the Court and determined deliberately, not as disturbing what has been universally accepted to be the true construction, but as deciding now for the first time—for so far as anybody knows, it never was decided before—what is the true construction of the statute? And as I have said, at the stage which the case has now reached, and when I am delivering my opinion, there is a great variety of opinion upon the question.

I think with Lord Lee that the construction upon which the first and also the second alternative proceeds are quite inadmissible.

The first alternative is a provision in favour of the second son. The granter of the deed only means to provide for him—to make a provision in his favour—stating the quite satisfactory reason that his other younger children are otherwise quite satisfactorily provided for. Therefore he has no intention of providing for them. Then he goes on,—"Or otherwise, and in the event of its being found to be in excess of my powers either to provide the whole of said sum to my son William Alexander Orr Paterson, or to apportion it among my said three sons in manner before mentioned (but in that event only), then to content and pay the said sum of £10,000 sterling among the said William Alexander Orr Paterson, Charles Orr Paterson, and Henry Edmund Paterson," and so on. If that is a provision for three or more of the children it is intelligible; if it is a provision for only one child, which I think it clearly is, it is certainly bad; and the opinion that it is good proceeds upon the view that it is a provision not for one child but for three. Now, I cannot accept it, but that is the opinion which, according to the view of five of the consulted Judges and of your Lordship, must prevail. But for the variety of opinion upon it the language of the statute I should have thought too clear to admit of any doubt, that

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the provision for one child shall not exceed one year's free rent or value of the estate. That language is, "provided always that the amount of such provision shall in no case exceed the proportions following," that is to say, for one child one year's free rent or value. And if this is a provision for one child, which I have said I think it is, then if the amount of the provision exceeds one year's free rent or value—being up to three years' free rent or value—it is in my opinion bad.

But it is said, and I confess it is the only argument in favour of the view I am opposing that I have seen, that the heir of entail does not object, and that the younger children have no interest to object, and that therefore it must be good. Now, it is quite certain that the heir of entail does not object, and it is quite certain that he has no interest to do so, because under this deed the heir of entail will have to pay £10,000, for one or other of the three alternatives must prevail, and each of them imposes an obligation on him to pay £10,000.

But is there no interest? Have the younger children no interest? It is said they have no interest. Why? Because there is no obligation on the parent to provide for any of them. I quite admit that. And if there had been no alternative in their favour they would have had no interest, and they would not have been listened to for a moment. If an heir of entail in possession makes a bond of provision in favour of one younger child for three years' free rent, or for four years', or for ten years', and the heir of entail is willing to pay it, the other younger children have no manner of title to object. They are not called in at all. It is for the heir of entail to object if he thinks fit. If he chooses to pay the money to a man who has no title to demand it, that is no affair of the other younger children, in whose favour the father is under no obligation.

But to go into that is to lose sight of the deed that is before us. The maker of the deed says,—"If that is not according to the true meaning of the entail, then I dispose of the fund otherwise. I give it to the other younger children in that event." That gives them an interest which otherwise they would not have had. But in the same way, suppose there is authority in the heir of entail in possession to make provision in favour of his widow. It happens to be in her case by way of liferent or annuity—an annuity not exceeding a third of the free rental of the estate. Suppose the man married a widow, and before his death he reasoned thus,—"It is all one to the heir of entail whether he pays the three years' free rent to my widow, or to one of my younger children whom I choose to nominate if I can under the Act of Parliament. My widow will be well provided for. She is another man's widow too, and she will have when I die £10,000 a-year. There is no occasion to provide for her, but I am empowered by the statute to provide for her, and instead of giving it to her who does not need it, I will give it to my son, or one of my daughters." Well, if he did that, and the heir of entail chose to pay it, as he might do out of regard to his father, or from any other motive, the widow would have no right to object at all, because he was under no obligation to make provision for her—none at all. But if he had made it as here,—"If by the statute I am empowered to give to my son or daughter this provision which the statute enables me to give to the widow, I will do it. But if that is not within my power under the statute, then I desire that my widow shall have it"—would she not have an interest then? Must we not have sustained her claim? and that upon the footing that there is no authority in the statute to give that to the son or daughter, and therefore the first provision must fail, but there is authority to give it to the widow, and therefore the second must have effect. All this reasoning, upon which the opinions which I am now expressing my grounds for differing from proceed, would be equally good in that case. It is all one to the heir whether he gives the annuity to the widow or to a son or daughter. It is of the same amount, and if he do not object, then the widow cannot object, because there is no right in her to demand the provision. But in the case I have put, in which the granter of the bond said,—"If I can by the statute give the widow's provision to a son or daughter, I do it; but if I cannot I give it to the widow"—then we would certainly sustain the widow's claim.

These are the grounds on which I reject, and I must say without any doubts or misgivings in my own mind, the construction of this statute on which this first provision proceeds. It is somewhat remarkable, it appears to me, that Lord Trayner, who concurs in that, thinks that the same result practically may be attained by giving one child a provision not of full three years' rents, but by giving small provisions to the others. I have a strong opinion against that. I think the provision is absolute. The provision for one child shall not exceed one year's free rent, and you cannot make it exceed one year's free rent by the palpable device of making it two years and three-quarters', or two years and nine-tenths', and dividing the fraction of the third year amongst the other younger children. That is the merest pretence, and is, I think, a violation of the Act of Parliament. I do not think immaterial that provision of the statute which says that one child is only to have one year's free rent, whatever the number of the children may be. You may give them, if they are up to the number of three or more, three years' free rent, but upon the condition that no one child shall have more than one. And what is the good sense of the thing upon another consideration? According to the opinion which is to prevail here, the eldest son is to have £10,000. If his two younger brothers had died, he could only have got a third of that. That is absolutely certain. Now, taking it as a matter of sense, what is the sense of a construction of the statute which makes the provision depend upon the death or the survivance of children who take nothing? A man has three children. He gives £10,000, which is assumed to be three years' free rent, to one of them, and not a shilling to the other two, and that upon a statement that they do not require any provision. If these two, who require nothing and take nothing, survive the testator, the one child shall have £10,000. If they do not, although nothing is given to them and nothing taken by them, that £10,000 provision is reduced to a third. Now, I must say my mind rebels at that as a reasonable construction of the Act of Parliament. A man has three daughters. One of them is unprovided for. The other two are married. They are duchesses. He gives three years' free rent to the child who is unprovided for. She will take that if the duchesses survive their father, but if they die, although they take nothing from him or from the entailed estate at all, then her provision is cut down to a third. Now, I avoid all that by simply construing the language of the statute according to the plain import of the words—the provision for one child shall not exceed one year's free rent. No matter how many children there are, the provision for no one shall exceed under any circumstances a year's rent. If there are more children up to three, you may divide three years' free rent amongst them as you please, subject only to this, that no one of them shall have more than one. That is a very plain

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LORD RUTHERFURD CLARK.—I agree with the opinion of the Lord President and of the other Judges who concur with him.

LORD CRAIGHILL was absent.

THE COURT pronounced the following interlocutor:—"The Lords having resumed consideration of the special case, with the opinions of the consulted Judges, in conformity with the opinions of the majority of the Judges of the whole Court, answer the second question to the effect that the third party is entitled to the sum due under the bond of provision: Find and declare accordingly: Find the parties of the fourth and fifth part entitled to payment out of the sum payable under the said bond of the expenses incurred by them since the 2d day of July 1887: Remit to the Auditor to tax the same and to report, and decern."

J. & A. FORMAN & THOMSON, W.S.—J. & A. PEDDIE & IVORY, W.S.—Agents.

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MARGARET BOYD OR RITCHIE AND ANOTHER, Pursuers (Reclaimers).—*D.-F. Mackintosh—C. S. Dickson.*

ALEXANDER CUTHBERT AND OTHERS (James Ritchie's Trustees), Defenders (Respondents).—*Mackay—H. Johnston.*

Trust—Liability of Trustees—"Investment."—Testamentary trustees who had power to invest the trust funds "in any of the Government securities, or upon heritable security in Scotland, or in such other way, or on such other securities as my trustees shall think proper," and who were declared not to be liable "for loss or depreciation in the investments of the trust funds," (1) lent part of the trust funds on deposit-receipt to a heritable security company; and (2) with another portion purchased fully paid-up stock of a limited company. There was a loss on both transactions. *Held* (*aff.* judgment of Lord M'Laren) that the *first* was an investment within the powers of the trustees, and that they were not liable for loss upon it, but (*rev.* judgment of Lord M'Laren) that the *second* was not an investment but the employment of the trust funds in a trading company of which the trustees thereby became partners, and that they were liable for the loss of funds so employed.

Trust—Loan by trustees to one of their number.—Trustees advanced part of the trust funds to the liferenter—one of their number—on the security of a house which he was erecting for his occupation. *Held* that the transaction was *ultra vires*, and that the trustees were bound to replace the funds so lent.

2D DIVISION.
Lord M'Laren.
I.

JAMES RITCHIE, sometime merchant in San Francisco, thereafter residing in Newton-upon-Ayr, died in May 1871. He left a trust-disposition and settlement conveying his whole estate heritable and moveable to trustees, including his brother Joseph Ritchie, J. B. King, and Alexander Cuthbert. The trustees were directed, after paying the truster's debts, to apply the residue of the estate for behoof of Joseph Ritchie and Mrs

Margaret Boyd or Ritchie, his wife, and the survivor in liferent only, which liferent was declared to be alimentary, and for behoof of Alexander Ritchie, son of Mr and Mrs Joseph Ritchie in fee.

Power was given to the trustees "to invest the trust funds in any of the Government securities, or upon heritable security in Scotland, or in such other way or on such other securities as my trustees shall think proper, and to continue the investments, or to vary or alter the same from time to time at their discretion: . . . And I hereby provide and declare that my trustees shall not be liable for the solvency of any person or persons to whom they may sell or dispose of any part of the trust-estate, or to whom they may lend any part of the trust funds, farther than that such person or persons were habit and repute solvent at the time of transacting; nor shall they be further liable for any factor or factors, attorney or attorneys, whom they may appoint, than that such factor or factors, attorney or attorneys, were habit and repute responsible at the time of their appointment; nor shall they be liable for loss or depreciation in the investments of the trust-funds. . . ."

In 1872 Joseph Ritchie, with the concurrence of his wife, applied to the trustees for a loan of £1000 over a house, Vancouver Lodge, which he erected at a cost of £1300. The £1000 was advanced and Joseph Ritchie occupied the house till he died in May 1876, and his widow and son occupied it for some time. They afterwards let it at a rent of £45, and removed to another.

In January 1874 the trustees purchased £1200 paid-up stock of the Anglo-American Telegraph Company, Limited, for £979, 8s. 2d. This was done at the request of Joseph Ritchie, and as the minute of trustees bore in order to benefit him as liferent beneficiary of the estate. In December 1874 other £2000 of that stock was, on the request of Joseph Ritchie, purchased for £1395, 10s. 11d. After Joseph Ritchie's death his widow requested that this investment be continued, and in token thereof signed a docquet of approval to the trustees' minute continuing it. In 1880 the stock having somewhat depreciated, the widow and her son Alexander Ritchie, then a minor, with her consent as his administratrix, delivered to the trustees a joint letter of request and guarantee requesting them to continue the investment, ratifying and approving thereof, and guaranteeing the trustees against responsibility and loss which might arise therefrom.

In February 1884 the trustees, after a report from their agent, held a meeting to ascertain whether in view of the increased depreciation of the stock, the beneficiaries desired to retain it, and Mrs Ritchie and her son as the beneficiaries then requested that it should be realised. The stock on being realised yielded £1192, 17s. 10d. less than what the trustees had paid for it.

At Whitsunday 1876 £1400 of the trust-funds had been lodged upon deposit-receipt with the Scottish Amicable Heritable Securities Association, Limited, which afterwards went into liquidation.

This investment was ratified and approved by Mrs Ritchie and her son at the same time as they granted the letter of guarantee above mentioned.

On 16th April 1887 Mrs Joseph Ritchie and Alexander Ritchie, as liferenter and fiar respectively of James Ritchie's estate, raised an action against Mr Cuthbert, the sole survivor of the original trustees, and against Alexander King, the representative of J. B. King, a deceased trustee, and against certain assumed trustees, concluding (1) for a count and reckoning by the trustees for James Ritchie's estate, and for payment of the balance due, or otherwise (2) for declarator that the trustees were

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vestment in telegraph shares, and on deposit with the Heritable Company, on which alone they offered argument)—(*a*) As to the Anglo-American Telegraph Shares.—Alexander Ritchie could not be said to have homologated the investment he now disputed, for his consent was given when in minority, and was subsequently recalled when he requested the stock to be sold. The placing money in this undertaking was not "investing" or placing it on "securities," as the trust-deed required. It was trading with it and exposing it to the risks of trade. An investment involved a debtor and security. It did not make the case for the trustees better in a question with the fiar, the pursuer Alexander Ritchie, that this mode of employing the money was first resorted to in order to give a higher return to the liferenter. Purchasing bank stock would have been an unlawful use of the money, for that was just trading with it, not an investment of it.[1] Only unlimited powers of using the trust money would justify such use of it. The powers of the trust were not by any means unlimited. It was to be "investing" on "securities," and a particular enumeration of investments, viz., "any of the Government securities," "heritable security in Scotland," was prefixed to the more general words, "or in such other way, or in such other securities, as my trustees shall think proper." The general words must be construed to mean "such other securities *ejusdem generis* as are before pointed out." Besides assuming the general words to have stood alone they would have left the trustees to their common law powers, as increased by the Trust Acts, 1867 and 1884.[2] (*b*) As to the "investment" on deposit with the Heritable Security Company.—The Lord Ordinary in his note erroneously called it a debenture. But it was a mere loan at interest, which the creditor was obliged to leave three years with the debtor. It could not even be called a loan on "personal security," for that expression involved

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stocks,—railway stocks, for example,—but were not entitled to invest in telegraph stocks, I should not be interpreting the power, but would be setting up a new power or a new order of legal investments, different from the recognised order, and not corresponding to anything written in the will.

"I find in the will an absolute reference to the judgment of the trustees in the matter of the choice of investments outside those which the law has recognised as suitable investments for trust money. Such a reference to the judgment of persons selected by the truster as good managers is neither an illegal nor a senseless thing. Being legal and rational, the power ought, in my opinion, to receive effect. The trustees exercised their judgment by investing in Anglo-American Telegraphs and Scottish Amicable Debentures, which they deemed good investments, yielding somewhat higher interest than heritable securities; and in my opinion the truster's authority is an indemnity to them against such a claim as the present.

"Of course, if a trustee or a body of trustees were to abuse a power of this description,—if, for example, they were to invest money in an undertaking which they knew to be bad, or which they had no reason to suppose to be good,—the clause would not protect them. But no such charge is made in the present action. It would be unfortunate if powers of investment were interpreted otherwise than according to the natural meaning; because a testator ought not to be allowed to lay a trap for his trustees inviting them to do something which the beneficiaries may either accept or repudiate according to the degree of success of the speculation. I am therefore for assoilzieing the trustees from this branch of the action."

[1] Brownlie v. Brownlie's Trustees, July 11, 1879, 6 R. 1233 (Lord Young (Ordinary) at p. 1274); Cochrane v. Black, Feb. 1, 1855, 17 D. 321, 27 Scot. Jur. 139; Grant v. Baillie, Oct. 27, 1869, 8 Macph. 77, 42 Scot. Jur. 38.

[2] Trusts Act, 1867 (30 and 31 Vict. c. 97), sec. 5; Trusts Act, 1884 (47 and 48 Vict. c. 63), sec. 3.

not a mere personal obligation of the debtor but his personal obligation fortified by some security.[1]

Argued for defenders;—The defenders ought to have been assoilzied;—(1) As to the alleged loan to Joseph Ritchie over the house.—Assuming the proposition to be universally sound that trustees could not lend the trust funds to one of their own number, that was not the true nature of the transaction challenged. It was rather the acquiring of a house. To have purchased a house for the use of the fiar and liferenter according to their respective rights would not have been *ultra vires.* But this transaction of aiding the liferenter to acquire one and making an advance on the security of it, while he subsequently by his will conveyed it to his widow in liferent, and his child in fee, was in substance the same thing. The house was sufficient security for the loan. It was well let, and no money had been lost by reason of the transaction. (2) As to the investments challenged.—No case had been cited of trustees being found responsible for an investment where their powers were as wide as in the present case. There was no absolute common law rule.[2] In *Grant* v. *Baillie* the trustees had no wide discretionary powers. The only question there was whether investing in bank stock was within the powers of the trustees, and it was decided that investing on bank stock was not investing on personal security. It was no doubt trading with the money. But personal security meant the security of the personal undertaking of the borrower.[3] Investing meant in ordinary language laying out money to profit. The pursuers in their summons so used the term when they sought declarator that the defenders "were not entitled to invest" the trust funds in the stock of the Telegraph Company. The deposit with the Heritable Security Company was an investment in this sense also, and it was not a trading with the money. It was clearly within the power to invest it in such "way" as the trustees thought proper. The indemnity clause of the trust must be read along with the investment clause, and read together they gave the trustees ample discretion and full indemnity in the application of the trust funds.

At advising,—

The opinion of the Court (LORD JUSTICE-CLERK, LORD YOUNG, LORD CRAIGHILL, LORD RUTHERFURD CLARK) was delivered by

LORD CRAIGHILL.—This reclaiming note brings up an interlocutor of the Lord Ordinary in an action of count and reckoning, and of declarator of liability of the trustees in the administration of the trust affairs of the late James Ritchie, sometime merchant in San Francisco, and afterwards residing at Newton-upon-Ayr. The pursuer Mrs Ritchie is the sister-in-law of the truster, her deceased husband, Joseph Ritchie, having been a brother and one of his trustees, and one of the principal beneficiaries under the trust; and the other pursuer, Mr Alexander Ritchie, is a son of the female pursuer, Mrs Ritchie, and her husband, the late Joseph Ritchie. The defenders are Mr Cuthbert, the only surviving trustee of those named in the trust-deed, and the trustee or executor of another of the trustees, who died during the trust administration.

To say the least, as the Lord Ordinary observes, the action is singularly un-

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[1] M'Laren on Wills and Succession, ii. 327; Lewin on Trusts, p. 306, 316, 319, and case of Pickard v. Andrew, 13 L. R. Eq. 608, there cited.

[2] Grainger's Curator, Feb. 23, 1876, 3 R. p. 479 (Lord President).

[3] Seton v. Dawson, Dec. 18, 1841, 4 D. 310, Lord Moncreiff at 328 (and at 14 Scot. Jur. 121); Lamb v. Cochran, March 23, 1883, 20 S. L. R. 575 (Lord Fraser).

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gracious. Assuming that advances were made which were not conformable to trust administration, or that money was laid out in a way not conformable to trust administration, it was well known to the pursuers that this was done upon the urgent instigation of Mr Joseph Ritchie, and he and his wife and his son were the only persons who benefited by that which was done. It may be that necessity is the explanation, but most people would have suffered far more than the pursuers have suffered before they could or would have consented to bring into trouble those who did that which is now objected to solely to oblige the pursuers and Joseph Ritchie.

These considerations of course make no change on the legal merits of the controversy, but all the same it is right that persons like the pursuers should be exposed when they try to make money out of their own wrong.

There are four questions which are presented for consideration and determination. One is the payment of capital to the liferenter, in place of limiting the payments to the income of the estate. This for the present, at least, has been made matter of arrangement between the parties. The Lord Ordinary, in the first finding of his interlocutor, has remitted the trust accounts to Mr Baxter, as Accountant and Auditor of Court, to audit the cash and business accounts of the estate. This was acquiesced in both by the pursuers and by the defenders, and the consequence is, as explained by the Lord Ordinary (Note, p. 2) that, upon his recommendation, counsel upon both sides agreed that an audit should be taken, without allowing a proof; and so, for the present at least, the first of the four questions does not call for consideration. Once there has been an audit, it is possible that there may be points of controversy upon which it will be necessary for the Court to pronounce judgment. Meantime, however, all are agreed as to the course which should be pursued.

The next question is as to the validity of the loan to Joseph Ritchie, the brother of the truster, and the husband of the pursuer Mrs Ritchie. The trustees say that Joseph Ritchie, after his brother's death, determined to erect a house in Ayr for the occupation of himself and his family, and that they, knowing that the trust funds had been left by the truster for the comfort in life of his brother and family, lent Joseph part of the trust funds on the security of the house. The cost of the house is stated by the pursuers to be £1100 odds, and by the defenders to be £1300. The sum lent on the security of the house was £1000. The objection to the investment is that Joseph Ritchie, being a trustee, could not, without violation of trust law, borrow, any more than the trustees could lend. The Lord Ordinary obviously thinks if there is to be a loss, the loss must be made good by the trustees, but he has by the second finding in his interlocutor found that the security ought to be carried to a suspense account. He therefore directs the trustees to call up the loan, and if necessary to exercise their powers of sale under the said heritable security, reserving all questions of ultimate liability for the loss, if any, arising out of the said loan. For my own part I consider that the question of liability ought to be determined at once, and there cannot be any doubt as to that which is the legal result. Joseph Ritchie was a trustee. He was ready, and he sought to borrow £1000 of trust money that therewith a house for his own and his family's occupation might be erected. He had no money of his own. He granted a bond to the trustees for the £1000, and that bond is still a charge upon the property. Now, it seems to me to be for the interest of all that the question of liability should be at once determined, and that the trustees should be left to call up the loan, sell the property if the loan is not paid up, and should there be any deficiency, make up that deficiency to the trust-estate. That is beyond doubt the legal result, and it would only be to put off the evil day without advantage to anyone if the Court were to postpone its judgment and await the realisation of the property. With people like the pursuers the more strictly the course of legal procedure conformable to law is pursued the safer it will be for all concerned.

The next question relates to the purchase of stock of the American Telegraph Company. It appears not to have been a prosperous undertaking even when the trustees resolved to buy, and unfortunately for the trustees and the beneficiaries of the trust the value of the property did not improve. The consequence was that there was a loss of £1192, 17s. 10d. upon the buying and selling of the stock of this company. The question is whether this purchase was within the powers of the trustees. Ample powers are given to them—as ample as ever I saw for the investment of trust money; and truly the question is whether the purchase of the stock of a trading company is in the sense of law and in the sense of the trust-deed an investment. I am of opinion that it was not. I think it was a partnership in a company, and that the trustees became partners. The shares that were bought formed their contribution of the capital. But there can be no investment of money properly so called where the trustees become partners. In investing money the trustees remain outside of the company. Here the trustees joined the company, and so far as money was concerned, all that they did was to pay what was their stipulated share of the capital. Therefore, I am obliged to come to the conclusion that the purchase of these shares—the joining of the company by the trustees as partners—was a breach of trust. I regret extremely that I am obliged to come to this conclusion, but I see no escape from it, unless on considerations of sympathy with those who have been very ill used, and the law cannot be disregarded that wrong-doers like the pursuers here may not reap the benefit of their own discreditable conduct.

On the last part of the case, I have no difficulty. I agree with the Lord Ordinary that the lending of money to the Scottish Amicable Securities Company was within the powers conferred by the truster on his trustees. I think there is no reasonable doubt on this subject. Judgment ought therefore to be pronounced to this effect.

The parties subsequently lodged a joint minute, stating that they had agreed to settle the case, and that they consented to the action being dismissed, without expenses to either party, and that they concurred in craving the Court to recall the interlocutor of the Lord Ordinary reclaimed against, to dismiss the action, and to find neither party entitled to expenses.

THE COURT pronounced this interlocutor:—"18th October 1888.—The Lords interpone authority to the joint minute for the parties, No. 74 of process, in terms thereof: Recall the interlocutor of the Lord Ordinary of date 16th August 1887: Dismiss the action: Find no expenses due by either party to the other."

D. TURNBULL, W.S.—HENDERSON & CLARK, W.S.—Agents.

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— July 20, 1888. Blair v. Hunters.

PATRICK BLAIR, Pursuer (Respondent).—*Balfour—Low—Murray.*
EVAN ALLAN HUNTER AND FRANK HUNTER, Defenders (Reclaimers).—*Darling—C. S. Dickson.*

Partnership—Contract—Right to books of firm on dissolution—Senior resident partner.—A contract of copartnery was entered into between three Writers to the Signet in Edinburgh, C being the youngest partner. Article 5 of the contract provided that the partners should be bound to devote their whole time, so far as necessary, to the business, but with the exception that if C was appointed Sheriff-clerk of Ayrshire he might give such time as was necessary to the duties of that office. Article 9 provided for the assumption of D as a partner on his becoming qualified to practise as a Writer to the Signet. Article 13 provided that on the dissolution of the firm the books should "belong to the senior resident partner at the time." C became Sheriff-clerk of Ayrshire, and D was thereafter assumed as a partner in the firm. On the dissolution of the firm, C being then senior partner, D raised an action for declarator that he was entitled to the books of the firm as "senior resident partner." From a proof it appeared that C had his residence in Ayrshire, but that he also had a house in Edinburgh, at which he lived on an average three working days in the week, and that he took, when there, an active part in the management of the business. During the rest of the week he resided at his residence in Ayrshire. *Held* (*rev.* judgment of Lord Trayner) that C was "resident" in Edinburgh within the meaning of the contract, and that, therefore, the books of the firm belonged to him.

1ST DIVISION. Lord Trayner. B.

MESSRS EVAN ALLAN HUNTER, PATRICK BLAIR, and FRANK HUNTER were the sole partners of the firm of Hunter, Blair, & Cowan, W.S., at the date of the dissolution of the firm on 31st July 1887.

On 28th October 1887 Mr Patrick Blair raised an action in the Court of Session against Mr Evan Hunter and Mr Frank Hunter, his junior partner, the conclusions of the summons being for declarator "that the whole business books of the now dissolved firm of Hunter, Blair, & Cowan, Writers to the Signet, Edinburgh, are now the sole and exclusive property of the pursuer, . . . and the defenders ought and should be decerned and ordained, conjunctly and severally, by decree foresaid, to deliver up to the pursuer the said books, to be retained and used by him as his sole and exclusive property as aforesaid, and that upon his granting an undertaking, in terms of the said contract of copartnery, to give full inspection of the same to the defenders when required by them."

It appeared from the record that in 1858 a contract of copartnery was entered into between Hugh Blair, W.S., David Cowan, W.S., and Evan Allan Hunter, W.S. (one of the defenders) by which it was agreed that the contracting parties should carry on the business of Writers to the Signet under the firm of Hunter, Blair, & Cowan, W.S. The contract was in thirteen heads, of which the important clauses for the purposes of this case were,—"Third, The profit and loss arising on the business from and after the said 31st day of July 1858 shall be divided into three equal shares, and each one-third shall be called a share.

"Fourth, The interest of the partners in the profit and loss shall be regulated by the number of shares held by each for the time when the same arises; and it is now agreed that each partner shall hold one share.

"Fifth, Each partner shall be bound to devote his whole time and attention to the management of this business, in so far as that may be necessary to its complete and speedy execution in all its departments, and none of the partners shall carry on any separate business for his individual behoof, except that, if Mr Evan Allan Hunter is appointed Sheriff-clerk of Ayrshire, he may give such part of his time as is necessary to the duties of that office."

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"Ninth, It is hereby agreed that the said Hugh Blair shall be entitled to assume his son Patrick Blair into this copartnery, and to assign to him one-half of the share belonging to him the said Hugh Blair so soon as the said Patrick Blair is qualified to practise the profession of a Writer to the Signet, and that for the remainder of the contract. And further, in the event of the death of the said Hugh Blair during the currency of this copartnery, and before the said Patrick Blair has been assumed a partner, the said David Cowan and Evan Allan Hunter hereby agree, so soon as the said Patrick Blair is qualified as above, to assume him into this copartnery, and give him the half share to which he would have been entitled had he been assumed previously; and the said Patrick Blair, on being so assumed as a partner in either of the events foresaid, shall become bound and obliged in terms of all the stipulations and provisions herein contained."

"Thirteenth, At the elapse of the said seven years" (which was to be the term of endurance of the copartnery), "if none of the partners shall give intimation to the contrary in writing during the course of the previous year that the contract is to come to an end at the 31st day of July next, then it shall be held to go on for another year, and so on from year to year until such notice of dissolution shall be given; and at such dissolution, whether by the expiry of this contract or in any other event not before provided for, then the books of the concern shall belong to the senior resident partner at the time, who shall be bound to give full inspection of the same to the other partners when required."

When the contract was signed Mr E. A. Hunter was a candidate for the office of Sheriff-clerk of Ayrshire, which was then vacant owing to the death of his father, who had been a partner of the firm of Hunter, Blair, & Cowan till the date of his death in 1858.

In 1860 Mr Patrick Blair (the pursuer in this case) was assumed a partner of the firm.

The firm of Hunter, Blair, & Cowan was first formed in 1843, when Mr Alexander Hunter, who was then sole partner of the previous firm, assumed Mr Hugh Blair, the pursuer's father, and Mr David Cowan as partners. In a deed of copartnery, dated in 1836, to which Mr Alexander Hunter was one of the parties (he being then Sheriff-clerk of Ayrshire), there was a clause (similar to clause 13 quoted above) stipulating that on the dissolution of the firm the books of the firm should belong to the "senior resident partner." This clause was repeated in the contract of copartnery in 1843.

In all the deeds entered into after the contract of 1858, including the deeds of assumption of Mr Patrick Blair, and of Mr Frank Hunter (the second defender) in 1882, the incoming partners became bound by all the stipulations in the contract of 1858.

At the date of the dissolution of the firm Mr Evan Hunter was the senior partner, Mr Patrick Blair the second, and Mr Frank Hunter the third partner.

The pursuer averred,—(Cond. 8) "By the Act 6 George IV. cap. 23, section 6, it is enacted that 'every person who has been appointed since the first day of August 1814, or who shall hereafter be appointed a clerk in the said Sheriff or Stewart Courts, shall discharge the duties of the said office personally.' The duties of Sheriff-clerk are of a varied and onerous character, demanding much time and personal attention, and frequent attendance in Court. The defender Evan Allan Hunter has, since his appointment, resided in Ayrshire, where he has maintained, and now maintains, a large establishment." (Cond. 9) "The pursuer has all along been, and at the date of the dissolution of the firm, was resident in

Edinburgh. At the dissolution he was within the meaning of the original articles or contract 'the senior resident partner' of the firm."

The defenders averred,—(Stat. 3) "The defender Mr Evan Allan Hunter has always been senior to the pursuer in the said firms. The defender Mr Evan Allan Hunter was at the date of dissolution the senior resident partner of the firm in question, in the sense of the contract of copartnery, and in terms thereof the books belong to the defender Evan Allan Hunter, who is willing to give inspection thereof to the pursuer as provided by the contract. The said defender has for some years rented a country house in Ayrshire, in which county the estates of the most important clients of the late firm (including those of the Marquess of Ailsa) were situated, but he has all along had a house in Edinburgh, where he has personally resided; his present house in Edinburgh is at No. 11 Maitland Street, where he resides, and of which he has a lease. He has his own servants in this house, and the furniture in it belongs to him."

The pursuer pleaded, *inter alia;*—The pursuer having been the senior resident partner of the firm at the time of the dissolution thereof, the books thereof belong to him in terms of the original articles or contract of copartnery and subsequent minutes, and he is entitled to decree in terms of the conclusions of the summons.

The defenders pleaded, *inter alia;*—(2) The defender, Evan Allan Hunter, having been at the date of dissolution the senior resident partner in the sense of the contract, the defenders should be assoilzied.

Proof was led in the cause. The evidence necessary to be quoted turned chiefly on the question as to Mr Hunter's places of residence during the subsistence of the partnership. On this point Mr Evan Hunter's evidence is given below.* States were put into process shewing the number of

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* "I believe the clause of the contract under which the question arises did not appear for the first time in the contract of 1858; the same clause appeared in the contracts of 1836 and 1843. I continued a partner of the firm continuously from 1848 till the dissolution at 31st July last. I took rooms in Edinburgh when I gave up Cameron House in 1859. Previous to that I had resided with my father at Cameron House and at Drum. The first rooms I took were at 130 Princes Street and afterwards at 121 Princes Street. (Q.) And there you resided until Whitsunday 1874? (A.) Yes. I resided longer than that in Princes Street, but at Whitsunday 1874 I became tenant of the house No. 121 instead of a lodger. Since then I have had a house in Edinburgh continuously. The furniture and the servants have been mine since 1874, both in the house in Princes Street and at 11 Maitland Street. (Q.) And from that period you have resided in those two houses? (A.) I have. I have also, during that time, had houses in Ayrshire on lease,—first Belmont, then Adamton, and now Newark Castle. (Shewn No. 17)—That is the lease under which I hold Newark. For some years back it has been my custom to leave Edinburgh on Friday and return the following Tuesday. Sometimes I left on the Friday morning and sometimes in the afternoon. I arrived in Edinburgh about six o'clock on the Tuesday evening. It was my practice to have the letter-book of the firm sent to my house on the Tuesday evening, so that I might see what had been doing in my absence. When I left Edinburgh on the Friday afternoon I left by the 4.30 train. That was my rule all through when I was in good health. I very seldom took a holiday—never in fact. My practice varied sometimes a day or two; sometimes I would leave Ayr on Monday and stay in Edinburgh till Saturday. By the Court.—Sometimes I did not come to Edinburgh all week. Examined.—Sometimes I was in Edinburgh from Monday or Tuesday of one week to Thursday or Friday of the following week. If Mr Blair was away I did that more frequently. When I was in Ayrshire I occasionally wrote letters on the business of the firm and sent them to Edinburgh to be booked. I also had meetings on business matters connected with the firm;

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days which Mr Evan Hunter and Mr Blair attended at the office respectively on an average during the year. It is sufficient to state that the state shewed that Mr Blair was at the office much more regularly than Mr Hunter, who was absent at Ayr on an average three of the working days of the week.

On 7th February 1888 the Lord Ordinary (Trayner) pronounced an interlocutor decerning in terms of the conclusions of the summons.*

I met Lord Ailsa's factor, and Mr Shaw, who was factor for Mr Macadam of Craigengillan. These were two considerable clients of the firm. I took special charge of their affairs. It was not my habit to sign many letters which had not been dictated or written by me. (Q.) You rather left the signing of letters to the other partners of the firm? (A.) Yes. A great many letters were written by responsible clerks. I have held the office of Sheriff-clerk of Ayrshire since 1858. There is nothing in my commission requiring me to live in the county. There have been Sheriff-clerk-deputes at Ayr and Kilmarnock all my time. The Court days at Ayr are on Tuesdays and Thursdays, and at Kilmarnock on Wednesdays and Thursdays. By the Court.—(Q.) So that, if the Sheriff insisted on it, you would require to be in Ayr on three days of the week? (A.) If he had the power. Examination continued.—I have given such attendance as Sheriff-clerk as I have been asked to give. There have been Sheriff-clerk-deputes not merely during my time, but ever since the passing of the Act of George the Fourth. That applies to Ayr; and there has been a depute at Kilmarnock ever since the county was divided into two districts. Under my tack of Newark Castle I pay £160 for the house and £140 for the shootings. I have not been in the way of shooting much—comparatively little. I have the shooting chiefly for the use of my friends. Since 1848 I have regularly held an attorney's licence for Edinburgh. I have always been on the register of voters for Edinburgh."

* "OPINION.—The firm of Hunter, Blair, & Cowan, which has been long established in Edinburgh, was dissolved on 31st July 1887, at which time the defender Mr Evan Allan Hunter was senior partner, and Mr Patrick Blair, the pursuer, was second in seniority.

"Mr Blair brings this action to have it declared that he is entitled to the whole business books of the now dissolved firm as his property, undertaking that access to the books shall be given to any other partner of the firm who may require to consult them. Mr Blair's right to the books is based upon a clause of the contract which he quotes in condescendence 6:—'At such dissolution, whether by the expiry of this contract or in any other event not before provided for, then the books of the concern shall belong to the senior resident partner, who shall be bound to give full inspection of the same to the other partners when required.'

"The title to the books, therefore, is in the senior resident partner of the concern at the time of dissolution; and the whole question is, who was the senior resident partner at that time. The meaning of the clause in the contract of copartnery is one regarding which different opinions may be entertained. If I dealt with that clause as meaning merely 'the senior partner resident in Edinburgh at the time of the dissolution,' I should be of opinion that the description applied more correctly to Mr Blair than Mr Hunter, because, although Mr Hunter had undoubtedly rooms, or a house—a small house—in Edinburgh at that time, his residence in the popular and proper sense of the term was undoubtedly in Ayrshire. His family was there, his establishment was there, he resorted there, if I may say so, whenever he could. It was the chief seat of his residence. His rooms or house in Edinburgh were rather of the character of temporary accommodation than a residence. But the question, I think, is a little different, from merely where the senior partner's residence was at the time of the dissolution. I think we must look at the three words together, "senior resident partner." My impression of the reading of that clause is that senior resident partner means that partner senior in the firm who was chiefly to be found at the seat of the firm's business, who was constantly in attendance upon

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The defenders reclaimed, and argued;—The test in this action was,—Was Mr Evan Hunter disqualified from obtaining possession of the books by non-residence, there being no doubt that he was senior partner at the time of the dissolution? Mr Hunter personally carried on the business in Edinburgh, he was there three out of the six working days of the week, and besides, did some of the business of the firm (that connected with the firm's agency for Lord Ailsa) when he was at Ayr. A man could have two residences, though he could only have one domicile,[1] and Mr Hunter had a residence in Edinburgh, which he kept up for the sole purpose of taking a share in the firm's work. His residence in Ayr was a residence of pleasure, that in Edinburgh a residence of business. A competitive examination as to whether the junior partner had been more regular in his attendance at the office than the senior could never form a test as to whether the latter was "resident" or not. Residence was not required of a sheriff-clerk, he could do his work, if necessary, by deputy.[2]

The clause with regard to the books could not have been intended to strike specially at Mr Hunter (1) because it occurred in the older contracts, which had been entered into by Alexander Hunter when he was senior or sole partner of the firm, and it could not be supposed that he would knowingly and voluntarily contract himself out of so valuable a right as that of the custody of the books, when all he had to do was to make his own terms; (2) because under the contract of 1858, by which Mr Evan Hunter entered as junior partner, he could never become senior partner at all. He might have become sole, but never senior partner. That contract must be looked at as at the date and under the circumstances of its signing.

Argued for the respondent;—The deed must be examined to see whether other parts of it threw light on the meaning of the word "resident." The partners under the deed were bound to devote their whole time to the business, and it was not contemplated that the senior partner should have another business which would take him away very much from Edinburgh. The office of sheriff-clerk under the statute required residence in the county. It was to meet the case of Mr Evan Hunter that article 13 was inserted in the contract, and that article was explained by article 5. The facts shewed that Mr Hunter's real residence was in Ayrshire. The argument that Mr Hunter could never have become senior partner under the contract of 1858 was met by clause 9, which provided for the assumption of another and junior partner.

Lord President.—This question is, I think, not unattended with difficulty. At first sight there is a good deal of plausibility in the view the Lord Ordinary has taken, but on full consideration, and after hearing a very good argument on both sides of the question, I have come to an opposite conclusion from that of the Lord Ordinary.

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the business, exercising his skill and occupying his time in its supervision. If that is a correct definition, then the only person who falls within it is Mr Blair. For while undoubtedly Mr Hunter was coming to the office two, or it may be for three days a-week, and giving some attention to business, the resident partner, in the sense I have just stated, was undoubtedly Mr Blair. He was not there for two days a-week; he was there every day of the week, and attending to the business of the office every day of the week. That being my view of the clause, I think Mr Blair is entitled to take the books, and I decern in terms of the conclusion of the summons."

[1] Lloyd v. Inland Revenue, March 12, 1884, 11 R. 687.

[2] Heddle v. Garioch, March 1, 1827, 5 S. 503; Dove Wilson on Sheriff Court Practice, p. 44.

The contract in question was entered into in 1858. Mr Alexander Hunter, the father of the defender, was then dead, and Mr Evan Hunter and the other partners acting with him under a previous arrangement entered into a new contract. The senior partner under this contract was Mr Hugh Blair, Mr David Cowan was the second, and Mr Evan Allan Hunter was the junior. The contract provided that the profit and loss on the business should be divided into equal shares, each partner having a share. It was provided by the fifth article:—"Each partner shall be bound to devote his whole time and attention to the management of this business, in so far as that may be necessary to its complete and speedy execution in all its departments, and none of the partners shall carry on any separate business for his individual behoof, except that, if Mr Evan Allan Hunter is appointed Sheriff-clerk of Ayrshire, he may give such part of his time as is necessary to the duties of that office,"—the exception in favour of Mr Evan Hunter being made in consequence of his expecting to be made Sheriff-clerk of Ayrshire.

The clause on which the controversy arises is the 13th. That clause provides,—"At the elapse of the said seven years, if none of the partners shall give intimation to the contrary in writing during the course of the previous year that the contract is to come to an end at the 31st day of July next, then it shall be held to go on for another year and so on from year to year, until such notice of dissolution shall be given; and at such dissolution, whether by the expiry of this contract, or in any other event not before provided for, then the books of the concern shall belong to the senior resident partner at the time, who shall be bound to give full inspection of the same to the other partners when required."

It is contended by the pursuers that that clause has special reference back to clause 5, which gives Mr Hunter his dispensation from constant attention at the office in order to enable him to discharge his duties at Ayr. I think there is no necessary connection between the two. The argument advanced by Mr Darling is not displaced by that contention because, under the contract of 1858, it is demonstrable that Mr Evan Hunter could never become the senior resident partner of the firm, he having entered into the partnership as junior partner, and so long as the contract remained undisturbed the possibility of Mr Hunter becoming entitled to the books of the firm was removed. But it is said, and there is some weight in the suggestion, that there was *in gremio* of the deed a power of expansion, that another partner might be brought in, and that then Mr Hunter might become senior resident partner. That is true, for there is a stipulation that Mr Hugh Blair might assume his son, Mr Patrick Blair, as a partner. That stipulation was not, however, to take immediate effect; it was a future event that was contemplated, and was merely an arrangement, not for a redistribution of the business, but only for giving off a part of Mr Hugh Blair's share to his son. Therefore, although after that assumption took place it became possible that Mr Hunter should become senior partner, it was not possible under the original circumstances in which the contract was entered into. I think we must construe the contract with reference to the time at which it was executed, and therefore I say that there is no necessary connection between clauses 5 and 13. We must, therefore, construe clause 13 in a reasonable way, and with reference to the circumstances of the existing partners and the relations between them.

Now, it is said that Mr Evan Hunter is not resident, and is therefore disqualified from getting the books as senior partner. The word "resident" cer-

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tainly admits of construction. It cannot mean that the senior partner must be constantly resident in one place, and the Lord Ordinary himself suggests something more important than that, namely, the amount of time which he devotes to the business. That is undoubtedly an element in the question, but what strikes me as very important is that Mr Hunter has not only a residence in Edinburgh, but that that residence was established and was kept up by him for the purpose of enabling him to attend to the business. There is no other object for which he can be said to have kept it up, because it is perfectly plain that if it had not been necessary for that purpose he would have had no residence here at all. His residence of choice was undoubtedly in Ayrshire, and that was obviously his home, but his residence in Edinburgh was a business residence as distinguished from a residence for pleasure and enjoyment. That is very important in construing this contract. If he took this house in Edinburgh only because he was carrying on business there, and so as to enable him to do so, how can he in the sense of this contract be said not to be a resident?

No doubt it is said, with some force, that his attendance at the office was not so constant as that of Mr Blair, but that may be quite accounted for by the fact that it was to enable him not to be always at the office that he obtained his dispensation from constant attendance under the contract of copartnery.

If I could read the 13th clause as referring back to the 5th, the force of that answer would be taken off, for then it might be contended that the fact of the dispensation being obtained showed that Mr Hunter was looked upon as being non-resident; but, as I have said, I think the clauses have no connection with one another.

Now, if a gentleman entitled to spend his time in Ayr is still an acting partner of a firm in Edinburgh, devoting to that business as much time weekly as is consistent with his official duties in Ayr, or as is necessary for that business, and if he has a house in Edinburgh for the express purpose of enabling him to carry on his business there, I cannot say that he is a non-resident partner. I think, therefore, we ought to alter the Lord Ordinary's interlocutor and assoilzie the defender.

LORD MURE.—I concur. The question depends entirely on the construction of the contract of 1858. It is admitted that the senior partner is Mr Hunter, and that he has taken a house permanently in Edinburgh, and lives there for three out of the working days in the week. It is said, however, that in consequence of his duties as Sheriff-clerk of Ayr he has to be resident there, but while he is there he still has his residence in Edinburgh, and it is specially arranged under the contract that he is to be allowed to be at Ayr for "such part of his time as is necessary to the duties of that office." The complaint that is made is, that because he discharges the duties of his office and is in Ayr for three working days in the week, he cannot be said to be resident in Edinburgh. I cannot take that view. In one sense Mr Hunter has two residences, and a man may certainly have two or even more residences at one time. Mr Hunter has taken a house in Edinburgh simply to enable him to act as a partner in this firm, and he lives in Edinburgh so many days in the week. He is therefore, I think, fairly within the meaning of the words "senior resident partner."

LORD SHAND.—"Resident" is an unusual term to find in a contract of this kind as applied to the partners, and I was at first disposed to find an explanation of it in the provisions of sec. 5 of the contract, in which Mr Hunter's prospect of being appointed Sheriff-clerk of Ayrshire is referred to. Any impression made on me by that section was, however, removed by Mr Darling pointing out that when the contract was entered into Mr Hunter was the junior partner. Clause 13th could not have been meant to affect him, for he could never become senior partner under that contract. The other two partners were the only persons who could ever become senior partners in that copartnery. The only way in which that point has been met is by saying that this was a provision intended to meet the case of Mr Patrick Blair afterwards becoming a partner. I cannot, however, accept that suggestion, and I therefore take up the question on the footing that there is nothing in the contract to shew the meaning of the word "resident." We are therefore thrown back on this, How ought that word to be construed in any contract of copartnery of professional men? I think it is clear that we cannot adopt the Lord Ordinary's view that we are to measure the work done by the partners, and take the one who does most as the resident partner. That is not a test of residence at all. The word "resident" has reference to the place in which the partner is living, not to the amount of work he is doing. The question then comes to be, has Mr Hunter resided in Edinburgh? I can only answer that question in the affirmative, and as he is undoubtedly the senior partner, so I think he is the senior resident partner. It cannot be made a question which of the partners resides most in Edinburgh. Each is resident, though Mr Blair may reside more in Edinburgh in the course of the year than Mr Hunter does. It may be that Mr Hunter has not done so much work for the firm as Mr Blair. But residence is the test, not the amount of work done, and senior partners often do not do so much work as their juniors. I have come in the end to be clearly of opinion that the Lord Ordinary has come to a wrong conclusion.

Lord Adam.—The question for us is, what is the meaning of the expression "senior resident partner"? The senior partner must have a residence somewhere near, but it is admitted that it need not be actually in Edinburgh, and it is suggested that the residence must be so near as to make attention to business possible. Now, the mere fact of having a residence in or near Edinburgh would not be enough; that would not make the partner "resident"; but Mr Hunter not only has a house in Edinburgh, but he occupies it, or resides in it, for a sufficient length of time weekly to enable him to take an active part in the work of the firm. To enable him to do that is the purpose for which Mr Hunter has a house in Edinburgh at all, and I therefore think it is impossible to say that he is not a resident partner. He resides here for a part of every week, and takes an active part in the business.

I only wish to add that the Lord Ordinary has not taken a right view of the case when he tried to solve the question by investigating as to which of the partners gave the most attention to the business. The question of residence cannot, I think, be solved in that way.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defenders.

Davidson & Syme, W.S.—A. J. Napier, W.S.—Agents.

No. 182.
July 20, 1888.*
Walker v. Buchanan.
2d Division.
M.

CATHERINE WALKER AND OTHERS, Petitioners.—*Macfarlane.*
JOHN BUCHANAN (Walker's Judicial Factor), Respondent.—*J. A. Reid.*

Judicial Factor—Recall of appointment—Failure to lodge accounts and vouchers.—A petition was presented by Mrs Catherine Main or Walker or Smith and others, beneficiaries under the trust-settlement of the late Robert Walker, for the removal of John Buchanan, judicial factor on the trust-estate, on the ground that his annual accounts had not been duly lodged, and when lodged were found to be neither intelligible nor complete. The Court appointed the factor to lodge a detailed account of his outlays for the four years ending 30th November 1887. Detailed accounts were subsequently produced by the factor, with vouchers, certain of which appeared to have been altered so as to represent receipts for larger sums than had been originally represented by them. The factor declined to resign, except on the footing that his accounts should first be approved of.

The Court, after looking at the vouchers, and being satisfied that they had been tampered with, recalled the factor's appointment, and remitted the cause to the Junior Lord Ordinary, with instructions to appoint a judicial factor in room of the said John Buchanan, and to proceed with the accounting.

WILLIAM FINLAY, S.S.C.—J. SMITH CLARK, S.S.C.—Agents.

No. 183.
July 20, 1888.†
Redding v. Redding.

MRS MARGARET MACKINLAY OR REDDING, Pursuer.—*G. R. Gillespie.*
ROBERT REDDING, Defender.

Jurisdiction—Husband and Wife—Divorce for desertion—Foreign.—A Scotswoman married an Englishman and resided with him in England for about ten years. The husband having deserted his wife and gone to America, she returned to reside in Scotland. In an action brought by her there for divorce on the ground of desertion, *held* by Lord M'Laren (Ordinary) that the Court had no jurisdiction over the defender, and that the action was incompetent.

Outer-House
Lord M'Laren.

IN 1869 Robert Redding, an Englishman, who had been for four years an officer of excise in Edinburgh, married there Margaret Mackinlay, a Scotswoman. Six months after the marriage, Redding removed to England, where he resided with his wife till February 1880, when he deserted her and went to New York.

Mrs Redding, in 1880, returned to Edinburgh, where she lived with her mother, a widow, and supported herself and her children by her own industry.

In January 1888 Mrs Redding raised an action of divorce, on the ground of desertion, against her husband.

No defences were lodged.

After a proof, the import of which is given in the Lord Ordinary's note, his Lordship heard the pursuer's counsel on the question of jurisdiction.

Argued for the pursuer;—The wife's domicile in cases of desertion did not follow that of the husband, for it was matter of every-day practice to entertain actions of divorce when the husband had transferred his domicile to a foreign country—Fraser on Husband and Wife, p. 1212. If, then, the wife had a capacity to retain a domicile separate from that of her husband, why should she not acquire a new domicile to the same effect? The desertion began in England, but the husband was now in desertion, and the wife was entitled to appeal to the Court of the country in which she was resident *animo remanendi* to redress the wrong which her husband day by day continued to inflict upon her. All the text writers agreed on the competency of this,—Fraser, 1254; Phillimore, iv. 346; Wharton, sec. 224; Bishop, ii. sec. 128; Bar, sec. 92; Story, 229a—and although there was no decided cases to that effect in this country, America supplied cases—Bishop, *loc. cit.*, and Story, *loc. cit.* Unless this were so the wife had no *forum* to which she could resort, for she did not know where her husband was, and the doctrine of "matrimonial domicile" was now exploded—*Pitt* v. *Pitt*, April 6, 1864, 2 Macph. (H. of L.) 28; *Wilson* v. *Wilson*, L. R., 2 P. and D. 435; *Stavert* v. *Stavert*, February 3, 1882, 9 R. 519. That the remedy of divorce for desertion was unknown in the country in which the spouses had lived as married persons was immaterial if Scotland was *bona fide* adopted as a domicile by the pursuer—*Carswell* v. *Carswell*, July 6, 1881, 8 R. 901.

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* Decided July 17, 1888. † Decided March 22, 1888.

The Lord Ordinary pronounced this interlocutor:—"Finds that the defender is not subject to the jurisdiction of the Court of Session; therefore dismisses the action, and decerns." *

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* "NOTE.—This is an action at the instance of the wife, concluding for a dissolution of the marriage on the ground of desertion. The desertion is clearly proved, and the only question is whether the Court of Session has jurisdiction over the spouses in the matter of the action. The proof was taken before me on the 10th inst., and in her examination the pursuer stated that her husband was born in Berwick-on-Tweed, and that both his parents were Scotch and had lived in Scotland before his birth. But as the pursuer was not professing to speak from personal knowledge or family tradition (because the question is as to the domicile of the husband's parents) I adjourned the proof in order that further evidence might be obtained on this point. On the case being called on the 20th inst., counsel for the pursuer stated that certain members of the husband's family had been communicated with, but that he could not say that their evidence would support the allegation that the husband's parents were of Scottish extraction. The case was accordingly argued on the assumption that the defender, Mr Redding, was not only born in England, but that England was his domicile of origin.

"The next question of fact is, whether at the time when the defender deserted his wife he had come to be domiciled in Scotland. The facts are these:—For a period of four years prior to the marriage the defender had resided in Edinburgh, where he had a situation in the Inland Revenue Office. The Edinburgh residence was continued after the marriage for a period less than a year, terminating in 1870; the spouses then resided in Devonshire for three years; and after a short stay in London settled in Cambridgeshire, where the defender held the position of superintendent of police. Here the spouses remained from 1874 to 1880, when the defender left his wife and went abroad. It appears to me that if I were to conclude that a Scottish domicile was acquired by reason of the defender's residence in Edinburgh for five years, I must also conclude that the English domicile was reacquired by the subsequent residence of the spouses in England for ten years. The character of the residence was the same in both cases, and the result is either that the defender must be taken to have retained his domicile of origin from the beginning until the act of desertion was committed, or if he had at one time acquired a Scottish domicile, that he reacquired his English domicile by accepting a permanent situation there, and was in fact domiciled in England at the time when he deserted the pursuer. Since 1880 the pursuer has been resident in Edinburgh, and she regards Scotland as her present domicile, and claims to sue for a divorce on grounds recognised by the law of Scotland.

"The question is, as I have said, whether this Court has jurisdiction. It has come to be authoritatively settled that the jurisdiction of the Court in actions of divorce is founded on the domicile of the spouses; because a divorce is a proceeding which affects the *status* of the spouses, and ought only to be granted by a Judge who has universal jurisdiction over the parties. In general this will be a universal jurisdiction over both spouses, because of the rule that the wife's domicile follows that of the husband. There is, however, in my opinion an exception to this rule, because I agree in the opinion expressed by Lord Westbury in *Pitt* v. *Pitt*, 2 Macph. 32, to the effect that after a cause of action has arisen the husband is not entitled by changing his domicile to subject his wife to the jurisdiction of the Courts of a foreign country, or to bring her under the dominion of a system of positive law to which she is a stranger. From this consideration it would follow that Mr Redding by settling in America could not subject his wife to an action at his instance in an American Court, or oblige her to seek redress for the wrong he had done in the Courts of America. For the purposes of adjudicating on any question of conjugal right I conceive that the Courts of England remain open to Mrs Redding, notwithstanding her husband's disappearance; and her remedy (possibly an imperfect one) is such as the laws of England confer on a deserted wife. These considerations are evidently antagonistic to the wife's claim in the present case to prosecute a divorce suit in Scotland. If the husband is not entitled to change the jurisdiction against the wife, it follows in my opinion that the wife has not the power by her change of residence to create a new jurisdiction against the husband. It is quite certain that the Court of Session has not a universal jurisdiction against the defender in this case. (1) To sustain the jurisdiction in respect of the wife's election to fix her domicile here (supposing that she has the power to do so) would, I apprehend, be tantamount to a revival of the old system of founding consistorial jurisdiction on special grounds applicable to one of the parties. (2) In general, when jurisdiction is founded *ratione domicilii*, it is the defender's domicile that is alone considered. Here the domicile founded on is that of the pursuer. This is another objection. But (3) the determining consideration in my mind is that the Court which is to make a decree dissolving a marriage ought to have jurisdiction over both parties. Where one of the spouses has wrongfully withdrawn from the country, it may not unreasonably be held that the jurisdiction against him or her is not destroyed by the party's own wrongful act. It is matter of familiar practice that this Court grants decrees of divorce against deserting spouses who have quitted the country finally to all appearance, and whose place of residence may even be unknown. If in such a case the husband is the pursuer, his wife's domicile is not changed by her desertion. If the wife is the pursuer, we act on the principle that the husband cannot by his own wrong change the joint domicile to the prejudice of the wife. But these rules do not appear to have any application to a case where the husband's last known domicile is England, and where the wife is not seeking to maintain the *status quo*, but to set in motion the Courts of a country which she claims to have chosen as her domicile, but to which it cannot be shewn that her husband owes obedience."

TAWSE & BONAR, W.S., Agents.

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VOLUME XV.

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Justiciary Cases, Public Health, or Public-House.

Acquiescence. See *Entail,* 8—*Trust,* 12.

Adjudication. *Trust—Diligence against trust-estate for expenses of litigation.*

1. *Held* competent to adjudge a trust-estate for expenses decerned for against the trustees in a litigation in which the trust-estate was alone concerned. Stewart v. Forbes, Feb. 8, 1888, p. 383.

Process—Decree.

2. Where a Lord Ordinary pronounced decree of adjudication, and on a reclaiming note the Court adhered, decree of adjudication was pronounced of new in the Inner-House. Stewart v. Forbes, Feb. 8, 1888, p. 383.

Administration of Justice. *Law-agent—Sheriff—Small-Debt Court—Small-Debt Act,* 1837, *secs.* 14 *and* 15—*Law-Agents Act,* 1873, *secs.* 2, 13, *and* 16—*Interdict.*

In a petition presented by an enrolled law-agent in a Sheriff Court for interdict against a person who was not an enrolled law-agent practising as a law-agent in the Small-Debt Court, *held* (*diss.* Lord Rutherfurd Clark) (1) that sec. 16 of the Law-Agents Act, 1873, had no application to persons allowed by the Sheriff to appear for others in the Small-Debt Court, and (2) that it was entirely within the discretion of the Sheriff to grant such leave to any person not an officer of Court.

Question, whether an application for interdict was an appropriate remedy in such cases. Milne v. Leslie, Feb. 29, 1888, p. 460.

See *Justiciary Cases,* 12.

Agent and Client. *Negotiorum gestor—Remuneration of agent.*

1. A landed proprietor having become insane, his brother, without judicial or other authority, managed his estate with the assistance of the law-agents who had previously managed the estate for the proprietor. After two years a *curator bonis* was appointed to the proprietor. In an action of accounting brought by the curator against the law-agents, the pursuer maintained that the defenders must be regarded as pro-curators, and were not entitled to credit for professional charges. *Held* that the law-agents were entitled to the ordinary remuneration for their services. Dunbar v. Wilson & Dunlop's Trustee, Dec. 21, 1887, p. 210.

General mandate—Consent to use of inhibition.

2. *Opinion,* that an agent was entitled, under a general mandate to recover a debt, to use inhibition. Clarke v. N'Nab, March 10, 1888, p. 569.

Liability of Agent—Alleged failure of agent to inform client of material fact —Proof—Onus.

3. *B, a law-agent, was employed by a client to obtain a loan on the security of a patent. S, another client of B, after consulting B, lent £5000. The patent was subsequently found to be invalid, having been anticipated by prior patents. In an action raised by S against B for payment of loss*

AGENT AND CLIENT—*Continued.*

through the transaction, on the ground that the defender had failed to communicate to the pursuer the fact that he had ascertained that the patent could not be relied on as valid without further inquiry than had been made, and had allowed him to advance his money in ignorance of this risk, held (rev. *judgment of First Division*) (1) *that the* onus *of proving that the communication had not been made lay upon the pursuer; and* (2) *on the proof* (diss. *the Lord Chancellor*) *that the pursuer had failed to discharge himself of this* onus, *and that from the facts proved and documents produced it was to be inferred that B did make the communication to his client.* M'Clure, Naismith, Brodie, & Macfarlane v. Stewart, July 22, 1887, H. L., p. 1.

Liability of agent—Trust—Investment—Title to sue—Beneficiary with contingent interest.

4. While both spouses were alive the children of a marriage, whose interest under their parent's marriage-contract was during the marriage contingent merely, brought an action against the marriage-contract trustees and the law-agent to the trust, "conjunctly and severally, or severally, or in such other way or manner as should seem just," to have them ordained to restore money alleged to have been lost to the trust through investment on insufficient security. The law-agent and one of the trustees lodged defences. The Court—while unanimously of opinion on a proof that the security was one which ought not to have been accepted by trustees—(*diss.* Lord Mure, Lord Shand, and Lord Rutherfurd Clark) *assoilzied* the trustee, and (*diss.* Lord Young) *assoilzied* the law-agent.

The Lord President, Lord Justice-Clerk, Lords Shand, Rutherfurd Clark, and Adam, *held* that the pursuers had no title to sue the law-agent, (1) because he was not employed by them, and (2) because they might never become entitled to the trust-estate, and would in that event suffer no damage.

Lords Mure and Shand were of opinion that there was no liability, even assuming a title to sue, because a law-agent is not responsible for the sufficiency of a security, unless there is a special undertaking to that effect, which was not alleged in the present case.

Lord Young was of opinion that as all the parties were before the Court the liability of the law-agent should be determined in the present action, and, on the evidence, that there had been a failure of duty on his part, and that he was liable. Rae v. Meek, July 20, 1888, p. 1033.

AGENT AND PRINCIPAL. See *Bankruptcy,* 8—*Retention.*

ALIMENT. See *Arrestment,* 3, 4—*Husband and Wife,* 1, 2—*Minor and Pupil,* 3.

ALIMENTARY PROVISION. See *Succession,* 11—*Trust,* 16.

APPEAL (HOUSE OF LORDS). *Interim execution pending appeal.*

1. Where an appeal is taken to the House of Lords against a decree of the Court of Session for an ascertained sum of money, the Court will, pending the appeal, allow interim execution of the decree. M'Beath v. Forsythe, Oct. 25, 1887, p. 8.

Competency—Question of Irish law not considered in Court of Session.

2. *In an action brought in the Court of Session by the widow of a Scotsman against her husband's testamentary trustees for reduction of an antenuptial contract of marriage signed by her in Ireland, by which she renounced for a small annuity her terce and* jus relictæ, *the pursuer averred that according to the law of Ireland she was an infant, and pleaded* (1) *minority;* (2) *lesion. After a proof, in which no evidence was led as to the law of Ireland, the Court found that the pursuer had failed to instruct lesion, and assoilzied the defenders. In an appeal to the House of Lords the pursuer contended that the marriage-contract should be reduced, on the ground that, by the law of Ireland, the pursuer being a minor had not the capacity to enter into a contract. The defenders objected to the competency of raising this plea, on the ground that no evidence had been laid before the Scottish Court as to the law of Ireland, that the proof was closed, and that it was not open to the*

APPEAL (HOUSE OF LORDS)—*Continued.*

House of Lords to consider the question. Held *that although the question as to the law of Ireland was a question of fact for the Court of Session, the House could dispose of it as a question of law; and that by the law of Ireland the pursuer, as a minor, had not the capacity to enter into the contract, which was therefore invalid.* Cooper v. Cooper, Feb. 24, 1888, H. L., p. 21.

Appeal in forma pauperis—Public Right.

3. *Leave to appeal in forma pauperis* refused *on the ground that the appellant represented the public only.* Bowie v. Marquis of Ailsa, Aug. 10, 1888, H. L., p. 114.

In Sequestration, see *Process*, 24, 25; From Sheriff Court, see *Process*, 23, 25; In Sheriff Courts, see *Sheriff*, 2; From Valuation Courts, see *Valuation*, 1.

ARBITRATION. *Lease—Reference to man of skill—Power to take evidence.*

1. In a reduction of a decreet-arbitral following upon a reference to two men of skill as arbiters under a lease as to the value of a waygoing crop, the pursuer averred that parties were not heard, that only one of the arbiters had seen the crop after it had been cut, and that no evidence had been led as to its value. *Held* that no relevant ground for reduction had been stated, and action *dismissed.*

   Observed that it would have been incompetent to lead evidence. Logan v. Leadbetter, Dec. 6, 1887, p. 115.

Reference to unnamed arbiter—Person holding an office for the time being.

2. *Held* that a clause of reference referring "any question that may arise as to the meaning or intent of this contract" to "the engineer of the F. B. Railway Company, for the time being" was ineffectual, in respect there was no nomination of a referee inferring a *delectus personæ* on the part of the contracting parties. Steel Company of Scotland v. Tancred, Arrol, & Co., Dec. 22, 1887, p. 215.

Process—Diligence for citing havers.

3. Where one of the parties to an arbitration presented a petition to the Court for warrant to cite witnesses to appear before a commissioner and produce documents conform to specification annexed, the Court *refused* the petition, holding that the approval of the arbiters to the specification ought first to have been obtained. Crichton v. North British Railway Co., June 26, 1888, p. 784.

Agricultural Holdings Act, 1883.

4. Suspension of appointment by Sheriff of referee under the above Act on the ground of excess of jurisdiction. Sinclair v. Clyne's Trustees, Dec. 7, 1887, p. 185.

ARRESTMENT. *Ad fundandam jurisdictionem.*

1. By antenuptial marriage-contract a lady who, with her husband, was domiciled in Germany, conveyed her whole estate, including *acquirenda*, to trustees, of whom her brother was one, for behoof of herself and her children. She subsequently succeeded to a legacy, which was arrested *ad fundandam jurisdictionem* in the hands of the representative of the donor (to whom the marriage-contract trust had not been intimated), by the trustee on her brother's sequestrated estate, for a debt alleged to be due by her to the latter. *Held* (*diss.* Lord Shand) that the arrestments were bad, as the trustee had no higher right than the bankrupt, who could not have benefited by his failure to intimate the marriage-contract trust to the testamentary trustee to the prejudice of the beneficiaries under the trust, whose interests it was his duty to protect. Graeme's Trustee v. Giersberg, June 1, 1888, p. 691.
2. To found jurisdiction by arrestment it is not necessary that the letters should be executed before the summons is signeted. Wall's Trustees v. Drynan, Feb. 1, 1888, p. 359.

Recall—Wages Arrestment Limitation Act, 1870.

3. Wages which were *held* exempted from arrestment by the above Act. M'Murchy v. Emslie & Guthrie, Feb. 4, 1888, p. 375.

ARRESTMENT—*Continued.*

Recall—Labourer with precarious income—Aliment.

4. A colliery labourer was entitled to a payment of 12s. per week from his father's estate for his alimentary use allenarly. Owing to an accident he was unable to earn a full wage, but was in receipt of about 12s. per week for his work in the pits. His employment was, however, precarious in respect of his state of health. In an action brought by him in the Court of Session he was unsuccessful, and the defenders obtained decree for expenses. Following thereon they arrested money due to him from his father's estate in the hands of the trustees. The Court in the circumstances *recalled* the arrestments. Dick v. Russell, Dec. 24, 1887, p. 261.

Recall—Enforcement of order of English Court—Companies Act, 1862.

5. A having used arrestments to found jurisdiction, raised an action against a company in Queensland, and on the dependence arrested sums due to the company in the hands of its shareholders in Scotland. The Queensland Company went into liquidation in Queensland, and subsequently applied for and obtained a winding-up order in London, where it had assets and creditors. The English liquidator then obtained from the Chancery Division of the High Court of Justice an order restraining A from further prosecuting the action in Scotland, but bearing, "this order is to be without prejudice to the security, if any, upon the amounts payable by the Scotch shareholders which" A "has acquired by the proceedings taken in Scotland." The order further directed that the amounts received from Scottish shareholders in respect of a call should be placed to a separate account. The Court, in applications by the liquidator, *granted* an order restraining A from proceeding with the action, but subject to the orders of the Court, although at the same time they held such an order to be unnecessary, and *granted* the petition for recall of the arrestments, holding that the terms of the order by the Court of Chancery prevented the respondent from being prejudiced. Queensland Mercantile and Agency Co., Limited, v. Australasian Investment Co., Limited, July 17, 1888, p. 935.

ASSIGNATION. See *Arrestment*, 1—*Bankruptcy*, 8—*Expenses*, 5—*Friendly Society.*

BANKRUPTCY. *Effect of bankruptcy—Act*, 1621, *cap.* 18—*Cash payment.*

1. A trader employed his daughter as a saleswoman in December 1883. In December 1885, being insolvent, he attempted unsuccessfully to compound with his creditors. Thereafter the daughter, at a time when she believed sequestration to be imminent, obtained from him payments amounting to £69 as the alleged amount of two years' wages. On 10th March 1886 the trader was sequestrated. In an action by the trustee for repetition of the amount paid to the daughter as a fraudulent preference, *held* that the pursuer was entitled to repetition,—the Lord Justice-Clerk and Lord Craighill holding, that assuming the alleged debt to be due to the defender, the payment was a fraudulent preference; Lord Craighill further holding with Lord Rutherfurd Clark that the resting owing of the alleged debt had not been proved. Jones' Trustee v. Jones, Jan. 25, 1888, p. 328.

Effect of bankruptcy—Act 1621, *c.* 18—*Conveyance by insolvent.*

2. A father who was insolvent, and had no other property than the furniture of a lodging-house, conveyed the furniture to his daughter on the narrative that she had for fifteen years acted as his housekeeper without remuneration. A creditor of the father, whose debt existed at the date of the conveyance, obtained decree for his debt and poinded the furniture. In a petition for interdict presented by the daughter against the sale of the furniture, the only evidence adduced by her in proof of her claim against her father was her own testimony to the effect that she had acted as a domestic servant to him for fifteen years without wages. *Held* that she had failed to prove that the disposition by her father to her had been granted for a just and necessary cause, and interdict refused. Dawson v. Thorburn, July 12, 1888, p. 891.

BANKRUPTCY—*Continued.*

Effect of bankruptcy—Cessio—Cash payment by insolvent.

3. A petition was presented in the Sheriff Court to ordain A, a farmer, to grant a disposition *omnium bonorum* under the Cessio Acts. On 28th September, the Sheriff, on the narrative that he was satisfied that there was *prima facie* evidence of A's notour bankruptcy, ordained him to lodge a state of his affairs by 6th October. On 30th September, A granted a trust-deed for behoof of his creditors. He did not lodge the state required by the deliverance, but on 7th October he sold part of his stock, and paid the proceeds to a firm of merchants in payment of an account due by him to them. The merchants were at the date at which the payment was made aware of A's insolvency, that the petition for cessio had been presented, and the first order pronounced thereon. In a question between the trustee and the firm of merchants *held* that the trustee was entitled to repetition of the amount paid to them in respect of their debt. Shaw's Trustee v. Stewart & Bisset, Nov. 15, 1887, p. 32.

Effect of bankruptcy—Preference—Uncompleted Security—Right to assignation of rates and duties.

4. The Greenock Harbour Trustees were authorised by their Acts to borrow money, and in security therefor to grant assignations of the rates and duties leviable by the trust. Some of the creditors of the trust held only interim receipts for their advances signed by the treasurer of the trust, with an undertaking that an assignment would afterwards be completed. The trustees became unable to meet all their liabilities. A question of preference between the holders of the statutory assignations and the holders of the interim receipts having arisen, *held* that creditors holding assignations granted in terms of the statute had a preference over the interim receipt holders, who held no statutory security. Greenock Harbour Trustees, Jan. 31, 1888, p. 343.

Sequestration—Trustee—Election—Appeal—Competency—Bankruptcy Act, 1856, *sec.* 71.

5. At a meeting of creditors for the election of a trustee in a sequestration, creditors to the value of £15,000 voted for A and creditors to the value of £1600 voted for B. Objections were taken by creditors to certain votes for A. The Sheriff-substitute sustained an objection to the vote of X, a creditor for £16, who had proposed A, and, on the ground that A had been proposed by a creditor who was not entitled to vote, declared B to have been duly elected. An appeal by A to the Court of Session was objected to on the ground that by sec. 71 of the Bankruptcy Act the Sheriff's judgment was final. *Held* that the appeal was competent, and that the interlocutor must be recalled, on the ground that the Sheriff had exceeded his jurisdiction—the Lord President holding that the Sheriff had exceeded his jurisdiction in failing to ascertain the number of valid votes for each candidate—Lord Shand holding that the Sheriff's jurisdiction was limited to disposing of objections stated to him—Lord Adam concurring on both grounds. Farquharson v. Sutherlands, June 16, 1888, p. 759.

Sequestration—Trustee—Tantum et Tale—Assignation.

6. By antenuptial marriage-contract a lady who, with her husband, was domiciled in Germany, conveyed her whole estate, including *acquirenda*, to trustees, of whom her brother was one, for behoof of herself and her children. She subsequently succeeded to a legacy, which was arrested *ad fundandam jurisdictionem* in the hands of the representative of the donor (to whom the marriage-contract trust had not been intimated), by the trustee on her brother's sequestrated estate, for a debt alleged to be due by her to the latter. *Held (diss.* Lord Shand) that the arrestments were bad, as the trustee had no higher right than the bankrupt, who could not have benefited by his failure to intimate the marriage-contract trust to the testamentary trustee to the prejudice of the beneficiaries under the trust, whose interests it was his duty to protect. Graeme's Trustee v. Giersberg, June 1, 1888, p. 691.

BANKRUPTCY—*Continued.*

Sequestration—Statutory examination—Examination of debtor to the estate —Bankruptcy Act, 1856, *secs.* 90 *and* 91.

7. In the sequestration of a bankrupt, the trustee examined a trader with reference to accounts of sales made by him for the bankrupt on which he had charged commission, and asked how he had disposed of the goods. The trader deponed that he had himself bought the goods. The trustee having further asked, "What did you do with those goods when you took possession of them?" the witness objected to the competency of the question. *Held* that the trustee was entitled to put the question. Brash v. Arnott's Trustee, March 13, 1888, p. 583.

Trust for creditors—Principal and Agent—Lease—Security.

8. A landed proprietor conveyed his whole estates to a trustee for behoof of his creditors, having the day before executed a lease of a farm in his own occupation in favour of the trustee, in security of advances to be made by him under the trust. The lease bore that the stock on the farm, of which the heritable estate mainly consisted, had been sold to the trustee for a price named, which price (it was by separate letter agreed) was not to be paid, but was to be imputed towards payment of the advances. It was also agreed that the truster should manage the farm for the trustee. The ostensible possession and ownership of the farm and stock continued in the truster, who incurred considerable debts in the course of his management. In an action against the trustee for payment of certain of these debts at the instance of tradesmen who had supplied the goods in ignorance of the trust arrangement, *held* (*rev.* judgment of Lord Trayner) that the effect of the deeds was to divest the granter of his estates, that his possession of the farm thereafter was as agent of the trustee, and consequently that the trustee was liable (to the extent of the trust-estate) in payment of goods supplied to the order of his agent in execution of his agency. Decree therefore *granted.* Macphail & Son v. Maclean's Trustee, Nov. 16, 1887, p. 47.

Balancing accounts in bankruptcy—Lease.

9. A tenant under an agricultural lease for nineteen years, having during its currency granted a disposition *omnium bonorum,* the trustee declined to adopt the lease, but entered into an agreement with the landlord whereby, on the narrative that it was expedient to arrange for laying down the crops for the current year, he continued the occupation of the farm till the following Whitsunday. By a second agreement the landlord agreed to take over and pay for certain articles which were on the farm at a valuation. These articles having been valued, the landlord sought to compensate the claim against him for their value by a debt due to him by the tenant, for which he could only rank as an ordinary creditor. *Held* that the debt due by the landlord had been incurred subsequently to the tenant's bankruptcy, and could not be compensated by the debt incurred by the tenant prior to bankruptcy. Taylor's Trustees v. Paul, Jan. 24, 1888, p. 313.

Accountant in Bankruptcy—Bankruptcy Act, 1856, *sec.* 166.—*Private trust.*

10. *Question,* whether private trusts can be brought under the superintendence of the Accountant in Bankruptcy, in terms of the 166th section of the Bankruptcy (Scotland) Act, 1856. Raeburn's Trustees, June 12, 1888, p. 740.

Appeal in Bankruptcy. See *Process,* 24, 25.

Fraudulent Bankruptcy. See *Justiciary Cases,* 2.

BILL OF EXCHANGE. *Diligence—Suspension of Charge—Caution.*

1. In a suspension brought by the acceptor of a bill of a charge given by the drawer, the complainer averred that the bill had been delivered by him as a blank bill to the drawer to be used for a different purpose from that for which it was used, but it appeared from letters signed by the complainer that he had admitted liability for the bill. *Held* that the complainer was not entitled to have the charge suspended without finding caution. Simpson v. Brown, June 9, 1888, p. 716.

BILL OF EXCHANGE—*Continued.*

Payment and discharge—Bills of Exchange Act, 1882, *sec.* 63—*Cancellation by mistake, or without authority.*

2. In an action upon a bill, on which the acceptor's name had been cancelled, the pursuer proved that the bank-agent to whom the bill had been sent for collection had taken payment from the acceptor, and had allowed him to cancel his signature; that the latter had paid the bill in the belief that the holder had agreed to a condition which he, the acceptor, had intimated to the bank-agents, viz., that payment of the bill should extinguish all claim by the holder for interest and expenses; that the holder had not agreed to that condition, or authorised the bank-agent to take payment on that condition, and that the holder had accordingly returned the money to the acceptor, and recovered the bill. *Held* that the bank-agent had no authority to agree to the payment and cancellation on the condition stated, and that if he believed that he had such authority the cancellation had been made under a mistake, and that in either view the cancellation was inoperative. Dominion Bank v. Anderson & Co., Feb. 10, 1888, p. 408.

BURGH. *Dean of Guild—Jurisdiction.*

Held (*per* the Lord Justice-Clerk and Lord Craighill) that the Dean of Guild in considering a petition for a lining has no jurisdiction to entertain the question whether, on a construction of the titles of other feuars, a restriction ought to be imported into the title of the petitioner, when that title is in itself unambiguous and unrestricted. Walker & Dick v. Park, Feb. 29, 1888, p. 477.

See *Police—Public Health.*

CAUTION. See *Bill,* 1.

CAUTION FOR EXPENSES. See *Process,* 7.

CESSIO. See *Bankruptcy,* 3.

CHURCH. *Patron—Compensation—Church Patronage Act,* 1874, *secs.* 4 *and* 5.

1. A patron obtained in 1875 in terms of the Church Patronage Act, 1874, an interlocutor by the Sheriff determining the amount of compensation to which he was entitled under the Act for the loss of the patronage of a parish, and finding and declaring that on the occurrence of a vacancy he should be entitled to receive from the heritors payment of the amount by four equal yearly instalments out of the first four years' stipend. A vacancy occurred in the parish in 1880, and a new minister was appointed, but the patron did not intimate the Sheriff's interlocutor to the heritors or apply for payment of his compensation till 1887—the whole stipend having been in the meantime paid in each year to the minister. *Held* that as the heritors were *in bona fide* in paying away the whole stipends for the four years over which the deduction in respect ~~of the compensa~~tion would have spread, the patron had lost his claim against them by neglecting to apply for his compensation within that period. Earl of Strathmore v. Heritors of Rescobie, Feb. 1, 1888, p. 364.

2. An heir of entail in possession claimed compensation for the value of the patronage of a parish church. He died after receiving one of the four equal statutory instalments. *Held,* on a construction of the Patronage Act, 1874, sec. 4, that the heir succeeding to the entailed estates had no right to any part of the patronage compensation, and that the same was personal to the deceased heir in possession who claimed it, and therefore fell to his executor. Paterson v. Paterson, July 20, 1888, p. 1060.

Seat rents in parochial church in burgh—Annuity-tax (*Edinburgh and Montrose*) *Abolition Act,* 1860, *secs.* 5, 6—*Annuity-tax Abolition Act Amendment Act,* 1870, *secs.* 25, 32—*St Giles' Edinburgh Ancient Church Act,* 1879.

3. *Held* (*diss.* Lord Rutherfurd Clark) that under the above statutes the right of the Edinburgh Ecclesiastical Commissioners to the seat rents in the Church of St Giles', Edinburgh, extended to the rents of chairs placed in

CHURCH—*Continued.*

the nave by the kirk-session. Edinburgh Ecclesiastical Commissioners v. Kirk-Session of High Kirk, Edinburgh, July 18, 1888, p. 952.

Allocation of seats—Property—Parts and Pertinents.

4. Where seats in a parish church are allocated to heritors according to real rent, they are parts and pertinents of the property in respect of which they are allocated, and cannot be alienated therefrom. Stephen v. Anderson, Nov. 18, 1887, p. 72.

Episcopal Church—Cy près.

5. Circumstances in which it was *held* that a church which had belonged to the "Licensed Episcopal" congregation of a town (which had for many years ceased to exist), fell to be made over to the "Scottish Episcopal" congregation of the town. Burnett v. St Andrew's Episcopal Church, Brechin, June 12, 1888, p. 723.

COMPANY. *Promotion money—Payments to a firm, one of whom was a director —Right to retain against firm.*

1. A mine-owner in San Francisco entered into an agreement with a firm of merchants there to pay them the half of any profit upon the sale of the mine in Great Britain. B, a partner of the firm, subsequently introduced the seller to purchasers in Great Britain, and although he took no part in deciding as to the purchase his name appeared in the prospectus of a company which was formed for the purpose of buying and working the mine as a provisional director, and also in the memorandum and articles of association as an original director. He subsequently acted as a director. The agreement between his firm and the seller was never communicated to the shareholders. The firm's share in the purchase price to the extent of £7000 was applied by the company as payments on account of shares which the firm agreed to take. *Held* that as B had, with the knowledge of his firm, occupied a fiduciary position towards the company in the purchase of the mine, his firm were bound to repay the £7000 to the company. Scottish Pacific Coast Mining Co. v. Falkner, Bell, & Co., Jan. 13, 1888, p. 290.

Register of members—Effect of registration.

2. *Held* that a person who applied for shares in a company registered under the Companies Acts, and authorised his name to be placed on the register of members, became, on allotment of the shares and registration of his name in terms of his authority, a shareholder of the company, and was not entitled to have his name removed from the register by shewing that he did not become a shareholder on his own account, but merely that he might, by agreement with the directors, place the shares among such persons as he found willing to take them. Miln v. North British Fresh Fish Supply Co., Limited, Nov. 15, 1887, p. 21.

Action for registration of transfer—Process—All parties not called.

3. The transferee of stock in a railway company raised an action against the company to have them ordained to register the transfer. The company in defence averred that the transferor had instructed them not to register the transfer, on the ground that the transferee was "illegally disposing of" the transferor's stock; and pleaded "all parties are not called." The Court *held* that it was not necessary to call the transferor as a defender in the action, but in respect that the action had not been formally intimated to him ordained the defenders to transmit to him a copy of the record and a copy of the interlocutor certifying him that if he failed within eight days to state objections to the registration of the transfer, judgment would be pronounced against the defenders. Shaw v. Caledonian Railway Co., March 7, 1888, p. 504.

Reparation—Fraud—Title to sue—Shareholder—Restitutio in integrum.

4. In 1877 a joint stock company was formed to buy an estate in Norway, believed to be valuable for its timber and minerals, at the price of £3800, three-fourths of the price to be paid in cash, the remainder in shares. The company entered into possession of the estate in 1877, and carried on busi-

COMPANY—*Continued.*

ness till 1884, when it was resolved to wind up the company. In November 1883 one of the partners raised an action of damages against the vendor for the loss the pursuer had sustained by becoming an original shareholder of the company, on the ground that he had been induced to do so by the fraudulent misrepresentations of the vendor. After a proof, *held* that fraudulent misrepresentation had not been proved, and that the vendor was not liable, the Lord Justice-Clerk, Lord Young, and Lord Craighill further holding that having regard to the proceedings of the company the pursuer had no title to sue, Lord Rutherfurd Clark reserving his opinion. Dunnett v. Mitchell, Dec. 7, 1887, p. 131.

Preference shares—Dividend—Payment of arrears out of subsequent profits.

5. Preference shares in a limited company were isued under special resolution of the company, "these shares to be entitled to a preferential dividend of 5½ per cent per annum." During two years there were no profits of the company wherewith to pay the guaranteed dividend. *Held* (1) that the preference shareholders were entitled to payment of the arrears of dividend out of the first profits made by the company, but (2) that interest was not due on the arrears. Partick, Hillhead, and Maryhill Gas Co., Limited, v. Taylor, June 5, 1888, p. 711.

Liquidation—Foreign.

6. Enforcement of order granted by English Court, in a liquidation, restraining action in Scotland.

Observed that there is nothing incompatible in the co-existence of a Colonial and of an English liquidation of the same company. Queensland Mercantile and Agency Co., Limited, v. Australasian Investment Co., Limited, July 17, 1888, p. 935.

See *Judicial Factor*, 1, 3.

CONTRACT. *Construction— Whether according to schedule rates or for a lump sum.*

1. Terms of offer for a building contract which, with acceptance, were *held* to constitute a contract according to the schedule rates, and not a contract for a lump sum, so that the offerer was not barred by an error in calculating the lump sum from claiming the full sum brought out at his rates. Jamieson v. M'Innes, Oct. 29, 1887, p. 17.

Construction—Expositio contemporanea.

2. Where the parties to a long lease had for a long period of years acted on a particular construction of obligation of relief of public burdens *held* that such construction must be regarded as the true meaning of the obligation, and receive effect accordingly. Jopp's Trustees v. Edmond, *et e contra*, Jan. 11, 1888, p. 271.

Conditions.

3. Notice (printed on letter of acceptance by the sellers) headed "Terms of Sale," and intimating that the sellers gave no warranty as to subjects sold, *held* effectual to bind the buyers. Smith & Son v. Waite, Nash, & Co., March 9, 1888, p. 533.

4. Condition alleged to be implied in a lease on the ground that it was in accordance with the good faith of the contract. Craig v. Millar, July 20, 1888, p. 1005.

Breach—Different actions of damages founded on one breach—Competency.

5. A single act, amounting either to a delict or to breach of contract cannot be made the ground of two or more actions for the purpose of recovering damages arising within different periods, but the whole damage present and future must be recovered in one action. Stevenson v. Pontifex & Wood, Dec. 7, 1887, p. 125.

See *Custom—Marriage-contract*, 2—*Foreign*, 1.

COPYRIGHT. *Copyright of designs—Infringement—Registration for "shape or configuration"—Patents, Designs, and Trades-Marks Act*, 1883, sec. 58.

A design was registered for shape or configuration under the 60th section

COPYRIGHT—*Continued.*

of the Patents, Designs, and Trades-Marks Act, 1883, the application being for "a range door, with moulding on top, moulding forming front of range, shape to be registered." The drawing shewed a moulding on the top of the door fitting into the moulding on the front of the range, and flush with it. The merit of the design lay in attaching the moulding to the door instead of to the fire-cover, the arrangement formerly in use in convertible kitchen ranges. *Held* that another design, which differed from the above in this, that the moulding on the door overlapped the moulding on the front of the range, was, except in certain immaterial respects, an "obvious imitation" of or identical with the registered design, and an infringement of it. Walker, Hunter, & Co. v. Hecla Foundry Co., May 25, 1888, p. 660.

CROFTER. See *Lease*, 8, 9.

CURATOR and CURATOR BONIS. See *Minor*, 1, 5.

CUSTOM. *Admissibility to construe written contract.*

1. *Held* that averments of custom of trade cannot be admitted to probation in order to construe a written contract clearly expressed.

A steel company contracted to supply "the whole of the steel required by" a firm of contractors in the building of a bridge, "the estimated quantity of steel to be 30,000 tons, more or less." In an action at the instance of the steel company against the contractors to have it declared that they were entitled to supply, and the defenders were bound to take from them all the steel necessary for the bridge, the contractors averred that according to the custom of the steel trade the contract was a contract only for the estimated quantity, with a margin of variation not exceeding 5 per cent. *Held* (*rev.* judgment of Lord Trayner) that the words of contract being plain and unambiguous the averment was not relevant to be admitted to probation. Steel Company of Scotland v. Tancred, Arrol, & Co., Dec. 22, 1887, p. 215.

Ship—Demurrage—Discharge of mixed cargo in separate lots—Custom of the port.

2. A ship, chartered to carry to the United Kingdom a cargo of ash and bones, the discharge of cargo to be according to the custom of the port of discharge, received from the charterers and loaded 33 tons of ash, about 397 tons of bones, and about 20 tons of horns, hoofs, and piths (which last were partly intermixed with the bones and partly loaded on the top of them). The master granted bills of lading for 33 tons of ash and 417 tons of bones. On arrival at the port of call the ship was directed to proceed to Aberdeen. The master having on the demand of the consignees there, but under protest, separated the hoofs, horns, and piths from the bones before giving delivery, brought an action against the consignees for four days' demurrage on account of the delay caused by this separation. After a proof, from which it appeared that the trade in bones at Aberdeen was of only about thirty years' standing, and almost entirely in the hands of the defenders themselves, *held*, *inter alia*, that the defenders had failed to prove any custom of the port entitling them to require the ship to effect such separation. Clacevich v. Hutchison & Co., Oct. 28, 1887, p. 11.

DELEGATION. *Police Commissioners—Power of committees to delegate to subcommittee—General Police and Improvement Act*, 1862, *sec.* 63—*Dundee Police and Improvement Act*, 1882.

Under the powers conferred by sec. 63 of the General Police and Improvement Act, 1862, incorporated with the Dundee Police Act, 1882, the Dundee Police Commissioners appointed a works committee to superintend the building of houses, &c. This committee had no express power under the general or local Act to delegate its powers. The committee remitted certain plans to a "subcommittee" of their number. The subcommittee issued a deliverance in name of "the Commissioners" disapproving the plans. On

DELEGATION—*Continued.*
appeal, *held* that the works committee had no power to delegate its powers, and that therefore the deliverance fell to be quashed. Thomson v. Dundee Police Commissioners, Dec. 8, 1887, p. 164.

DESIGN. See *Copyright.*

DOMICILE. See *Foreign*, 1, 2.

ELECTION LAW. *Service Franchise—Soldier—Representation of the People Act*, 1884, *sec.* 3.

1. A soldier who has, in respect of his position in the army, lived in separate apartments in barracks for the qualifying period, is entitled as a servant of the Queen to be enrolled in the register of voters as tenant of a "dwelling-house."

Held further, that commissioned officers who each had the exclusive occupation of a bedroom for the qualifying period, but took their meals in a mess-room, to which they had a common right, were also entitled to be placed upon the roll of voters. Gay v. M'Gill, Nov. 23, 1887, p. 90.

Service Franchise—Inhabitant-occupier—Miner out on strike—Representation of the People Act, 1884, *sec.* 3.

2. A miner who occupied a dwelling-house by virtue of his contract of employment having gone out on strike, his employer, on 24th August 1887, obtained decree of ejection. The decree had not been extracted, and he still occupied the house on 6th October 1887, when the Sheriff proceeded to consider his claim to be put upon the roll of voters. *Held* that having left the employment and suffered decree of ejection to go out against him, he was not in occupation by virtue of any right, and was therefore not entitled to be put upon the roll. Strachan v. Binnie, Jan. 19, 1888, p. 308.

ENTAIL. *Power to feu—Consent subject to conditions—Entail Amendment Act*, 1848, *sec.* 4.

1. An heir of entail in possession presented a petition under section 4 of the Entail Amendment Act, 1848, in which he prayed the Court to grant warrant to him to feu the entailed estate (with certain exceptions), "at such times, in such portions, and for payment of such feu-duties as the petitioner may think fit," subject to the condition contained in a deed of consent by the next heir (whose consent was alone requisite to enable the petitioner to disentail), that no feu-charter or long lease should be granted during the lifetime of the consenter without his consent to the terms thereof. The Court (*rev.* judgment of Lord Trayner) *granted* the prayer of the petition. Christie, June 27, 1888, p. 793.

Provisions to younger children—Power of entailer over amount of—Aberdeen Act.

2. An heir of entail executed a bond of provision on the narrative of the Aberdeen Act, whereby he provided £10,000, calculated to be the amount of three years' rents of his entailed estate, to his second son, or in the event of that being held beyond his powers, £9000 to his second son, £600 to his third son, and £400 to his fourth son; or in the event of its being held beyond his powers to give the whole or an unequal portion to his second son, then he provided £10,000 to his whole younger children, five in number, equally. *Held*, by a majority of the whole Court (Lord President, Lord Justice-Clerk, Lords Mure, Shand, Rutherfurd Clark, Adam, Kinnear, and M'Laren), that it was within the powers of the granter to provide the whole amount of the three years' rents to the second son.

Lord Fraser and Lord Trayner *held* that the second alternative provision of £9000 to the second son, £600 to the third, and £400 to the fourth should receive effect.

Lord Young and Lord Lee *held* that under the statute the provision to one child could not exceed one year's free rent, and therefore that the third mode of provision, viz., in favour of the younger children equally, was the only one that could receive effect. Paterson v. Paterson, July 20, 1888, p. 1060.

ENTAIL—*Continued.*

Provisions to younger children—Money held under trust to purchase and entail lands—Aberdeen Act.

3. An heir of entail in possession executed a bond of provision in virtue of the powers contained in the Aberdeen Act, providing to his younger children a sum equal to three years' rent of his entailed estates. In addition to the lands under the entail he held also certain sums of money invested under a trust for the purchase of additional lands to be entailed in the same way, or to be applied in payment of children's provisions charged on the entailed estate, in regard to which sums he had "the same powers" as if the money had been already applied in the purchase of such lands. *Held* that the interest of these sums fell to be included with the rent of the entailed estate in calculating the amount due to the younger children under the bond of provision. Paterson v. Paterson, July 20, 1888, p. 1060.

Patronage compensation—Church Patronage Act, 1874.

4. An heir of entail in possession claimed compensation for the value of the patronage of a parish church. He died after receiving one of the four equal statutory instalments. *Held,* on a construction of the Patronage Act, 1874, sec. 4, that the heir succeeding to the entailed estates had no right to any part of the patronage compensation, and that the same was personal to the deceased heir in possession who claimed it, and therefore fell to his executor. Paterson v. Paterson, July 20, 1888, p. 1060.

Improvement expenditure—Extent of right of legatee of heir of entail to charge entailed estate—Entail Amendment Act, 1875, *secs.* 8 *and* 11—*Entail Act,* 1882, *sec.* 6.

5. *Held* (*rev.* judgment of Lord Trayner) that under the above Acts the bond and disposition in security to which the legatee of an heir of entail, who has died without charging the estate for improvement expenditure, is entitled is limited to three-fourths of the sum expended on the improvements. Leith v. Leith, July 18, 1888, p. 944.

Improvement expenditure—Expenses of application—Entail Amendment Act, 1875, *sec.* 7.

6. *Held* that where an entailed estate is charged under secs. 8 and 11 of the Entail Amendment Act, 1875, by bond and disposition in security with three-fourths of improvement expenditure, the charger is only entitled to have included in the bond three-fourths of the actual or estimated costs of the application. Leith v. Leith, July 18, 1888, p. 944.

Consigned money—Railway—Loan by trustees to heir in possession on security of fee-simple estate.

7. An heir of entail in possession prayed the Court to authorise trustees, who held a sum of money, consigned by a railway company as the price of part of the entailed lands taken for the purposes of their undertaking, in trust for himself and the succeeding heirs of entail, to lend the money to him on the security of an estate belonging to him in fee-simple. The Lord Ordinary reported the case. The Court *remitted* the petition to the Lord Ordinary to sanction the proposed loan, on his being satisfied with the sufficiency of the proposed security. Earl of Rosebery, July 4, 1888, p. 824.

Burden on entailed property—Disentail—Acquiescence of subsequent heirs.

8. The heir of entail in possession of K, an estate situated on the north bank of a river, in 1858 granted permission (not in writing) to M, the proprietor of lands on the other bank and tenant of the shootings on the entailed estate, to build over the river a carriage bridge, one of the abutments of which rested on part of the entailed lands. The bridge was connected by a good road, forty-five yards long, with a public road which ran along the north bank. The succeeding heir of entail, who in 1884 disentailed the estate, did not object to the continued use of the bridge by M. In 1885, after the death of the disentailer, M assigned the remainder of his lease of the shootings over K to W, who shortly thereafter placed a deer fence across the access to the bridge on the north side. In an action against M at the instance of W and the fee-simple proprietor of K, who up to that time had

ENTAIL—*Continued.*
not objected to M's use of the bridge, for declarator that they were not entitled to have the use of the bridge discontinued, *held* that M's right to the use of the bridge rested on sufferance only, and that, therefore, the pursuers were entitled to declarator that he was not entitled to continue to use it. Winans v. Lord Tweedmouth, March 10, 1888, p. 540.

Disentail—"Heir-apparent"—Entail Amendment Act, 1848, *secs.* 2 *and* 52.

9. An heir of entail in possession presented a petition for authority, under the Rutherfurd Act, 1848, and subsequent Acts, to disentail the entailed estate on obtaining the consent of his eldest son as his "heir-apparent." The deed of entail provided that the heir in possession should for himself and his "heir-apparent" forfeit all right to the estate in the event of his succeeding to a certain peerage, to which at the date of the petition the former was heir-presumptive. *Held* that the petitioner's eldest son was his heir-apparent in the sense of the statute, notwithstanding the contingency to which the son's right of succession was exposed. Forbes v. Burness, June 29, 1888, p. 797.

EXECUTOR. *Heir and Executor—Incidence of burdens.*

1. Heritable property, burdened to the extent of £5000, was sold for £5100, the seller coming under an obligation to clear off incumbrances upon payment of the price. A few days after the purchase the purchaser died intestate. At the time of his death he had almost completed negotiations for a re-sale of the property, of which he had still to pay the price, and which was still burdened for £5000. In a special case between his heir and his executor, *held* (1) that it being incompetent to look at the circumstances as evidence of an intention on the part of the deceased to treat the subject purchased as moveable, it fell as heritable succession to the heir; and (2) that the price of £5100 fell to be paid by the executor without relief from the heir. Ramsay v. Ramsay, Nov. 15, 1887, p. 25.

Heir and Executor—Warrandice—By whom obligation of warrandice prestable—Catholic security.

2. *An obligation to free lands of debt arising under the warrandice clause of a disposition falls to be satisfied by the executor of the granter of the disposition in a question between him and the heir.*

In a trust-disposition and settlement, executed in 1853, *the granter conveyed his whole estate, heritable and moveable, to trustees, for the purpose,* inter alia, *failing heirs of his body, of conveying his estate of M, and his other lands in the county of L, to his brother, and the heirs of his body, under the fetters of an entail. By the same deed he directed his trustees, failing his own issue, to make over the whole residue of his estate to the person who should succeed to M. By a codicil, dated in* 1876, *he disponed to his wife, in the event of her surviving him, the lands of B and A (which were among the lands originally directed to be entailed), and bequeathed to her the whole residue of his estate. The disposition of B and A contained a clause of warrandice in ordinary form under the Titles to Land Consolidation Act,* 1868 (31 *and* 32 *Vict. cap.* 101), *which imports absolute warrandice. In* 1882 *the truster granted a bond and disposition in security for* £250,000 *over the estates of M, B, and A. On the truster's death his widow maintained that the obligation of warrandice in the disposition of B and A shewed the truster's intention that she should be relieved of the heritable debt, which she would not be if she had to pay it out of the residue.* Held (aff. *judgment of Second Division) that the obligation of warrandice was a personal obligation which fell to be satisfied out of the moveable estate before the residue could be ascertained, and that she was not entitled to be relieved by the truster's heir.* Duchess of Montrose v. Stuart, Nov. 15, 1887, H. L., p. 19.

EXPENSES. *Certificate of presiding Judge—Jury trial—Slander—Nominal damages—Court of Session Act,* 1868, *sec.* 40.

1. The 40th section of the Court of Session Act, 1868, enacts that where the

EXPENSES—*Continued.*

pursuer in an action of damages in the Court of Session for defamation or libel recovers by the verdict of the jury less than £5, he shall not be entitled to recover from the defender any expenses unless the Judge before whom the verdict is obtained shall certify that the action was brought for vindication of character, and was, in his opinion, fit to be tried in the Court of Session. *Held* that when the Judge grants such certificate the Court will give effect to his opinion, and award expenses to the pursuer. Macmillan v. Wilsons, Oct. 25, 1887, p. 6.

Certificate of Lord Ordinary—Shipping Law—Salvage—Merchant Shipping Acts, 1854, *sec.* 460, *and* 1862, *sec.* 49.

2. In a salvage case, in which the Lord Ordinary gave decree for £50 and certified under the above Acts that the case was one fit to be tried in a superior Court, the Court *held* that the certificate had been properly given.
Observed that the Inner-House will be slow to interfere with the exercise by the Lord Ordinary of his discretion in regard to the granting of such a certificate, and that the circumstances of the case were such as justified the Lord Ordinary in granting it. Lawson v. Grangemouth Dockyard Co., June 14, 1888, p. 753.

Trust—Adjudication.

3. *Held* competent to adjudge a trust-estate for expenses decerned for against the trustees in a litigation in which the trust-estate was alone concerned. Stewart v. Forbes, Feb. 8, 1888, p. 383.

Taxation as between agent and client—Taking of land compulsorily—Lands Clauses Consolidation Act, 1845, *sec.* 119.

4. *A proprietor of lands brought an action against the Crown and against a railway company, concluding for declarator that he had right to the foreshore* ex adverso *of his lands, and for interdict against the railway company entering upon it. The pursuer obtained decree in his favour in the Court of Session, and in appeals by both defenders to the House of Lords, with a finding against the appellants for costs in the appeals. The railway company having then served on the proprietor a notice under the Lands Clauses Act of their intention to take the foreshore, the latter presented a petition to the House of Lords against the railway company praying that the costs in the appeal should be taxed as between agent and client in terms of section* 119 *of the Lands Clauses Act.* Held *that the costs in the railway company's appeal should be taxed as between agent and client.* Young v. North British Railway Co., March 8, 1888, H. L., p. 32.

Decree for expenses—Assignation—Title to sue.

5. A defender obtained a decree for expenses against the pursuer, and thereafter assigned his interest therein to a third party. The assignee raised an action for the amount of the expenses against persons who were not named in the decree, averring that they had been the true *domini litis* in the former action. *Held* (*reversing* judgment of Lord Lee, Ordinary) that he had no title to sue. Rose v. Stevenson, Jan. 27, 1888, p. 336.

Modification.

6. Power of Lord Ordinary to modify. Clarke v. M'Nab, May 26, 1888, p. 676.

See *Entail*, 6—*Process*, 7, 12.

FISHINGS. *Salmon-fishings—Division of, where ex adverso of adjoining properties—Property—Marches.*

1. In a question as to the boundary between salmon-fishings *ex adverso* of two seaboard properties, circumstances in which it was *held* that a stream which at low water divided the foreshores of the properties unequally did not constitute a natural boundary between the salmon-fishings so as to displace the ordinary legal rule of division applicable to such cases in the absence of prescriptive possession. Magistrates of Tain v. Murray, Nov. 23, 1887, p. 83.

Salmon-fishings—Competing Title—Possession—Net and coble.

2. In an action brought by the burgh of Inverness and others, for declarator that the pursuers had the exclusive right of salmon-fishing in the river Ness from both banks from the stone X to the sea, the pursuers founded

FISHINGS—*Continued.*

on a crown charter dated in 1591 ratifying all former grants to the town, and conveying "aquam de Nyss omnesque partes ac utrumque latus . . . cum omnibus piscationibus et piscariis tam salmonum quam aliorum piscium." Defences were lodged by the proprietor of the estate of Holme on the south bank, part of which was situate above the stone X and part below that mark. The defender held one half of the lands of Holme under Fraser of Balnain as superior upon a title which did not carry any right of fishing, and the other half of the lands as a feu from the Earl of Moray, on a title in which the subjects were described as " toto et integro dimidio villæ et terrarum de Holme . . . cum dimidio salmonum piscarium super aqua de Ness ad dict. terras apertans," the superior's title being a charter granted by Queen Mary in 1566 in favour of the Earl of Moray, conveying " dimidietatem terrarum de Holme cum salmonu et aliis piscariis earundem in aqua de Nysa." The disputed portion of the fishings (below the stone X) was *ex adverso* of part of the lands held of the Earl of Moray; the upper portion of the Holme fishings, which was not in dispute was partly *ex adverso* of the remainder of Lord Moray's feu and partly of Fraser of Balnain's feu. The defender did not dispute the pursuers' right to fish for salmon *ex adverso* of Holme below the stone X, but claimed a right along with them. The defender admitted that he had possessed the salmon-fishing *ex adverso* of the upper half of Holme. *Held* (*diss.* Lord Rutherfurd Clark) that the defender was entitled to absolvitor, in respect (1) that the grant to the Earl of Moray of one-half of the salmon-fishings of Holme was to be construed as a grant of one-half *pro indiviso* of the fishings pertaining to the whole lands of Holme; (2) that in the absence of evidence to the contrary, these were to be regarded as the fishings *ex adverso* of the whole lands; and (3) that on the evidence the defender's possession was sufficient to preserve his right.

Opinion (*per* Lord Young) that a general grant of fishings may be explained to include salmon-fishings by possession thereof in other ways than by net and coble fishing. *Opinion contra per* Lord Rutherfurd Clark. Warrand's Trustees v. Mackintosh, July 6, 1888, p. 833.

Salmon-fishing—Fishery Board—Title to sue—Interdict—Salmon Fisheries Act, 1862—*Salmon Fisheries Act*, 1868.

3. Under the Salmon Fisheries Acts of 1862 and 1868 Fishery Boards have power to sue for penalties for offences under the Acts, and to apply summarily to the Sheriff for the enforcement of rules and regulations made by them. In a note of suspension and interdict brought by a Fishery Board at common law to prevent persons fishing in a manner alleged to be illegal, *held* that the complainers, being merely a statutory board with statutory remedies had no title to sue. Tay District Fishery Board v. Robertson, Nov. 16, 1887, p. 40.

Herring and White Fishing—Waste or uncultivated land beyond high-water mark—Act 11 *Geo. III. cap.* 31, *sec.* 11.

4. Prior to 1868 a piece of ground about four acres in extent, lying between a high road and the sea, and within 100 yards above the highest high-water mark, was in a waste and uncultivated condition. In that year the proprietor, at some expense, had it levelled, top-dressed with earth, and sown out with grass seeds, the result being that in place of a piece of beach with very rough accommodation for nets, a piece of fairly good pasture and of good net ground was provided. Both prior to and after 1868 fishermen made use of it for drying their nets, &c., paying a small rent to the tenant of the farm to which the ground belonged. In 1886 they claimed right to make use of it, under the above statute, without payment of rent. In an action by the proprietor and his tenant to have the fishermen interdicted from so using the ground, *held* that the ground was not waste or uncultivated in the sense of the statute. Interdict *granted* accordingly. Scott v. Gray, Nov. 15, 1887, p. 27.

See *Justiciary Cases*, 6.

FOREIGN. *Domicile—Capacity to contract—Minor.*

1. *When a contract is executed in a country by a person domiciled there who by the law of the country has not the capacity to contract, the contract will not be valid in any country.* Cooper v. Cooper, Feb. 24, 1888, H. L., p. 21.

Domicile—Anglo-Indian domicile.

2. A person's domicile of origin must prevail until he has manifested and carried into execution an intention of abandoning it and of acquiring another as his sole domicile.

Observations (*per* Lord President) on Anglo-Indian domicile. Steel v. Steel, July 13, 1888, p. 896.

Divorce for desertion.

3. A Scotswoman married an Englishman and resided with him in England for about ten years. The husband having deserted his wife and gone to America, she returned to reside in Scotland. In an action brought by her there for divorce on the ground of desertion, *held* by Lord M'Laren (Ordinary) that the Court had no jurisdiction over the defender, and that the action was incompetent. Redding v. Redding, July 20, 1888, p. 1102.

Arrestments—Recall—Enforcement of order of English Court.

4. A having used arrestments to found jurisdiction, raised an action against a company in Queensland, and on the dependence arrested sums due to the company in the hands of its shareholders in Scotland. The company went into liquidation in Queensland, and subsequently in England, where the English liquidator obtained an order restraining A from prosecuting the action in Scotland, but bearing "this order is to be without prejudice to the security, if any, upon the amounts payable by the Scotch shareholders which" A "has acquired by the proceedings taken in Scotland." The order further directed that the amounts received from Scottish shareholders in respect of a call should be placed to a separate account. The Court of Session, on the application of the liquidator, *granted* an order enforcing the English order restraining A from proceeding with the action subject to the orders of the Court, but intimated that they held that such an order by them was unnecessary, and *granted* a petition for recall of the arrestments, holding that the terms of the order by the Court of Chancery prevented the respondent from being prejudiced. Queensland Mercantile and Agency Co., Limited, v. Australasian Investment Co., Limited, July 17, 1888, p. 935.

Company—Liquidator.

5. *Observed* that there is nothing incompatible in the co-existence of a Colonial and of an English liquidation of the same company. Queensland Mercantile and Agency Co., Limited, v. Australasian Investment Co., Limited, July 17, 1888, p. 935.

Trustee resident in England.

6. In an action of accounting against two trustees, one who was resident in England pleaded no jurisdiction. Plea *repelled*, on the ground that the trust-estate was in Scotland. Robertson v. Nicholson, July 13, 1888, p. 914.

Ship—Bill of lading—Proof.

7. In an action brought by the owners of a Danish ship against the indorsees of the bill of lading for freight on the cargo delivered to them at the port of discharge in Scotland, the defenders averred that they had not received the full cargo specified in the bill of lading granted by the master at Riga, the port of shipment, and pleaded that they were entitled to retain from freight the value of the deficiency, alleging that by Danish law (the law of the flag) the bill of lading was conclusive against the owners. After a proof, which shewed that the indorsees of the bill of lading had only agreed to pay for so much of the cargo as was delivered to them, *held* that the defenders had only become indorsees of the bill of lading to the extent of the cargo actually on board the vessel, and were not entitled to retain any part of the freight.

Opinions (*per* the Lord Justice-Clerk, Lord Young, and Lord Craighill) that the owners were only liable for the cargo actually put on board, and

FOREIGN—*Continued.*
that by the law of Scotland, which, as the law of the *forum*, must regulate the proof, the bill of lading was not conclusive evidence as to the amount of cargo shipped. Owners of the "Immanuel" v. Denholm & Co., Dec. 7, 1887, p. 152.

FRANCHISE. See *Election Law.*

FRAUD. See *Reparation*, 4.

FRIENDLY SOCIETY. *Assignation of shares in security—Intimation to manager.*
D, a member of an investment society (who was also its manager), assigned certain shares of the society standing in his name to a firm in security of an advance of money. No intimation was made to the directors, and no alteration was at the time made in the shareholders' ledger, which was the only register of members kept by the society. In an action brought by the assignees against the society, *held* that the knowledge of D was not equivalent to knowledge on the part of the society, and that therefore the society was not in bad faith in making a payment to D on account of his shares after the date of the assignation, and that the society was not liable to the assignees for the sum so paid.

Question, whether such shares can be the subject of a security for an advance of money. Grigor Allan v. Urquhart, Nov. 16, 1887, p. 56.

GUILD, DEAN OF. See *Burgh.*

GROUND-ANNUAL. See *Personal or Real—Servitude*, 1.

HARBOUR. See *Insurance*, 1.

HEIR. See *Executor.*

HUSBAND AND WIFE. *Aliment—Amount.*

1. In an action of separation and aliment against a husband, he agreed by joint minute to pay to his wife £250 per annum as aliment for herself and the two children of the marriage, who resided with her. The agreement was given effect to in an interlocutor granting decree of separation. Three years later he presented a petition to have the aliment restricted. His income having been ascertained to amount to £430 per annum, and his wife having no means of her own, the Court *restricted* the aliment to £150 per annum, although the husband had failed to prove that his income was less than at the date of the agreement. Stewart v. Stewart, Dec. 3, 1887, p. 113.

Liability to support wife's mother—Married Women's Property Act, 1877.

2. *Held* that a man who was married subsequent to the passing of the Married Women's Property Act, 1877, and who was not *lucratus* by the marriage, was not liable to aliment his wife's mother, in respect that the wife's obligation to aliment her mother was a subsisting obligation at the date of the marriage, and was an antenuptial debt in the sense of the Act. M'Allan v. Alexander, July 7, 1888, p. 863.

Jus relictæ—Implied renunciation—Wife's signature to husband's settlement.

3. *A husband by his trust-disposition and settlement gave his wife the liferent of his whole means and estate, and in the fourth purpose directed his trustees, "after the death of the survivor of me and my said wife, and with her consent and full approval (in token of which she has subscribed this deed)," to pay over a large number of legacies, many of them to relatives of his wife. By the fifth purpose he directed that after the death of his widow his household furniture should be divided among certain of her relatives. The residue was to be devoted to religious and charitable purposes. The wife signed the deed. She survived her husband only a few weeks. Her executor, in a multiplepoinding brought by the husband's trustees, claimed her terce and* jus relictæ, *maintaining that her consent had been given to the legacies only, and not to the whole settlement.* Held (*in aff. judgment of Second Division*) *that although it could not be inferred from the wife's signature to the deed that she gave any consent thereto further than the deed*

HUSBAND AND WIFE—*Continued.*

bore, her consent to the fourth purpose implied an acceptance of the liferent provided to her in the deed in lieu of terce and jus relictæ. Edward v. Cheyne, March 12, 1888, H. L., p. 33.

Implied donation of wife's income to husband.

4. *In an action brought by the wife's executor against the husband's trustees* held (*in* aff. *judgment of the First Division*) *that the facts shewed that the wife had made a gift to her husband of her whole separate income, and of any savings she had made therefrom.* Edward v. Cheyne, March 12, 1888, H. L., p. 37.

Mother's second marriage—Guardianship of Infants Act, 1886.

5. *Held* that the fact of a mother entering into a second marriage does not affect her right under the above statute to be guardian to her children by the first marriage. Campbell v. Maquay, June 27, 1888, p. 784.

Divorce—Domicile—Anglo-Indian domicile.

6. A person's domicile of origin must prevail until he has manifested and carried into execution an intention of abandoning it and of acquiring another as his sole domicile.

A Scotsman, born and educated in Scotland, raised an action of divorce in the Court of Session against his wife on the ground of desertion. The wife pleaded that the pursuer had lost his Scottish domicile and had not reacquired it. Evidence on which the Court *held* that the pursuer had not lost his domicile of origin, and that, therefore, the Court had jurisdiction in the cause.

Observations (*per* Lord President) on Anglo-Indian domicile. Steel v. Steel, July 13, 1888, p. 896.

Divorce—Desertion—Foreign.

7. A Scotswoman married an Englishman and resided with him in England for about ten years. The husband having deserted his wife and gone to America, she returned to reside in Scotland. In an action brought by her there for divorce on the ground of desertion, *held* by Lord M'Laren (Ordinary) that the Court had no jurisdiction over the defender, and that the action was incompetent. Redding v. Redding, July 20, 1888, p. 1102.

Divorce—Desertion.

8. It is not an answer to a husband's action of divorce on account of his wife's desertion, that she has left him because he had superseded her in the management of a shop belonging to him. Gould v. Gould, Dec. 22, 1887, p. 229.

Divorce—Alleged condonation pending reclaiming note against decree of divorce—Process.

9. A husband brought an action for divorce against his wife, founding on several alleged acts of adultery. The Lord Ordinary granted divorce, holding one of the alleged acts of adultery, but one only, to be proved. The defender reclaimed, and at the hearing moved to be allowed to aver, and to prove, that the pursuer had, after the date of the Lord Ordinary's interlocutor, condoned the adultery (assuming it to have been committed) by resuming cohabitation with her. The Court were of *opinion* that so long as the Lord Ordinary's interlocutor granting divorce stood, the plea of condonation was excluded, but having on a consideration of the evidence come to the conclusion that the act of adultery which the Lord Ordinary *held* to be proved was not proved, they recalled the Lord Ordinary's interlocutor, and, without expressing any opinion regarding the other acts of alleged adultery, *allowed* the defender to plead, and to lead evidence of, condonation. Robertson v. Robertson, July 19, 1888, p. 1001.

Divorce—Condonation—Proof.

10. In an action of divorce on the ground of adultery, while it is competent to lead evidence of misconduct on the part of the defender prior to condonation in order to shew the character of the defender's subsequent actings, which are admitted or proved as facts, but are in themselves capable of being regarded in different lights, it is not competent to refer to such previous

HUSBAND AND WIFE—*Continued.*
misconduct as evidence of the alleged facts themselves. Robertson v. Robertson, July 19, 1888, p. 1001.

INHIBITION. *Trust—Title to sue.*
1. When a heritable bond is granted in favour of certain persons as trustees, the assignation of the beneficial interest to other persons does not affect the title of the trustees to use inhibition in their own names against the debtor in the bond. Clarke v. M'Nab, March 10, 1888, p. 569.
Agent and Client—General mandate—Consent to use of inhibition.
2. *Opinion*, that an agent was entitled, under a general mandate to recover a debt, to use inhibition. Clarke v. M'Nab, March 10, 1888, p. 569.

INSANITY. See *Poor*, 3.

INSURANCE. *Marine Insurance—" Port."*
1. Held (aff. *judgment of First Division*) *that in a policy of insurance on a ship for the voyage, and " while in port thirty days after arrival," the meaning of the term " port " as applicable to the port of Greenock did not include the fairway of the navigable channel of the river Clyde* ex adverso *of the harbour works.* Hunter v. Northern Marine Insurance Co., Limited, July 30, 1888, H. L., p. 72.
Fire insurance—Insurable interest—Right of postponed bondholder to recover insurance when prior bondholder has recovered sum sufficient to reinstate.
2. *The proprietor of mills (which with the site were at least of the value of* £10,000) *granted bonds over them for* £9000, *and subsequently a postponed bond to another creditor for* £900. *Policies of fire insurance for* £7000 *were taken in name of the prior bondholders for behoof of themselves and of the owner in reversion. The postponed bondholder, an investment society, took a policy of fire insurance from another company for* £900 *in name of the society and of the owner " in reversion." The policy insured against damage by fire " the property described on the margin hereof." On the margin were set forth various items forming parts of the mills and machinery, with the specific sum insured on each. The owner paid the premiums of insurance. A fire occurred, which damaged the mills and stopped the works. The holders of the prior bonds obtained under their policies of insurance the sum of* £5668, *which was sufficient to reinstate the works, but they applied it in reduction of their debt. Subsequently the investment society raised an action, with consent and concurrence of the owner, against their insurers for declarator that the pursuers were entitled to be indemnified by the defenders against the loss they had sustained by the fire, and for payment. The defenders denied liability, on the ground that the loss caused by the fire had already been made good to the prior bondholders and the owner. It was admitted that at the date of the fire the subjects were of sufficient value to cover all the bonds, and that after the fire the subjects were not of sufficient value to meet the prior bonds.* Held (aff. *judgment of whole Court*) *that the defenders were bound under their contract to indemnify the investment society for the loss it had sustained by the fire.* Westminster Fire Office v. Glasgow Provident Investment Society, Aug. 10, 1888, H. L., p. 89.

INTERDICT. *Trade name.*
1. In order to entitle a wholesale dealer to interdict against a retail dealer selling over his counter goods on the representation that they are of the pursuer's manufacture, when in point of fact they are not, it is not sufficient to prove that in a few instances, when goods of the pursuer's manufacture were asked for, other goods were supplied. Thomson & Co. v. Robertson, July 12, 1888, p. 880.
Unqualified person practising as law-agent.
2. *Question* whether a petition by an enrolled law-agent for interdict against a person, who was not an enrolled law-agent, practising as a law-agent in

INTERDICT—*Continued.*
the Sheriff Court was an appropriate remedy. Milne v. Leslie, Feb. 29, 1888, p. 460.
See *Fishings*, 3.

JUDICIAL FACTOR. *Companies Clauses Consolidation Act*, 1845, *secs.* 56 *and* 57.
1. Mortgagees of a company petitioning under the above sections for the appointment of a judicial factor are entitled to suggest the name of a person to be appointed, and the Court will, in the absence of personal objections, appoint him. Broad v. Edinburgh Northern Tramways Co., May 19, 1888, p. 641.

Making up Title—Royal Bank Stock.
2. *Held* that an interim act and decree appointing a judicial factor on a trust-estate in place of a deceased judicial factor, and authorising him to complete a title in his person to, *inter alia*, certain stock of the Royal Bank of Scotland standing in the name of the former judicial factor in the books of the bank, was a sufficient title to the bank to register him as proprietor of the stock in their books. Royal Bank of Scotland v. Greenlees, Oct. 27, 1887, p. 9.

Interim Judicial Factor— Vacation— Companies Clauses Consolidation Act, 1845, *sec.* 57.
3. The powers conferred upon the Court by the 57th section of the Companies Clauses Consolidation (Scotland) Act, 1845, for the appointment of an interim judicial factor cannot be exercised by the Lord Ordinary on the Bills during vacation. Broad v. Edinburgh Northern Tramways Co., March 20, 1888, p. 615.

Power to sell—Trusts Amendment Act, 1884, *sec.* 2.
4. Power to sell heritage *refused* to a judicial factor on a trust (the trustees on which had power to sell) on the ground that the proposed sale might prejudice the interests of the fiar. Molleson v. Hope, May 26, 1888, p. 665.

Pro-curator—Remuneration of agent.
5. A landed proprietor having become insane, his brother, without judicial or other authority, managed his estate with the assistance of the law-agents who had previously managed the estate for the proprietor. After two years a *curator bonis* was appointed to the proprietor. In an action of accounting brought by the curator against the law-agents, the pursuer maintained that the defenders must be regarded as pro-curators, and were not entitled to credit for professional charges. *Held* that the law-agents were entitled to the ordinary remuneration for their services. Dunbar v. Wilson & Dunlop's Trustee, Dec. 21, 1887, p. 210.

Recall of appointment.
6. Failure to lodge accounts and vouchers. Walker v. Buchanan, July 20, 1888, p. 1102.

JURISDICTION. *Foreign—Trust.*
1. A person carrying on business in Scotland granted a trust-deed for behoof of his creditors to two trustees, one of whom resided in Scotland and the other in England. In an action of accounting raised in Scotland against both trustees, the trustee residing in England pleaded no jurisdiction. The Court *repelled* the plea, on the ground that the trust-estate was in Scotland. Robertson's Trustee v. Nicholson, July 13, 1888, p. 914.

Arrestment jurisdictionis fundandæ causa.
2. Where jurisdiction is to be founded against a foreigner by letters of arrestment *jurisdictionis fundandæ causa*, it is not necessary to execute them before the summons is signeted. Walls' Trustees v. Drynan, Feb. 1, 1888, p. 359.
3. Bankruptcy—*Tantum et Tale.* Graeme's Trustee v. Giersberg, June 1, 1888, p. 691.

See *Bankruptcy*, 5—*Burgh*—*Husband and Wife*, 7—*Lease*, 4.

JUSTICIARY CASES. *Crimes—Breach of the Peace—Relevancy—Specification —Criminal Procedure Act*, 1887, *sec.* 5.

1. *Held* that a summary complaint setting forth that, time and place libelled, certain persons, duly designed, did "form part of a disorderly crowd of persons, and behave in a disorderly manner, and annoy and disturb the lieges, and commit a breach of the public peace," was a relevant complaint under the above Act. Bewglass v. Blair, Feb. 10, 1888, Just. Cases, p. 45.

Crimes—Fraud—Bankruptcy—Credit obtained by undischarged bankrupt —Bankruptcy, Frauds, and Disabilities Act, 1884, *sec.* 4.

2. Circumstances in which an undischarged bankrupt, who had obtained credit to a considerable extent without disclosing that he was an undischarged bankrupt, was proved to have so acted with intent to defraud, and convicted of an offence under the Bankruptcy, Frauds, and Disabilities Act, 1884, sec. 4. Her Majesty's Advocate v. Livingstone, Feb. 29, 1888, Just. Cases, p. 48.

Crimes—Mobbing and Rioting—Day Poaching.

3. In a trial for the crimes of mobbing and rioting the evidence for the Crown was that the accused were part of a crowd exceeding a hundred persons who in the day-time entered upon an extensive deer forest and openly marched across it, shooting the deer thereon as they went; that they were seen by the keepers of the forest, who were unable to interfere with them on account of their numbers, and that they continued so acting for two days. The Lord Justice-Clerk *directed* the jury that such conduct, if proved, amounted to the crime of mobbing and rioting. Her Majesty's Advocate v. Macrae, Jan. 18, 1888, Just. Cases, p. 33.

Crimes—Prevarication—Summary punishment—Public-Houses Amendment Act, 1862, *sec.* 27.

4. The Public-Houses Amendment (Scotland) Act, 1862, sec. 27, gives Magistrates trying complaints under the Act power to adjudge witnesses, who should "prevaricate or wilfully conceal the truth," to be imprisoned for a period not exceeding sixty days, without formal complaint, and in a summary manner, and provides that "the sentence awarding such punishment shall set forth shortly the nature of the offence." *Held* that under this enactment the particulars of the offence must be specified in the sentence, and that a sentence which merely found the witness "guilty while under examination on oath of prevarication and wilfully concealing the truth," fell to be quashed. Soutar v. Stirling, May 26, 1888, Just. Cases, p. 62.

Crimes—Theft.

5. *Held* (*diss.* Lord Rutherfurd Clark) that a summary complaint in which the charge against the accused was that having, time and place libelled, "found in money one pound, he did deny having found the same, and did appropriate and thus steal the same," was not a relevant complaint, in respect that the facts stated did not necessarily infer the crime of theft. Campbell v. M'Lennan, March 20, 1888, Just. Cases, p. 55.

Statutory offences—Salmon-fishing—Weekly close time, calculation of—Salmon Fisheries Act, 1862, *sec.* 7—*Salmon Fisheries Act*, 1868, *sec.* 24, *and Sched. D, bye-law.*

6. The occupier of a fishery in the Forth district was charged with a contravention of the 24th section of the Act of 1868, and the above bye-law, in so far as during the weekly close time, on a particular Saturday, he had failed to have three fly-nets thrown out of fishing order at six P.M., in terms of the bye-law. The Sheriff found the accused not guilty. On appeal the Court (*diss.* Lord Rutherfurd Clark) affirmed the judgment of the Sheriff-substitute, holding that the practice of throwing nets out of fishing order after six P.M. on Saturday nights, when the state of the tide rendered compliance with the bye-law at that hour impossible, which was admitted to have existed in the Forth district since 1862, made it inexpedient for the Court to interfere with a judgment of acquittal. Osborne v. Anderson, Nov. 4, 1887, Just. Cases, p. 12.

JUSTICIARY CASES—*Continued.*

Statutory offences—"Frequenting" with intent to commit a crime—Edinburgh Municipal and Police Act, 1879, *sec.* 272.

7. Section 272 of the Edinburgh Municipal and Police Act, 1879, enacts that every suspected person, or reputed thief, who is found "frequenting any street with intent to commit a crime" shall be deemed a rogue and a vagabond, and liable to be imprisoned for sixty days. *Held* (*diss.* Lord Craighill, and the Lord Justice-Clerk giving no opinion) that proof that a known thief had been on the street libelled with intent to steal on a single occasion was not sufficient to satisfy the charge of frequenting the street with such intent. Linton v. Clark, Nov. 10, 1887, Just. Cases, p. 25.

Statutory Offences—Poaching—Day Trespass Act, 1832—*Ground Game Act,* 1880, *sec.* 1.

8. *Held* that a person who had been found on a farm shooting ground game with the written permission of the occupier of the farm, but who was not one of the persons specified in sec. 1, subsec. 1 (*b*) of the Ground Game Act, 1880, had been rightly convicted of a contravention of the Day Trespass Act, 1832. Niven v. Renton, Feb. 10, 1888, Just. Cases, p. 42.

Statutory Offences—Weights and Measures Act, 1878, *sec.* 59—*Proof—Onus.*

9. The Weights and Measures Act, 1878, sec. 59, enacts that where any false weight is found in the possession of any person carrying on trade, such person shall be deemed, for the purposes of the Act, until the contrary is proved, to have such weight for use for trade. Evidence stated by magistrates in a case under the Summary Prosecutions Appeals Act, 1875, which was *held* (*diss.* Lord Rutherfurd Clark) not to warrant the magistrates in convicting a trader of a contravention of the above Act, and conviction *quashed* accordingly.

Per Lord Young—The preliminary necessity is that the magistrate shall be satisfied that the weights were used, or intended to be used, and if the magistrate is satisfied that they were not, or is not satisfied that they were used, or intended to be used, he is not to convict merely because the accused has led no evidence, or has not proved, that they were not used, or intended to be used. Hood v. Malcolm, Nov. 3, 1887, Just. Cases, p. 4.

Statutory offences—Cruelty to animals—Prevention of Cruelty to Animals Act.

10. In a complaint against a cattle-dealer for a contravention of the Cruelty to Animals Act, 1850, by sawing off the horns of oxen close to the skull, it was proved that the operation caused great pain to the animals operated on, but that it was in common use throughout the counties of Fife, Forfar, and Kincardine, as a means of preventing the cattle doing each other harm by goring one another, or when in railway trucks; and that in other districts operations securing the same result, but painless, were made use of. The Sheriff-substitute acquitted the accused. In an appeal the Court affirmed the judgment, holding that the operation being a customary operation for a legitimate and useful purpose, did not infer a contravention of the Act. Renton v. Wilson, June 1, 1888, Just. Cases, p. 84.

Procedure—Instance—Complaint—Desertion of diet pro loco et tempore.

11. When a prosecutor deserts a complaint *pro loco et tempore* the complaint falls, and it is incompetent again to cite the accused to answer to it, though the prosecutor may raise a new complaint in the same terms. Collins v. Lang, Nov. 3, 1887, Just. Cases, p. 7.

Procedure—Private Prosecutor—Concurrence of Lord Advocate.

12. Circumstances in which the Court, while indicating that in very exceptional circumstances they might authorise a private person to prosecute without the concurrence of the Lord Advocate, *refused* to grant such authority. Robertson v. H. M. Advocate, Oct. 28, 1887, Just. Cases, p. 1.

Procedure—Indictment—Modus—Specification—Reset.

13. An indictment bore—"The charge against you is that, on several occasions, between 1st October 1886 and 15th January 1888, at your premises in Saracen Street, &c. aforesaid, you did reset 100 tons of pig-iron, the same

JUSTICIARY CASES—*Continued.*

having been dishonestly appropriated by theft." *Held* that it was irrelevant for want of specification. Her Majesty's Advocate v. M'Donald, Feb. 29, 1888, Just. Cases, p. 47.

Procedure—Indictment—Latitude in time—Incest.

14. *Question*, whether an indictment charging the panel with having committed incest on several occasions during a period of seven years was relevant. Her Majesty's Advocate v. A E, Dec. 5, 1887, Just. Cases, p. 32.

Procedure—Indictment—Criminal Procedure Act, 1887, *secs.* 5 *and* 8.

15. A B was convicted before a Sheriff and a jury upon an indictment which bore—"The charge against you is that, on 10th March 1888 you did, in the shop . . . pretend to A S that you had just come from the Royal Bank at Perth, and had been promoted to be teller in the branch of that bank at Leith, and did thus induce the said A S to deliver to you at Elm Row, Edinburgh, on 18th March 1888 a piano, which you appropriated to your own use, without paying or intending to pay therefor."

The Court (*diss.* Lord Rutherfurd Clark) *suspended* the sentence, Lord M'Laren holding that falsehood and fraud were facts necessary to support the charge, and that as the indictment did not set forth these it was not relevant—Lord Young, while concurring with Lord M'Laren, resting his judgment on the ground that the case proved was one of theft, and that the indictment was not fitted for the safe trial of a charge of theft. Dingwall v. Her Majesty's Advocate, May 26, 1888, Just. Cases, p. 69.

See also 1 and 5, *supra.*

Procedure—Proof—Competency—Evidence of accused in previous civil action.

16. *Opinions* that in a criminal trial statements made by the accused as a witness in a previous civil action, relating to the same subject-matter, may be used as evidence against him. Banaghan v. Her Majesty's Advocate, Feb. 10, 1888, Just. Cases, p. 39.

Procedure—Proof—Competency—Statement by prisoner volunteered to policeman.

17. *Held* that a statement voluntarily made by an accused person while out on bail to the policeman who had apprehended him regarding the crime with which he was charged was competent evidence against the accused, although the policeman had not cautioned the accused. Smith v. Lamb, March 16, 1888, Just. Cases, p. 54.

Procedure—Proof—Witnesses—Particeps criminis.

18. Where a father was charged with incest committed with his daughter, *held* (*per* Lord Young) that the daughter was not competent as a witness for the Crown, she being of full age and not having been herself charged with the crime. H. M. Advocate v. A E, Dec. 5, 1887, Just. Cases, p. 32.

19. *Held* that in a trial on a charge of procuring abortion, the evidence of the woman on whom the act was said to have been committed was competent, though she was not charged with the crime. Her Majesty's Advocate v. Rae, July 3, 1888, Just. Cases, p. 80.

Procedure—Proof—Prior attempts.

20. In a trial on a charge of procuring abortion *held* competent to lead proof to shew that some months before the act charged the accused had undertaken to procure abortion in the case of another woman. H. M. Advocate v. Rae, July 30, 1888, Just. Cases, p. 80.

Proof—Declaration—Right of accused to have assistance of law-agent—Criminal Law Procedure Act, 1887, *sec.* 17.

21. The declaration of an illiterate woman charged with the crime of murder was not admitted when tendered in evidence, in respect the accused had not been informed before emitting it of her right to have the assistance and advice of a law-agent. Her Majesty's Advocate v. Goodall, May 3, 1888, Just. Cases. p. 82.

Procedure—Sentence—Culpable Homicide.

22. Circumstances in which a person who had pleaded guilty to a charge of culpable homicide by shooting a fellow clerk with a revolver, was *dismissed*

JUSTICIARY CASES—*Continued.*

(*per* the Lord Justice-Clerk) without a sentence. Her Majesty's Advocate v. A B, Nov. 21, 1887, Just. Cases, p. 30.

Procedure—Withdrawal of plea—Criminal Procedure Act, 1887, *secs.* 31 *and* 41.

23. Where a person accused of a crime has, under the 31st section of the Criminal Procedure Act, 1887, intimated his intention of pleading guilty, and has been brought before the Sheriff and pleaded guilty, and has been remitted to the High Court for sentence, he cannot on being brought up for sentence withdraw his plea, sec. 41 of the Criminal Procedure Act not being applicable to such a case. Her Majesty's Advocate v. Lyon, May 26, 1888, Just. Cases, p. 66.

Review—Suspension.

24. A person accused before a Glasgow Police Court having appeared to answer to the complaint, the diet was on the prosecutor's motion deserted *pro loco et tempore*, and he was liberated, and a pledge he had left for his appearance was returned to him. The prosecutor into whose hands the complaint had come subsequently obtained a warrant to re-cite, and it was again served upon the accused. He did not appear, but was apprehended, tried, and convicted. In a suspension of the proceedings brought by him, it was maintained that a suspension was incompetent, his remedy being under the local Police Act, which prescribed a different mode of appeal, or being by appeal on a stated case under the Summary Prosecutions Appeals Act, 1875. *Held* that the objection could not be sustained, because the proceedings against him under the new citation were fundamentally null, and therefore liable to suspension. Collins v. Lang, Nov. 3, 1887, Just. Cases, p. 7.

25. *Question*, whether it is a competent ground of suspension that a Sheriff's charge to the jury at a criminal trial was erroneous in law. Banaghan v. Her Majesty's Advocate, Feb. 10, 1888, Just. Cases, p. 39.

Review—Appeal—Bond of caution.

26. In a note to have a Sheriff ordained to state a case for appeal under the Summary Prosecutions Appeals Act, 1875, it appeared that the bond of caution required by the Act to be lodged by a party desiring to have a case for appeal stated reached the Sheriff-clerk on the morning after the statutory period of three days had expired (having been posted the evening before), but no special circumstances were stated. The Court *declined* to ordain the Sheriff to state a case.

Question, whether the Court has power in special circumstances to authorise a bond to be received after the lapse of the three days. M'Gregor v. Rose, Nov. 3, 1887, Just. Cases, p. 10.

Review—Appeal—Form of questions in law.

27. Questions of law in appeals on stated cases, in the form "whether in view of the facts found proved the magistrate ought to have convicted," are not absolutely incompetent, but ought to be avoided. Dickson v. Linton, June 1, 1888, Just. Cases, p. 76.

Objection to conviction in inferior Court—Form of complaint—Edinburgh Municipal and Police Act, 1879.

28. In summary prosecutions, under the Edinburgh Municipal and Police Act, 1879, it is sufficient that the procedure complies with the provisions of that Act, although it does not satisfy the requirements of the Summary Jurisdiction Acts, 1864 and 1881. Dickson v. Linton, June 1, 1888, Just. Cases, p. 76.

LEASE. *Construction.*

1. Where the parties to a long lease had for a long period of years acted on a particular construction of obligation of relief of public burdens, *held* that such construction must be regarded as the true meaning of the obligation, and must receive effect accordingly. Jopp's Trustees v. Edmond, Jan. 11, 1888, p. 271.

LEASE—*Continued.*

Subject of lease—Implied obligation—Breach of contract.

2. Certain premises in a densely populated part of Glasgow, known as "Graham's Lodging House," were let on lease for seven years. After four years of the lease had run, the landlord, who owned an adjacent block of buildings, converted it into and started a rival lodging-house. There was no express condition in the lease against his so doing. The tenant brought an action of damages against the landlord on the ground that the landlord's actings were in violation of the good faith of the contract. *Held* after a proof, by a majority of the whole Court (*diss.* Lord Lee), that the lease in favour of the pursuer implied no obligation on the part of the landlord not to set up a rival establishment.

Opinions that such a restriction could not be implied from the circumstances in which a lease was granted. *Opinions contra per* Lord Lee and Lord Fraser. Craig v. Millar, July 20, 1888, p. 1005.

Waygoing crop—Reference to man of skill—Power to take evidence.

3. In a reduction of a decreet-arbitral following upon a reference to two men of skill as arbiters under a lease as to the value of a waygoing crop, the pursuer averred that parties were not heard, that only one of the arbiters had seen the crop after it had been cut, and that no evidence had been led as to its value. *Held* that no relevant ground for reduction had been stated, and action *dismissed.* Logan v. Leadbetter, Dec. 6, 1887, p. 115.

Compensation—Notice to and consent of landlord—Reference—Jurisdiction—Interdict—Agricultural Holdings Act, 1883, *secs.* 3, 4, 20, *and sched., parts i. and ii.*

4. The tenant of a farm under a nineteen years' lease died, and his estates were sequestrated and a trustee appointed thereon. The trustee carried on the farm for some time, and when he gave it up gave notice of a claim under the Agricultural Holdings Act, 1883, for improvements. The claim consisted of seven heads. The trustee appointed a referee to judge on the claim in terms of the Act. The landlord also appointed a referee, but limited his powers to judging on the sixth and seventh heads of the claims, on the ground that the first five heads did not fall under the statute, in respect that to some of the improvements his consent had not been obtained, and that notice had not been given to him in terms of the statute that the others were about to be executed. The trustee thereupon applied to the Sheriff to have a referee appointed in place of the one appointed by the landlord, and the appointment was made. The landlord thereupon presented a note of suspension and interdict to have the trustee's referee and the referee appointed by the Sheriff interdicted from proceeding with the reference, alleging that five heads of the claim were outwith the statute. The trustee stated that he was not aware whether the statutory requirements with regard to notice or consent had been observed. The Court (*rev.* judgment of Lord Trayner) *held* that the suspension was competent, and remitted to the Lord Ordinary to pass the note. Sinclair v. Clyne's Trustees, Dec. 17, 1887, p. 185.

Bankruptcy of tenant—Balancing accounts in bankruptcy.

5. A tenant under an agricultural lease for nineteen years, having during its currency granted a disposition *omnium bonorum*, the trustee declined to adopt the lease, but entered into an agreement with the landlord whereby, on the narrative that it was expedient to arrange for laying down the crops for the current year, he continued the occupation of the farm till the following Whitsunday. By a second agreement the landlord agreed to take over and pay for certain articles which were on the farm at a valuation. These articles having been valued, the landlord sought to compensate the claim against him for their value by a debt due to him by the tenant, for which he could only rank as an ordinary creditor. *Held* that the debt due by the landlord had been incurred subsequently to the tenant's bankruptcy, and could not be compensated by the debt incurred by the tenant prior to bankruptcy. Taylor's Trustees v. Paul, Jan. 24, 1888, p. 313.

LEASE—*Continued.*

Hypothec—Hypothec Abolition Act, 1880, *sec.* 1—*Houses and land separately let by one writing—Invecta et illata—Cattle.*

6. A proprietor granted a written lease of a dwelling-house, with byres and other offices "for one year from Whitsunday 1887 till Whitsunday 1888 at the rent of £30 sterling, payable at Martinmas, also three grass fields . . . . 25 acres, till Martinmas, at the rent of £70 sterling, payable at Martinmas." The house and offices were not on the fields let, but on separate though adjoining lands. *Held* (1) that the house and offices were let separately from the fields, and therefore that the Hypothec Abolition Act did not apply to them, and (2) that the landlord was entitled to sequestrate cattle in the offices. Clark v. Keirs, Feb. 25, 1888, p. 458.

Hypothec.

7. *Question,* whether goods in the possession of a tenant under a contract of "sale or return" are subject to the landlord's hypothec. Macdonald v. Westren, July 19, 1888, p. 988.

Crofter—Crofters Holdings Act, 1886.

8. A person who at the passing of the above Act was a crofter complying with the conditions of sec. 34 died before the parish in which his croft was situated had been declared a crofting parish in terms of sec. 19. In an action of removing by his landlord against his heir, who was in possession and occupation of the croft, *held* that the defender was a crofter in the sense of the Act, and entitled to resist removing, subject to the conditions of sec. 1. M'Nab v. Campbell, Feb. 29, 1888, p. 472.

9. Where a crofter had several years before the passing of the above Act entered into an arrangement with a farm-servant engaged yearly, from Whitsunday to Whitsunday, to allow him to occupy a house and part of the arable ground on the croft, as part remuneration for his services, and had continued this arrangement after Whitsunday 1887, *held* that, as the subdivision of the croft had taken place prior to the passing of the Act, the crofter had not by the mere continuance of the arrangement after that date subdivided his holding and so committed a breach of the statutory condition contained in sec. 1, subsec. 4, of the Act. Lord Abinger v. Cameron, March 16, 1888, p. 598.

Reparation—Game damage—Fences—Wire-netting—Landlord's right to remove.

10. The landlord of a farm was bound by the lease to repair the fences, and on that being done the tenant accepted the fences "as in sufficient tenantable condition and repair, and binds and obliges himself to uphold them in tenantable condition during the currency of the lease, and to leave them in the like condition at the expiry thereof, ... and the tenant shall also be at half the expense of upholding plantation and march-fences." At the beginning of the lease the lands let were separated from a plantation (which also was the landlord's property, and was full of ground game) by a fence lined with wire-netting. The landlord sometime after the beginning of the lease removed the netting. *Held* that the tenant was entitled to have the netting restored, and to recover damages for injury done to his crops by ground game coming out of the plantation after the removal of the netting. Cameron v. Drummond, March 2, 1888, p. 489.

Reparation—House becoming uninhabitable—Liability of landlord for death in tenant's family.

11. Action by the tenant of a house against the landlord for damages on account of the alleged insanitary condition of the house, and for *solatium* for the death of two children of the tenant through the same cause, *held* irrelevant from want of specification.

Observed (*per* Lord Young) that where tenants continue to inhabit a house which they believe to be dangerous to health through the fault of the landlord they cannot hold him responsible for any evil consequence arising from the continued occupation. Henderson v. Munn, July 7, 1888, p. 859.

LEASE—*Continued.*

Reparation—Urban tenement—Injury to business by operations of neighbouring occupier.

12. Where a tenant of an urban tenement sues his landlord for damages in respect that his rights as occupant have been encroached on by operations carried on by the proprietor of a neighbouring tenement, he must aver, in order to found a relevant action, that he has applied to his landlord to have his rights protected, and that the landlord in breach of his duty, has refused, or unduly delayed, to protect them. Menzies v. Whyte, Feb. 29, 1888, p. 470.

Reparation—Wrongous use of diligence.

13. A tenant of grazings agreed with his landlord in writing to have a certain amount of stock always on the ground while the rent remained unpaid. He also granted a bill for the rent. The bill having fallen due, and being unpaid, the landlord presented a petition to the Sheriff for warrant to sell the stock to an amount sufficient to pay the rent and expenses. The Sheriff —no appearance being made for the tenant—granted warrant to sell so much of the stock as would meet the debt and expenses of process and sale, and the sale was carried out, and the proceedings reported to the Sheriff by the person appointed by him as judge of the roup. The tenant thereafter raised an action of damages against the landlord, on the grounds (1) that the warrant of sale was illegal, as being granted while he was still tenant of the grazing and in possession of the stock; (2) that in any view it was illegally carried out since the stock had been sold in an improper manner, and to an extent greatly exceeding the amount of the debt; (3) that the defender had verbally agreed, before the sale began, to accept a certain sum as in full of his debt and expenses, which sum was to be sent for from a neighbouring bank by a friend of the tenant who was present, and had only to send for the money, but that the defender had broken this agreement and instructed the sale to be proceeded with, without allowing time for the money to be brought, the result being, as the pursuer averred, that his stock was sacrificed at a low price, and his credit much injured. The Court (*diss.* Lord Rutherfurd Clark) dismissed the action as irrelevant. Kennedy v. Creyk, Dec. 6, 1887, p. 118.

See *Bankruptcy*, 8.

MANDATARY. See *Agent and Client—Process*, 6.

MARRIAGE-CONTRACT. *Antenuptial contract.*

1. Opinion, per *Lord Watson, that a deed in the form of an antenuptial marriage-contract might receive effect as such if signed immediately after the marriage ceremony.*

Per *Lord Macnaghten,—"I should venture to doubt whether a contract executed after the status of the contracting party had been definitely altered by marriage could be regarded as an antenuptial contract."* Cooper v. Cooper, Feb. 24, 1888, H. L., p. 21.

Construction—Implication.

2. In the construction of a marriage-contract, *held* that to extend by implication from other clauses in the deed an obligation by the father of the lady to provide for the children of the marriage to events not expressly contemplated by the clause of obligation, the inference must be very clear. Dolphin's Trustees v. Baxter, June 12, 1888, p. 733.

Testament and subsequent marriage-contract—Revocation.

3. In 1879 a lady, then a widow, executed a settlement by which she conveyed her whole estates to executors, directing them to pay certain legacies, specific and general, and to divide the residue among three charitable institutions named. In 1886 she entered into a second marriage, and by antenuptial contract on the occasion of that marriage she, on her part, conveyed her whole estate, heritable and moveable, then belonging to her, or which she might acquire during the subsistence of the marriage, to trustees, who were directed to hold the estate for her behoof in liferent, and to hold

MARRIAGE-CONTRACT—*Continued.*

"the capital of the said estate for behoof of such person or persons and on such terms and payable at such periods as the second party may appoint by any writing under her hand, however informally executed, and failing such appointment the trustees shall hold the said capital for behoof of the second party's nearest heirs *in mobilibus* whomsoever." The lady died about a year after her marriage, survived by her husband, and leaving the settlement of 1879, but no other writing except the marriage-contract. The capital of the estate had been delivered to the marriage-contract trustees, but at her death the lady was in possession of a considerable accumulation of income, paid partly before and partly after her marriage, and of some jewellery and personal belongings. In a question between the beneficiaries under the deed of 1879 and the lady's heirs *in mobilibus*, as beneficiaries under the marriage-contract, *held* (*diss.* Lord Rutherfurd Clark) that the deed of 1879 was not effectual either as an independent settlement or as an appointment under the marriage-contract, but was absolutely revoked by the marriage-contract, which on a sound construction was to be taken as a settlement of the lady's entire estate as existing at her death, and that her heirs *in mobilibus*, as legatees under the marriage-contract, had right thereto. Bertram's Trustees v. Matheson's Trustee, March 10, 1888, p. 512.

Acquiescence—Trust.

4. Spouses raised an action against the trustees under their marriage-contract for repayment, with interest, of sums expended out of the wife's estate, on the ground that the payments were *ultra vires* of the trustees. *Held* that, even assuming the payments to have been *ultra vires*, the action was barred by the fact that the wife had been a party to an agreement which embodied a settlement of the whole transaction.

Opinion (*per* the Lord Justice-Clerk) that the question was one not between beneficiary and trustee, but between truster and trustee, and that the wife being in the position of a truster, and having been in the knowledge of the action of the trustees, was not entitled to dispute it afterwards. Spence v. Boyd, Feb. 7, 1888, p. 376.

Vesting.

5. In an antenuptial marriage-contract the husband bound himself to pay an annuity of £150 to his wife, if she survived him, and to pay £4000 to the children of the marriage at the first term after the death of the survivor of the spouses. In security of these provisions he bound himself to convey to trustees an insurance policy for £4000, declaring that if he should predecease his wife the trustees should have power to purchase an annuity of £150 for her, and that the children's provisions should in that event be restricted to the balance of the £4000, and be payable to them at majority or marriage. It was further provided that in the event of there being no children, or of all predeceasing the survivor of the spouses, without lawful issue, the sum should be held for the husband's own heirs and assignees. There were children of the marriage, which was dissolved by the death of the husband. *Held* that the right of the children vested at his death. Murray's Trustees v. Bloxsom's Trustees, Dec. 22, 1887, p. 233.

See *Trust*, 16.

MASTER AND SERVANT. *Wrongous dismissal—Disobedience to orders—Coachman.*

Held that a mistress was entitled to dismiss her coachman for having, against her orders, carried friends of his own in her carriage. Thomson v. Stewart, June 29, 1888, p. 806.

See *Reparation*, 7, 8, 9, 10, 11, 12.

MINES AND MINERALS. *Clay—Water-Works Clauses Act*, 1847—*Railway Clauses Act*, 1845.

Held (diss. *Lord Herschell*, rev. *judgment of First Division*) *that the provision of the Water-Works Clauses Act*, 1847, *excluding from conveyances of lands purchased under the Act* (*when not expressly included*) "*mines of coal, iron-*

MINES AND MINERALS—*Continued.*
stone, slate, or other minerals under any land purchased," did not apply to a seam of clay forming the subsoil of the lands conveyed. Magistrates of Glasgow v. Farie, Aug. 10, 1888, H. L., p. 94.

MINOR AND PUPIL. *Choosing of Curators—Procedure in vacation.*
1. *Held* that the authority given by sec. 93 of the Court of Session Act, 1868, to the Lord Ordinary on the Bills to grant decrees in absence in vacation extends to actions of choosing curators. Hay v. Hay, Sept. 21, 1887, p. 1.
Minor—Capacity to contract—Foreign—Domicile.
2. *When a contract is executed in a country by a person domiciled there who by the law of the country has not the capacity to contract, the contract will not be valid in any country.* Cooper v. Cooper, Feb. 24, 1888, H. L., p. 21.
Tutor—Aliment and education out of capital—Nobile officium.
3. Circumstances in which the Court allowed a mother as tutor to her pupil children to repay to herself out of the capital belonging to them a sum expended by her on their maintenance and education, and further, to take an additional sum annually until the majority of the eldest child for their maintenance and education. Milne, Feb. 11, 1888, p. 437.
Tutor—Mother's second marriage—Guardianship of Infants Act, 1886.
4. *Held* that the fact of a mother entering into a second marriage does not affect her right under the above statute to be guardian to her children by the first marriage. Campbell v. Maquay, June 27, 1888, p. 784. See *Parent and Child,* 5.
Curator bonis—Special powers—Unauthorised expenditure.
5. A *curator bonis* to a minor *held* personally liable for expenditure in rebuilding the mansion-house on his ward's estate, incurred without special powers, but reserving to him any claim he might be able to establish in respect of any benefit accruing to the ward's estate in consequence of the said expenditure. Semple v. Tennent, July 3, 1888, p. 810.

NEGOTIORUM GESTOR. See *Judicial Factor,* 5.

NOBILE OFFICIUM. See *Trust,* 7, 17, 18, 19—*Minor and Pupil,* 3.

NUISANCE. See *Reparation,* 13.

PARENT AND CHILD. *Custody—Illegitimate child—Mother's right.*
1. While the mother is the only person who has a legal title to the custody of an illegitimate child the Court are bound to consider the interests of the child in any question as to its custody.
Circumstances in which a petition at the instance of the mother for the custody of her illegitimate child was *refused.* Sutherland v. Taylor, Dec. 22, 1887, p. 224.
Custody—Child placed voluntarily in charge of charitable institution.
2. A father voluntarily placed his child, aged ten months, in the hands of the directors of a charitable institution for children. Ten months afterwards the father petitioned the Court for an order on the directors to deliver it to him. The Court being satisfied that the welfare of the child would suffer if it were restored to its parents, in the special circumstances of the case *refused* the petition. Markey v. Colston, July 14, 1888, p. 921.
Custody—Guardianship of Infants Act, 1886, *sec.* 5.
3. A widow who had three children by her first marriage—two girls and a boy—married a British subject who was engaged in business in Florence, and she and her husband thereafter permanently settled there. A petition at her instance to have her daughters, who were in pupillarity, delivered to her was resisted by their uncle, their tutor-nominate, with whom they were at that time residing in Scotland. The Court, having regard to the provisions of the 5th section of the Guardianship of Infants Act, 1886, granted the prayer of the petition. Maquay v. Campbell, March 17, 1888, p. 606. See *Minor and Pupil,* 4.

PARENT AND CHILD—*Continued.*

Custody—Illegitimate child—Guardianship of Infants Act, 1886.

4. *Question,* whether the Guardianship of Infants Act, 1886, applies to bastards. Brand v. Shaws, Feb. 24, 1888, p. 449.

Action for custody of bastard—Title to sue—Personal and intransmissible.

5. *Held* that an action at the instance of a mother for custody of her bastard child could not be insisted in after her death by a person named by her in a testament as "tutor, curator, and guardian" to her child. Brand v. Shaws, Feb. 24, 1888, p. 449.

Trust—Separate maintenance of child.

6. A truster directed his trustees to pay to his wife, if she survived him, a certain annuity, and to permit her to have the occupation during her lifetime of a dwelling-house and the use of the furniture therein, declaring that she "shall out of the foresaid provisions educate and maintain my children . . . in a way befitting their station in life, until they shall respectively attain the age of twenty-one years, or, if daughters, be married." He was survived by his wife and by several sons and daughters of that and of a prior marriage. The settlement left undisposed of part of the income and most of the capital of his estate, which was of considerable amount. *Held* that one of the daughters of the first marriage, who was over twenty-one years of age, and desired to live apart from the widow, was not entitled under the settlement to a separate maintenance out of the widow's annuity, it being sufficient implement of the widow's obligation that she offered to maintain the daughter in family with her in the dwelling-house left by the truster. Barry's Trustees v. Barry, March 2, 1888, p. 496.

PARTNERSHIP. *Public Company—Promotion money—Payments to a firm, one of whom was a director—Right to retain against firm.*

1. A mine-owner in San Francisco entered into an agreement with a firm of merchants there to pay them the half of any profit upon the sale of the mine in Great Britain. B, a partner of the firm, subsequently introduced the seller to purchasers in Great Britain, and although he took no part in deciding as to the purchase his name appeared in the prospectus of a company which was formed for the purpose of buying and working the mine as a provisional director, and also in the memorandum and articles of association as an original director. He subsequently acted as a director. The agreement between his firm and the seller was never communicated to the shareholders. The firm's share in the purchase price to the extent of £7000 was applied by the company as payments on account of shares which the firm agreed to take. *Held* that as B had, with the knowledge of his firm, occupied a fiduciary position towards the company in the purchase of the mine, his firm were bound to repay the £7000 to the company. Scottish Pacific Coast Mining Co., Limited, v. Falkner, Bell, & Co., Jan. 13, 1888, p. 290.

Liability of assumed partner for debts incurred prior to assumption.

2. When the whole estate of a going concern is taken over by a new partnership, the new partners contributing no capital, and the business being continued on the same footing as before, the presumption is that the liabilities are taken over with the stock, and that the new partnership undertakes liability for all the trade debts previously contracted. Heddle's Executrix v. Marwick & Hourston's Trustee, June 1, 1888, p. 698.

Joint adventure—Contract with individual adventurer.

3. Evidence on which *held* (*rev.* judgment of Lord M'Laren) that joint adventurers were not parties to a contract of sale entered into by one of their number; that the goods furnished in implement of the contract were not *in rem versum* of the joint adventure, and therefore that the joint adventurers fell to be assoilzied in an action for the price. Lockhart v. Brown, June 14, 1888, p. 742.

Right to books of firm on dissolution—Senior resident partner.

4. A contract of copartnery, between three Writers to the Signet in Edinburgh, provided that the partners should be bound to devote their whole time, so

PARTNERSHIP—*Continued.*

far as necessary, to the business, but with the exception that if C, one of the partners, was appointed Sheriff-Clerk of Ayrshire he might give such time as was necessary to the duties of that office, and that on the dissolution of the firm the books should "belong to the senior resident partner at the time." C became Sheriff-clerk of Ayrshire. On the dissolution of the firm, C was senior partner. *Held*, after a proof (*rev.* judgment of Lord Trayner) that C was "resident" in Edinburgh within the meaning of the contract, and that, therefore, the books of the firm belonged to him. Blair v. Hunters, July 20, 1888, p. 1094.

PATENT. *Specification—Construction—Disconformity between provisional and complete specification.*

1. The specification of a patent for improvements in treating oils and fats claimed as a novelty of the invention :—1. The subjecting of oils and fats in shallow layers to the joint action of air and heat; 2. The combining of oxidised or thickened vegetable or animal oils or fats with mineral oils, so as to form a lubricant with little tendency to thicken. In an action for damages for infringement of the patent against an oil manufacturer who combined oxidised or thickened vegetable and animal oils with mineral oils in order to form a lubricant, and thickened the vegetable and animal oils through the influence of air and heat, but by a different process from that described by the pursuer in his patent, *held*, after a proof, (1) that if the first head of the pursuer's claim in his patent was to be construed as a claim to a process there had been no infringement, the defender's process being different; if it was to be construed as a claim to a product the patent was invalid for want of novelty, oxidised or thickened animal and vegetable oils having been well known long prior to the date of the patent; (2) that the patent was invalid on the further ground that the complete specification claimed more than the provisional specification, in respect that the second head of the claim in the complete specification claimed as part of the invention the combination of thickened animal and vegetable oils with mineral oils irrespective of the process by which the thickening had been effected, whereas the provisional specification was limited to the thickening of vegetable and mineral oils in the particular manner therein described; and (3) that the patent was also invalid on the ground that the mixing of animal and vegetable with mineral oils either required no invention, or, if it did, that the process had not been disclosed. Hutchison, Main, & Co. v. Pattullo Brothers, May 24, 1888, p. 644.

Infringement—Prior use—Trade secret.

2. In an action of damages for infringement of a patent the defenders pleaded, *inter alia*, prior use, and in support of that plea adduced a witness from the firm of manufacturers from whom they had bought the articles said to constitute the infringement. This witness deponed that his firm had been in the habit of manufacturing the articles for many years before the date of the pursuer's patent, but that they had kept their process "to themselves" as long as they could, and it appeared that it did not become a matter of public knowledge until after the date of the pursuer's patent. *Held* that the patent was invalid by reason of prior use. Hutchison, Main, & Co. v. Pattullo Brothers, May 24, 1888, p. 644.

Infringement—Damages.

3. *In an action brought by a manufacturer, who held a patent for a machine for making horse-shoe nails of a special description, against another manufacturer, for damages arising from the sale by him of nails of the same description made by a machine which to a limited extent infringed the pursuers' patent, the defender, while admitting the sale of a certain quantity of nails which had been produced by the pirated machine, maintained that as he could have manufactured the same kind of nails by other machinery without infringing the patent, the pursuer had suffered no loss by the sale, and that the damage was nominal.* Held (rev. *judgment of the First Division*) (1) *that the defender was liable for the loss sustained by the pursuer by the*

ıally made; (2) that as it had been proved that the
on in question had a preference in the market over
the sale of the pirated nails had restricted the sale of
nd (3) that the measure of the pursuer's damage was
ıve made in selling the quantity of nails sold by the
ng a percentage for sales which might be due to the
the defenders. United Horse Shoe and Nail Co.,
; Co., March 12, 1888, H. L., p. 45.
r damages.
lains of an infringement he cannot claim profits derived
and also damages. United Horse Shoe and Nail
art & Co., March 12, 1888, H. L., p. 45.

l right. Yuille v. Rushbury, July 4, 1888, p. 828.
See *Copyright.*

ISIBLE. See *Parent and Child*, 5.

ınd-annual—Obligation to build within a certain time
r successor.
u-contract, conveyed part of his feu by contract of
vith and under the burdens and conditions contained
ıd further under an obligation to erect certain build-
within one year from the term of entry, in order to
ı ground-annual and of the share of the feu-duty, &c.,
ıted upon the ground disponed, and to maintain the
ər and repair in all time. B bound himself and "his
epresentatives whomsoever, and his assignees," to per-
, and they were declared to be real burdens upon the
d appointed to be recorded in the Register of Sasines.
ned the subjects to C, and six years after the date of
-annual C disponed them to D, the disposition being in
nder the real liens and burdens, conditions, provisions,
ıd contained in said contract of ground-annual." The
estrated estate having raised an action against D, to
was bound to implement the obligations in the feu-
ligation in the contract of ground-annual, as to the
nt maintenance of buildings, *held* (1) that as the pur-
o the feu-contract he had no title to sue upon it; and
ıe contract of ground-annual was concerned it imposed
ı to erect buildings which was enforceable against a
he lands, and defender therefore assoilzied.
he obligation to erect buildings contained in the con-
l could be made effectual as a real burden. Marshall's
Co., June 19, 1888, p. 762.

Right in security—Assessments—Taxes Management
oor-Law Act, 1845, *sec.* 88.
ıoor-rates had, under the above Acts, a preference over
o had obtained decree in an action of poinding of the
ıh Property Investment Co., Limited, v. Paterson,

e—Bye-law—Driver licensed by another burgh—
provement (Scotland) Act, 1862, *sec.* 308.
made by the magistrates of a burgh under sec. 308
Act, 1862, for the regulation of hackney carriages
ı" the burgh, do not apply to all hackney carriages
ets, but only to those licensed by the magistrates of
Main, March 16, 1888, Just. Cases, p. 51.

POLICE—*Continued.*

Road—Exposing goods to the obstruction or annoyance of the residents or passengers—Aberdeen Police and Water-Works Act, 1862, *sec.* 134.

2. *Held* that a shopkeeper who was proved to have had, during a whole day, a quantity of drapery goods hung over the front of his shop, except the windows, so that the goods projected over the footway of the street to an extent varying from six to eleven inches, within six feet from the level of the footway, had rightly been convicted of a contravention of the above enactment, although it was not proved that any persons had actually been obstructed by the goods. Taylor v. Lamb, Nov. 4, 1887, Just. Cases, p. 18.

Police Commissioners—Power of committees to delegate to subcommittee—General Police and Improvement Act, 1862, *sec.* 63—*Dundee Police and Improvement Act,* 1882.

3. Under the powers conferred by sec. 63 of the General Police and Improvement Act, 1862, incorporated with the Dundee Police Act, 1882, the Dundee Police Commissioners appointed a works committee to superintend the building of houses, &c. This committee had no express power under the general or local Act to delegate its powers. The committee remitted certain plans to a "subcommittee" of their number. The subcommittee issued a deliverance in name of "the Commissioners" disapproving the plans. On appeal, *held* that the works committee had no power to delegate its powers, and that therefore the deliverance fell to be quashed. Thomson v. Dundee Police Commissioners, Dec. 8, 1887, p. 164.

Failure to light common stair—Prosecution of factor as owner—Edinburgh Municipal and Police Act, 1879, *sec.* 5.

4. *Held* that under the above provision a person who, as factor, drew the rents and otherwise managed a tenement with a common stair, the owner of which was resident in Edinburgh, had rightly been convicted of a contravention of section 95 of the Act, in respect that he had, "as owner" of the stair, failed to provide the necessary supply of gas for lighting it. Forbes v. Linton, Nov. 10, 1887, Just. Cases, p. 19.

POOR. *Settlement—Proof—Parish Register.*

1. In an action of relief of a pauper's aliment brought against one of the two parishes in which a town was situate, it was proved that the pauper was born in the town in 1811. The only evidence that the pauper was born in the defender's parish was an entry of the birth and baptism in the Register of Births and Baptisms kept for that parish, and an entry in a register of baptisms kept by the minister of a chapel of ease within the parish. *Held* that there was sufficient proof that the pauper had been born in the parish. Lemon v. Wallace, Nov. 26, 1887, p. 92.

Residential settlement—Retention of settlement.

2. A husband died within four years after removing with his family from the parish of M, in which he had a residential settlement. His widow became chargeable in another parish sometime after the four years of absence from M had expired. *Held* that the derivative settlement in M which accrued to the widow on her husband's death had not been retained after the expiration of four years and a day from the time of removing from M. Caldwell v. Glass, Dec. 9, 1887, p. 166.

Settlement—Lunatic.

3. In an action brought by a relieving parish against the parish of the pauper's birth, it was pleaded in defence that the pauper, in respect of idiocy and imbecility, was incapable of having a settlement other than her father's. It was proved that the pauper, a woman twenty-four years of age, was a congenital imbecile, but not an idiot, that she was incapable of earning a living, and could not learn either to write or to go a message, and that she could not dress herself or do ordinary housework without superintendence. The Court *held* on the proof that she was not in such mental condition as to be a perpetual pupil, and therefore was capable of having a settlement of her own, which, in the circumstances, was that of her birth. Nixon v. Rowand, Dec. 20, 1887, p. 191.

Poor's-Roll. *Circumstances warranting admission.*

A man earning 27s. a-week with a wife and family dependent on him who had been found to have a *probabilis causa litigandi*, *held* (*diss.* Lord Rutherfurd Clark) entitled to the benefit of the poor's-roll. Paterson v. Linlithgow Police Commissioners, July 4, 1888, p. 826.

Possession. See *Fishings*, 2—*Property*, 3—*Road.*

Presumption. *Presumption of Life Limitation Act*, 1881, *sec.* 4—*Moveable estate—Where no vested right in absentee.*

Petition under the above Act for authority to make up a title *refused* in respect that as no part of the testator's estate had vested in the absent person, the petitioners could not complete a title through him. Minty v. Ellis' Trustees, Dec. 24, 1887, p. 262.

See *Partnership*, 2.

Process. *Summons—Signeting of summons—Arrestment jurisdictionis fundandæ causa.*

1. Where jurisdiction is to be founded against a foreigner by letters of arrestment *jurisdictionis fundandæ causa*, it is not necessary to execute them before the summons is signeted.

Opinions that it is enough that they be executed before defences are lodged.

Observations (*per* the Lord President) on the legal significance of the signeting of a summons. Walls' Trustees v. Drynan, Feb. 1, 1888, p. 359.

Summons—Commencement of action.

2. *Held* that the date of the commencement of an action is the date of the execution of the summons. Alston v. Macdougall, Nov. 18, 1887, p. 78.

Summons—Misnomer in summons.

3. A small-debt summons was raised against "William Cruickshanks," and was served personally on William Vincent Cruickshank, who did not defend the action. Decree was obtained and a charge given thereon, and a poinding followed. William Vincent Cruickshank then brought an action to have the sale under the poinding interdicted, and for damages, on the ground that his name was "William Vincent Cruickshank," that he was not the William Cruickshanks who was the pursuer's debtor, and that he had intimated by letter when the summons was served that he knew nothing of the alleged debt. *Held* that he ought to have defended the action, and that his action came too late. Cruickshank v. Gow & Sons, Jan. 25, 1888, p. 326.

Execution—Registered letter—Citation Amendment Act, 1882, *sec.* 3.

4. *Held* that when a person is cited in an action by the posting of a registered letter in terms of sec. 3 of the Citation Amendment Act, 1882, the date of posting is the date of execution. Alston v. Macdougall, Nov. 18, 1887, p. 78.

All parties not called—Company—Action for registration of transfer.

5. The transferee of stock in a railway company raised an action against the company to have them ordained to register the transfer. The company in defence averred that the transferor had instructed them not to register the transfer, on the ground that the transferee was "illegally disposing of" the transferor's stock; and pleaded "all parties are not called." The Court *held* that it was not necessary to call the transferor as a defender in the action, but in respect that the action had not been formally intimated to him ordained the defenders to transmit to him a copy of the record and a copy of the interlocutor certifying him that if he failed within eight days to state objections to the registration of the transfer, judgment would be pronounced against the defenders. Shaw v. Caledonian Railway Co., March 7, 1888, p. 504.

Mandatary—Extent of mandatary's powers.

6. A mandatary has no power to settle an action without special authority to do so. Thoms v. Bain, March 20, 1888, p. 613.

Caution for expenses—Bankrupt.

7. *Held* (*rev.* judgment of Lord Lee) that an undischarged bankrupt who had brought an action against his landlord for damages on account of the land-

PROCESS—*Continued.*

lord unwarrantably breaking into the premises let and removing furniture and stock therein belonging to the pursuer, was entitled to insist in the action without finding caution for expenses, although the trustee in the sequestration had declined to sist himself as a party to the action. Thom v. Andrew, June 26, 1888, p. 780.

Leave to reclaim—Allowance of proof—Remit to man of skill—Court of Session Act, 1868, *sec.* 28—*A. S.*, 10*th March* 1870, *sec.* 2.

8. In a case where a remit was made by the Lord Ordinary to a man of skill the Court *held* that as the interlocutor was one which virtually settled the mode of proof of at least a part of the case, it was of the class of interlocutors which might be reclaimed against without leave within six days of its date. Quin v. Gardner & Sons, Limited, June 22, 1888, p. 776.

Procedure in vacation—Companies Clauses Consolidation (*Scotland*) *Act*, 1845, *sec.* 57.

9. The powers conferred upon the Court by the 57th section of the Companies Clauses Consolidation (Scotland) Act, 1845, for the appointment of an interim judicial factor cannot be exercised by the Lord Ordinary on the Bills during vacation. Broad v. Edinburgh Northern Tramways Co., March 20, 1888, p. 615.

Procedure in vacation—Choosing of curators—Decree in absence—Court of Session Act, 1868, *sec.* 93.

10. *Held* that the authority given by sec. 93 of the Court of Session Act, 1868, to the Lord Ordinary on the Bills to grant decrees in absence in vacation extends to actions of choosing curators. Hay v. Hay, Sept. 21, 1887, p. 1.

Expenses—Modification—Suspender not insisting in suspension.

11. While a note of suspension of a charge upon a bond and disposition in security was in the Bill-Chamber, the complainer, in respect of the decision of the Inner-House refusing a petition for recall of an inhibition used by the charger, which raised the same question as the suspension, moved the Lord Ordinary to refuse the note. The Lord Ordinary refused the note, found the complainer liable in expenses, and modified the same to five guineas. The respondent reclaimed. The Court *held* (following *Hare* v. *Stein*, June 8, 1882, 9 R. 910) that the Lord Ordinary was entitled to modify the expenses, and in the circumstances *refused* to alter the sum at which he had modified them. Clarke v. M'Nab, May 26, 1888, p. 670.

Expenses—Interlocutor.

12. An interlocutor awarding expenses without qualification gives expenses as between party and party, and after the Court has pronounced such an interlocutor it is too late to move for expenses as between agent and client. Fletcher's Trustees v. Fletcher, July 7, 1888, p. 862.

See *Expenses.*

Proof—Diligence—Action of damages for personal injuries—Defender's right to recover pursuer's business books and income-tax receipts.

13. In an action of damages for personal injuries alleged to have been sustained through the defenders' fault, in which the pursuer alleged that his business had suffered from his inability to attend to it owing to the injuries, the defenders moved for a diligence to recover the pursuer's business books for the preceding four years, and his income-tax receipts for the same period. The Court *refused* the motion. Craig v. North British Railway Co., July 3, 1888, p. 808.

Proof—Diligence for citing havers—Arbitration.

14. Where one of the parties to an arbitration presented a petition to the Court for warrant to cite witnesses to appear before a commissioner and produce documents conform to specification annexed, the Court *refused* the petition, holding that the approval of the arbiters to the specification ought first to have been obtained. Crichton v. North British Railway Co., June 26, 1888, p. 784.

PROCESS—*Continued.*

Proof—Remit to man of skill—Consent.

15. In an action brought for recovery of an alleged balance of the price of certain contract railway work, the question relating to the construction and scope of a written agreement, the Lord Ordinary made a remit to a man of skill to report "whether the railway as executed is covered by the contract . . . or whether it differs from the work contemplated . . . in whole or in part, and that to such extent and degree that the schedule prices cannot be fairly applied to the work as executed." The defenders reclaimed and asked for a proof. The Court recalled the Lord Ordinary's interlocutor and allowed a proof,—*holding* that as the remit involved questions of law as well as fact, it was inexpedient, if not incompetent, to make it without the consent of parties. Quin v. Gardner & Sons, Limited, June 22, 1888, p. 776.

Jury trial—New trial—Reparation—Juryman visiting locus during progress of trial—Act 55 *Geo. III. cap.* 42, *sec.* 6.

16. During a jury trial in an action of damages at the instance of a workman who was injured in a colliery, evidence was led on 21st and 24th January. On the 23d one of the jury went by himself to inspect the *locus* of the accident, and the method of working the colliery. The jury returned a verdict for the pursuer. The defender moved the Court to grant a new trial, in terms of sec. 6 of the Act 55 Geo. III. cap. 42, on the ground that the conduct of the juryman had rendered it impossible for the jury to return a verdict according to the evidence led before them. The Court *granted* a new trial. Sutherland v. Prestongrange Coal and Fire-Brick Co., Limited, March 2, 1888, p. 494.

Jury trial—New trial—Surprise.

17. In an action against road trustees for damages for the death of a child about three years of age, which had crept under a fence on the public road and had been drowned in a burn, through the alleged fault of road trustees in not duly fencing the road, the only defence on record was that the road was sufficiently fenced, and that the child had been negligently allowed by the pursuer, her father, to wander about unattended at the place in question. The pursuer's evidence shewed that there had been other accidents to children at that place, and that he had felt apprehension with regard to it, but he did not prove that he had given any notice of the danger to the defenders. The jury found for the defenders "on the ground of contributory negligence on the part of the pursuer, who, while living in fear of the burn, made no complaint to any authority as to the danger." The pursuer moved for a rule for a new trial on the ground that the contributory negligence which the jury had found proved had not been averred, and that he had therefore been taken by surprise. The Court *refused* a rule. Murray v. County of Middle Ward of Lanark Road Trustees, June 12, 1888, p. 737.

Jury trial—New trial—Excessive damages.

18. A widow brought an action of damages for the death of her husband, resulting from personal injuries caused by the defenders. He was a builder by trade, and his whole income from that and other sources amounted to £150. The widow was left unprovided for. The jury awarded her £900. On a motion for a new trial the Court *held* the award excessive, and reduced it to £500. Wallace v. West Calder Co-operative Society, Limited, Jan. 13, 1888, p. 307.

Jury trial—Employers Liability Act, 1880—*Notice of injury.*

19. *Held* that the question whether the excuse offered by a pursuer, suing for damages under the Employers Liability Act, 1880, for omitting to send notice of the injury to the employer in terms of sec. 4, is reasonable, may be decided by the Court at the adjustment of issues, or may in their discretion be postponed for the decision of the Judge who tries the cause. Trail v. Kelman & Co., Oct. 22, 1887, p. 4.

Jury trial—Slander—Nominal damages.

20. Judge's certificate. Macmillan v. Wilsons, Oct. 25, 1887, p. 6.

PROCESS—*Continued.*

Adjudication—Decree.

21. Where a Lord Ordinary pronounced decree of adjudication, and on a reclaiming note the Court adhered, decree of adjudication was pronounced of new in the Inner-House. Stewart v. Forbes, Feb. 8, 1888, p. 383.

Special Case—Competency.

22. In a special case presented by the Greenock Harbour Trustees and by certain classes of lenders holding assignments under the different Acts of the Trust, it was stated that the funds of the Trust "were not at Whitsunday last and have not since been adequate to meet the repayments of certain loans then and since payable, and the payments of interest due in respect of money borrowed." The Court entertained the case and decided questions of preference raised therein. Greenock Harbour Trustees, Jan. 31, 1888, p. 343.

Appeal—Competency—Interlocutor limiting proof to writ or oath—Sheriff Court (Scotland) Act, 1853, *sec.* 24.

23. A Sheriff pronounced an interlocutor sustaining a plea for the defender of prescription, and limiting the proof to his writ or oath. The pursuer appealed. *Held* that the Sheriff's judgment was not a final interlocutor within the meaning of the Sheriff Court Act, 1853, sec. 24, and was therefore not appealable. Wilson v. Brakenridge, March 15, 1888, p. 587.

Appeal—Competency—Cessio—Debtors Act, 1880.

24. An interlocutor by a Sheriff in a process of *cessio* under the Debtors Act, 1880, reviewing a trustee's deliverance, and ranking a claimant, may competently be appealed to the Court of Session. Taylor's Trustee v. Paul, Jan. 24, 1888, p. 313.

Appeal—Competency—Election of trustee in bankruptcy—Bankruptcy (Scotland) Act, 1856, *sec.* 71.

25. At a meeting of creditors for the election of a trustee in a sequestration, creditors to the value of £15,000 voted for A and creditors to the value of £1600 voted for B. Objections were taken by creditors to certain votes for A. The Sheriff-substitute sustained an objection to the vote of X, a creditor for £16, who had proposed A, and, on the ground that A had been proposed by a creditor who was not entitled to vote, declared B to have been duly elected. An appeal by A to the Court of Session was objected to on the ground that by sec. 71 of the Bankruptcy Act the Sheriff's judgment was final. *Held* that the appeal was competent, and that the interlocutor must be recalled, on the ground that the Sheriff had exceeded his jurisdiction—the Lord President holding that the Sheriff had exceeded his jurisdiction in failing to ascertain the number of valid votes for each candidate—Lord Shand holding that the Sheriff's jurisdiction was limited to disposing of objections stated to him—Lord Adam concurring on both grounds. Farquharson v. Sutherlands, June 16, 1888, p. 759.

Appeal—Appeal for Jury Trial—Judicature Act, 1825, *sec.* 40.

26. It is incompetent to remove a Sheriff Court cause to the Court of Session under the 40th section of the Judicature Act while the interlocutor allowing a proof is under appeal to the Sheriff. M'Arthur v. Boucher, Dec. 6, 1887, p. 117.

See *Interdict.*

PRO-CURATOR. See *Judicial Factor,* 5.

PROOF. *Onus—Agent and Client—Reparation—Alleged failure of agent to inform client of material fact.*

1. *B, a law-agent, was employed by a client to obtain a loan on the security of a patent. S, another client of B, after consulting B, lent £5000. The patent was subsequently found to be invalid, having been anticipated by prior patents. In an action raised by S against B for payment of loss through the transaction, on the ground that the defender had failed to communicate to the pursuer the fact that he had ascertained that the patent could not be*

PROOF—*Continued.*

relied on as valid without further inquiry than had been made, and had allowed him to advance his money in ignorance of this risk, held (rev. *judgment of First Division*) (1) *that the* onus *of proving that the communication had not been made lay upon the pursuer; and* (2) *on the proof* (diss. *the Lord Chancellor*) *that the pursuer had failed to discharge himself of this* onus, *and that from the facts proved and documents produced it was to be inferred that B did make the communication to his client.* M'Clure, Naismith, Brodie, & Macfarlane, v. Stewart, July 22, 1887, H. L., p. 1.

Onus—Testament—Signature on erasure.

2. When in a testamentary deed the signature bearing to be that of the testator was written on an erasure, but was otherwise *ex facie* duly tested, and the deed was challenged as vitiated *in essentialibus*, *held* that the deed was *ex facie* probative, and that the *onus* was consequently on the party challenging it to prove either that the signature was not genuine, or, if genuine, that it had not been duly tested. The proof on these points having failed, deed *sustained.* Brown v. Duncan, March 9, 1888, p. 511.

Onus—Restrictions on building—Common feuing plan—Loss of plan.

3. A feu-charter, dated in 1825, providing for the erection of a tenement in a town, declared that it should not be in the power of the feuar to make any deviation from or alteration of a plan of the tenement, signed as relative to the feu-charter, "all which it is hereby specially provided may be stopped, demolished, or removed by us or our foresaids, or by any of the feuars of the said street, at the expense of the feuars offending." The tenement was erected in 1826. In 1887 the proprietor proposed to bring forward the front of the tenement to the line of the street by covering the area. Neighbouring feuars, with a title to object, objected on the ground that the proposed alteration was a deviation from the plan, but the plan itself was lost. *Held* that, as it was to be presumed that the existing buildings had been erected in conformity with the plan, the *onus* lay upon the proprietor to shew that the alterations proposed by him were not disconform to the plan. Sutherland v. Barbour, Nov. 17, 1887, p. 62.

Usage of trade.

4. *Held* that averments of custom of trade cannot be admitted to probation in order to construe a written contract clearly expressed.

A steel company contracted to supply "the whole of the steel required by" a firm of contractors in the building of a bridge, "the estimated quantity of steel to be 30,000 tons, more or less." In an action at the instance of the steel company against the contractors to have it declared that they were entitled to supply, and the defenders were bound to take from them all the steel necessary for the bridge, the contractors averred that according to the custom of the steel trade the contract was a contract only for the estimated quantity, with a margin of variation not exceeding 5 per cent. *Held* (*rev.* judgment of Lord Trayner) that the words of the contract being plain and unambiguous the averment was not relevant to be admitted to probation. Steel Company of Scotland v. Tancred, Arrol, & Co., Dec. 22, 1887, p. 215.

Parish Register.

5. In an action of relief of a pauper's aliment brought against one of the two parishes in which a town was situate, it was proved that the pauper was born in the town in 1811. The only evidence that the pauper was born in the defender's parish was an entry of the birth and baptism in the Register of Births and Baptisms kept for that parish, and an entry in a register of baptisms kept by the minister of a chapel of ease within the parish. *Held* that there was sufficient proof that the pauper had been born in the parish. Lemon v. Wallace, Nov. 26, 1887, p. 92.

Husband and Wife—Divorce—Evidence of young child.

6. In a proof in an action for divorce on the ground of adultery, the Lord Ordinary rejected the evidence of a boy nearly seven years of age, "in respect of his tender years and of the nature of the case." *Opinion* that

PROOF—*Continued.*

the evidence had rightly been rejected. Robertson v. Robertson, July 20, 1888, p. 1001.

Husband and Wife—Divorce—Condonation.

7. In an action of divorce on the ground of adultery, while it is competent to lead evidence of misconduct on the part of the defender prior to condonation in order to shew the character of the defender's subsequent actings, which are admitted or proved as facts, but are in themselves capable of being regarded in different lights, it is not competent to refer to such previous misconduct as evidence of the alleged facts themselves. Robertson v. Robertson, July 20, 1888, p. 1001.

Diligence—Action of damages for personal injuries—Defender's right to recover pursuer's business books and income-tax receipts.

8. In an action of damages for personal injuries alleged to have been sustained through the defenders' fault, in which the pursuer alleged that his business had suffered from his inability to attend to it owing to the injuries, the defenders moved for a diligence to recover the pursuer's business books for the preceding four years, and his income-tax receipts for the same period. The Court *refused* the motion. Craig v. North British Railway Co., July 3, 1888, p. 808.

Proof in a reference.

9. Competency of leading evidence in a reference to men of skill as to the value of a waygoing crop. Logan v. Leadbetter, Dec. 6, 1887, p. 115.

See *Justiciary Cases*, 16, 17, 18, 19, 20, 21—*Ship*, 2—*Valuation Acts*, 6.

PROPERTY. *Church—Allocation of seats—Parts and Pertinents.*

1. Where seats in a parish church are allocated to heritors according to real rent, they are parts and pertinents of the property in respect of which they are allocated, and cannot be alienated therefrom. Stephen v. Anderson, Nov. 18, 1887, p. 72.

Theatre—Letters-patent—Patrimonial right—Bond and disposition in security—Parts and Pertinents.

2. In 1878 the lessee of a theatre in Glasgow, holding letters-patent granted by the Crown (under the Act 43 Geo. III. c. 142) authorising him, "his executors, administrators, and assigns," to maintain a company of players in a certain theatre in Glasgow, or any other theatre in a suitable place in Glasgow, for a certain term of years, assigned the letters-patent to the proprietor of the theatre. Subsequently the proprietor granted a bond and disposition in security for £13,000, which conveyed the subjects with the "parts, pertinents, and privileges thereof." The bondholders having entered into possession, let the theatre to a new tenant. Their lessee having continued to produce stage plays, and having no licence to do so except in so far as he had right to the letters-patent, the proprietor brought an action against him and the bondholders to have them interdicted from producing stage plays in the theatre in virtue of the licence in the letters-patent, the right to which he maintained was still in him. The Court *held* that the pursuer had no title to sue, the Lord Justice-Clerk and Lord Young on the ground that the licence in the letters-patent was not a right of property separable from the theatre, and Lord Rutherfurd Clark on the ground that the pursuer had, by granting the bond and disposition in security, divested himself of his right to the letters-patent. Yuille v. Rushbury, July 4, 1888, p. 828.

Title—Sale—Possession.

3. In 1880 two adjoining feus were sold by public roup, Martin purchasing one, and Balderston the other. In 1885 Balderston sold his feu to Ross, and in 1886 Ross raised an action against Martin for declarator that a portion of the feu possessed by Martin belonged to him (Ross).

Held (*rev.* judgment of Lord Kinnear) that as the subjects in dispute were within the pursuer's and not within the defender's title, as recorded, the pursuer as a singular successor could not be affected by such personal exceptions arising from the terms of the articles of roup and the pos-

PROPERTY—*Continued.*

session since the roup, as might have been pleaded against his author Balderston, and therefore that he was entitled to decree as concluded for. Ross v. Martin, Jan. 12, 1888, p. 282.

Title—Notarial instrument—Titles to Land Consolidation (Scotland) Act, 1868, secs. 3 and 19.

4. By trust-disposition for behoof of creditors, Yeaman the truster conveyed “to and in favour of John Shields” (designed) “and as trustees, to act in succession as after mentioned; whom failing, to such person or persons as I may appoint by any writing under my hand validly executed, as trustees . . . and to the assignees of the said trustees or trustee, All and Sundry my whole means, estate, and effects, heritable and moveable.” Power was given to the trustee, *inter alia*, to take possession of the whole trust-estate, to complete titles thereto, and to sell the whole or any part thereof. Shields accepted, but without having made up a title to any of the truster's heritable properties, he, after having acted for a few months, resigned by minute of resignation endorsed on the trust-disposition. Yeaman thereupon, on the narrative of the trust-disposition and of the minute of resignation, nominated Buchan “as trustee under the said trust-deed, with full power, by himself alone, to manage and execute the trust thereby created, in the same manner and as fully and freely in every respect as if the said trust-deed had been granted in favour of him the said Thomas Buchan as sole trustee, and that for the purposes, and with the powers, and subject to the declarations and provisions contained in the said trust-deed.” Buchan's agent made up a title by notarial instruments bearing to be in terms of the Titles to Land Consolidation Act, 1868. The notarial instruments, which were duly recorded, set out the sasine under which Yeaman was infeft, the trust-disposition in favour of Shields, and the deed of nomination in favour of Buchan. Buchan (for the purpose of having the validity of the title determined by the Court) refused payment of his agent's account on the ground that the notarial instruments did not form a valid title in his favour, in respect (1) that Shields had a personal right to the properties and had never divested himself thereof; (2) that the case did not fall within the provisions of the Act of 1868; (3) that the trust-disposition and the minute of appointment did not constitute a valid warrant for completing Buchan's title by notarial instrument; and (4) that even if it were competent to complete Buchan's title by notarial instrument, the notarial instruments were insufficient, inasmuch as the minute of resignation was not set forth as one of the warrants of instruments, such minute being an essential link in the progress of titles. The other party maintained that the titles had been validly completed in terms of the 19th section of the Titles to Land Consolidation Act, 1868, as interpreted by the 3d section of the same Act. In a special case *held* (*diss.* Lord Rutherfurd Clark) that the titles had been validly completed, and that the agent was entitled to payment of his account. Kerr's Trustee v. Yeaman's Trustee, March 9, 1888, p. 520.

Burden on entailed property—Disentail—Bridge—Acquiescence of subsequent heirs.

5. The heir of entail in possession of K, an estate situated on the north bank of a river, in 1858 granted permission (not in writing) to M, the proprietor of lands on the other bank and tenant of the shootings on the entailed estate, to build over the river a carriage bridge, one of the abutments of which rested on part of the entailed lands. The bridge was connected by a good road, forty-five yards long, with a public road which ran along the north bank. The succeeding heir of entail, who in 1884 disentailed the estate, did not object to the continued use of the bridge by M. In 1885, after the death of the disentailer, M assigned the remainder of his lease of the shootings over K to W, who shortly thereafter placed a deer fence across the access to the bridge on the north side. In an action against M at the instance of W and the fee-simple proprietor of K, who up

PROPERTY—*Continued.*

to that time had not objected to M's use of the bridge, for declarator that they were entitled to have the use of the bridge discontinued, *held* that M's right to the use of the bridge rested on sufferance only, and that, therefore, the pursuers were entitled to declarator that he was not entitled to continue to use it. Winans v. Lord Tweedmouth, March 10, 1888, p. 540.

Common property—Common interest—Alteration of buildings.

6. The proprietor of a shop in an area and of a dwelling-house above, the latter being on the street level, and both forming part of the same tenement, petitioned the Dean of Guild for authority to bring forward his dwelling-house to the line of the street. The petitioner's title was a disposition to "All and Whole that shop and dwelling-house in . . . together with a cellar in the front area . . . together also with a right in common with" the other proprietors of the tenement "to the *solum* of the piece of ground upon which the foresaid shop and dwelling-house are built." The other cellars in the area were the property of certain of these upper proprietors of the tenement. *Held* that the petitioner was not proprietor of the area, and that the other proprietors were entitled to object to his proposed alterations. Sutherland v. Barbour, Nov. 17, 1887, p. 62.

Reparation—Nuisance—Neighbourhood.

7. The purchaser of a quantity of fallen timber in a plantation in the course of removing the timber dragged it across a stream which flowed through the plantation and fed a salmon-hatchery below. The result was that the stream became fouled, and that the ova in the hatchery were destroyed. In an action of damages by the proprietor of the hatchery against the purchaser of the timber, it was proved that the latter had continued his operations after he became aware of their probable consequences to the ova, but was willing to take any reasonable precautions which did not materially impede the removal of the timber, he being under contract with the proprietor of the plantation to remove the timber within a limited time. *Held* (*rev.* judgment of Lord M'Laren) that the pursuer was not entitled to damages, the defender having followed the ordinary method of carrying out an ordinary and legitimate operation. Armistead v. Bowerman, July 3, 1888, p. 814.

River—Servitude—Water rights.

8. *B., who was proprietor of the lands surrounding Loch H., and on both sides of Loch H. Burn for some distance after it left the loch, in* 1854 *disponed to D., an inferior heritor, along with two mills on Loch H. Burn, his "whole rights of water and water-power, and other rights connected with the mills hereby disponed, including all right" he had "to dam up and draw water from Loch H., or to form embankments or breast-works at said loch," but so that the water of the loch should not be raised more than three feet above its then existing level. At the same time he expressly reserved his rights in the foresaid loch and burn, excepting his rights therein connected with the mills and "other rights above conveyed or granted," and particularly his right to use the water-power for driving agricultural machinery. In* 1883 *the Water-works Commissioners of the burgh of Dumbarton obtained compulsory powers to take the water of Loch H. for the supply of the inhabitants, but their special Act provided that they must discharge into Loch H. Burn a regular supply of* 320,000 *gallons a-day, which should "be deemed to be compensation to mill-owners and other persons interested in the waters flowing down the stream called Loch H. Burn for the water intercepted and appropriated for the purposes of this Act"; and also that "nothing in this Act contained shall be held to prejudice or affect the rights (if any) of B. in the loch known as Loch H., or to prevent him from claiming" from the Commissioners compensation for any such rights which should be injuriously affected by their operations. The Commissioners acquired by private agreement all the rights of D. in Loch H. and Loch H. Burn. B. claimed compensation, not only for land taken and wayleave, but for rights and interests in the water of the loch and burn injuriously affected.* Held *that the*

PROPERTY—*Continued.*

grant of servitude to D. was limited to the use of water for the mills, and that the Water Commissioners were bound to compensate B. for the water withdrawn from the loch for the supply of the town of Dumbarton. Lord Blantyre v. Water-Works Commissioners of Dumbarton, May 11, 1888, H. L., p. 56.

See *Expenses*, 4—*Fishings*, 1, 2, 4—*Servitude*, 1. For Restrictions on Buildings, see *Superior and Vassal*, 4, 5, 6.

PUBLIC BURDENS. *Clause of relief—Lease—Expositio Contemporanea.*

Where the parties to a long lease had for a long period of years acted on a particular construction of obligations of relief of public burdens, *held* that such construction must be regarded as the true meaning of the obligation, and receive effect accordingly. Jopp's Trustees v. Edmond, Jan. 11, 1888, p. 271.

PUBLIC HEALTH. *Common lodging-house—Right of officer of Local Authority to inspect—Public Health Act*, 1867, *sec.* 68.

1. The keeper of a common lodging-house, on access to his house being demanded by two officers of the Local Authority, refused access (1) to a room which opened off a licensed room, and could only be entered through it—(this room had not been observed when the premises were inspected with a view to licence being granted, and was not itself licensed); (2) to two rooms which were licensed, but which he had shut off entirely from the rest of the house, which had a separate access to the street, and which, after giving notice to the Local Authority that he had ceased to use them as part of the lodging-house, he had let to a monthly tenant. *Held* that in refusing access to the first-mentioned room he had contravened the above statute.

Opinions, that in refusing access to the other two rooms he had not contravened the statute, but that his conduct in doing so would have justified the magistrates in cancelling the licence. Gunn v. Cadenhead, May 25, 1888, Just. Cases, p. 57.

Burgh—Drainage—Public Health Act, 1867, *secs.* 77 *and* 108—*Rivers Pollution Prevention Act*, 1876, *sec.* 7.

2. A paper manufacturer, whose works were within a burgh and who was liable for drainage assessment, presented a petition in the Sheriff Court, founding on the 77th section of the Public Health Act, 1867, and the 7th section of the Rivers Pollution Prevention Act, 1876, to have the local authority ordained to allow him to empty the drains containing the discharge from his works into the burgh sewers. The defenders, founding on the latter section, stated that the discharge in question would "prejudicially affect" their sewers and the quality of their sewage, and unduly increase the volume of the total discharge in its application to their sewage farm.

Held, upon a report by men of skill, that the defenders had failed to prove that the quality of the discharge was such as would "prejudicially affect" the sewers or the sewage in any of the particulars of the section founded on; that the term "application to land" was used in a general and not in a special sense; and that the defenders were bound to receive the discharge into their sewers—provided that their sewage pipes were large enough to carry it. Guthrie, Craig, Peter, & Co. v. Magistrates of Brechin, Feb. 8, 1888, p. 385.

Possession of unsound meat—Edinburgh Municipal and Police Act, 1879, *sec.* 261.

3. *Opinions* that to obtain a conviction against the occupier of premises for a contravention of the Edinburgh Police Act, 1879, by being in the possession of unsound meat as or for human food, it is not essential to prove that the accused knew either of the meat being in his premises or of its unsound condition. Dickson v. Linton, June 1, 1888, Just. Cases, p. 76.

PUBLIC-HOUSE. *Certificate—Transfer—Act* 9 *Geo. IV. cap.* 58, *sec.* 19.

Held that a removal and transfer under the above statute absolutely divests

Public-House—*Continued.*
the original holder of all right of trafficking in exciseable liquors under the certificate.

A transfer of a public-house certificate running from May 1887 till May 1888 was granted in July 1887, but was not confirmed at the ensuing Quarter Sessions in October, the transferee having been guilty of a breach of the certificate. The original holder then resumed possession of the premises, and proceeded to traffic therein in exciseable liquors without obtaining a new certificate. *Held* that he had been rightly convicted of trafficking in exciseable liquors without a certificate. Miller v. Linton, Feb. 10, 1888, Just. Cases, p. 37.

Railway. *Taking of land compulsorily—Expenses—Lands Clauses Consolidation (Scotland) Act,* 1845, *sec.* 119.

A proprietor of lands brought an action against the Crown and against a railway company, concluding for declarator that he had right to the foreshore ex adverso *of his lands, and for interdict against the railway company entering upon it. The pursuer obtained decree in his favour in the Court of Session, and in appeals by both defenders to the House of Lords, with a finding against the appellants for costs in the appeals. The railway company having then served on the proprietor a notice under the Lands Clauses Act of their intention to take the foreshore, the latter presented a petition to the House of Lords against the railway company praying that the costs in the appeal should be taxed as between agent and client in terms of section* 119 *of the Lands Clauses Act. Held that the costs in the railway company's appeal should be taxed as between agent and client.* Young v. North British Railway Co., March 8, 1888, H. L., p. 32.

See *Entail,* 7.

Real Burden. See *Servitude,* 1.

Reparation. *Excessive damages—Personal injury.*

1. A widow brought an action of damages for the death of her husband, resulting from personal injuries caused by the defenders. He was a builder by trade, and his whole income from that and other sources amounted to £150. The widow was left unprovided for. The jury awarded her £900. On a motion for a new trial the Court *held* the award excessive, and reduced it to £500. Wallace v. West Calder Co-operative Society, Limited, Jan. 13, 1888, p. 307.

New trial—Juryman visiting locus during progress of trial—Act 55 *Geo. III. cap.* 42, *sec.* 6.

2. During a jury trial in an action of damages at the instance of a workman who was injured in a colliery, evidence was led on 21st and 24th January. On the 23d one of the jury went by himself to inspect the *locus* of the accident, and the method of working the colliery. The jury returned a verdict for the pursuer. The defender moved the Court to grant a new trial, in terms of sec. 6 of the Act 55 Geo. III. cap. 42, on the ground that the conduct of the juryman had rendered it impossible for the jury to return a verdict according to the evidence led before them. The Court granted a new trial. Sutherland v. Prestongrange Coal and Fire-Brick Co. Limited, March 2, 1888, p. 494.

Breach of contract—Different actions of damages founded on one breach.

3. A single act, amounting either to a delict or to breach of contract cannot be made the ground of two or more actions for the purpose of recovering damages arising within different periods, but the whole damage present and future must be recovered in one action. Stevenson v. Pontifex & Wood, Dec. 7, 1887, p. 125.

Fraud—Title to sue—Company—Shareholder—Restitutio in integrum.

4. In 1877 a joint stock company was formed to buy an estate in Norway, believed to be valuable for its timber and minerals, at the price of £3800, three-fourths of the price to be paid in cash, the remainder in shares. The

REPARATION—*Continued.*

vendor guaranteed that the sum so paid in cash should be repaid from sales of timber within four years from the company's entering into possession. The company entered into possession of the estate in 1877, and carried on the sale of timber for two years. The business proved unprofitable, and in 1879 the company entered into an agreement with the vendor by which the parties declared the original contract to be no longer binding on either, and discharged all claims by the one party against the other under it, and the company agreed to pay to the vendor (for salary as manager and advances) a sum of money, and to grant him a mortgage over the estate for a further sum. The company carried on the business till January 1884, when they resolved to sell the estate and to wind up the company. In November 1883 one of the partners raised an action of damages against the vendor for the loss the pursuer had sustained by becoming an original shareholder of the company, on the ground that he had been induced to do so by the fraudulent misrepresentations of the vendor. After a proof, *held* that fraudulent misrepresentation had not been proved, and that the vendor was not liable, the Lord Justice-Clerk, Lord Young, and Lord Craighill further holding that having regard to the proceedings of the company the pursuer had no title to sue, Lord Rutherfurd Clark reserving his opinion. Dunnett v. Mitchell, Dec. 7, 1887, p. 131.

Lease—Urban tenement—Injury to business by operations of neighbouring occupier.

5. Where a tenant of an urban tenement sues his landlord for damages in respect that his rights as occupant have been encroached on by operations carried on by the proprietor of a neighbouring tenement, he must aver, in order to found a relevant action, that he has applied to his landlord to have his rights protected, and that the landlord, in breach of his duty, has refused, or unduly delayed, to protect them. Menzies v. Whyte, Feb. 29, 1888, p. 470.

Lease—House becoming uninhabitable—Liability of landlord for death in tenant's family.

6. Averments in an action by the tenant of a house against the landlord for damages from the house becoming uninhabitable from its insanitary condition, and for *solatium* on account of the loss of the tenant's two children from the same cause, *held* irrelevant from want of specification.

Observed (*per* Lord Young) that where tenants continue to inhabit a house which they believe to be dangerous to health through the fault of the landlord they cannot hold him responsible for any evil consequence arising from the continued occupation. Henderson v. Munn, July 7, 1888, p. 859.

Master and Servant—Employers Liability Act, 1880, *secs.* 4 *and* 7—*Notice of injury.*

7. *Held* that the question whether the excuse offered by a pursuer, suing for damages under the Employers Liability Act, 1880, for omitting to send notice of the injury to the employer in terms of sec. 4, is reasonable, may be decided by the Court at the adjustment of issues, or may in their discretion be postponed for the decision of the Judge who tries the cause. Trail v. Kelman & Co., Oct. 22, 1887, p. 4.

Master and Servant—Known danger—Employers Liability Act, 1880, *sec.* 1—"*Plant*"—*Horse.*

8. A man who had been in the employment of a carting contractor as carter for several years, was afterwards employed by him as stableman. Some months thereafter he was ordered by his master to tie up a horse which had got loose in its stall. While doing so he was bitten by the horse and severely injured. In an action for damages he averred,—"The horse in question, which was an entire horse, was a vicious and dangerous animal, and on several previous occasions it had attacked, bitten, and severely injured those who were in charge of it." *Held* that his averments shewed that the pursuer was aware that the horse was vicious, and that he incurred danger

REPARATION—*Continued.*

by entering its stall when it had got loose, and therefore that his action was irrelevant.

Held (*per* Lord Adam) that a horse used by a carting contractor in his business is "plant" in the sense of sec. 1 of the Employers Liability Act, 1880. Fraser v. Hood, Dec. 16, 1887, p. 178.

Master and Servant—Defective machinery.

9. A workman was fatally injured while engaged along with others in raising a heavy barrel, which was suspended by a moveable block and tackle from an iron bar laid across a hatchway in the roof of the apartment in which he was working. The iron bar was laid upon two wooden stools, the block and tackle being attached to it by a hook, and the accident took place through the slipping of the bar. The deceased had assisted to adjust the block and tackle on the day of the accident, and on various previous occasions on which the same operation had been conducted with safety during the preceding four years. In an action by his widow and family against the employer, *held* that, in the circumstances, neither defect in the machinery nor neglect to provide proper appliances had been proved, and defender assoilzied accordingly. Watt v. Neilson & Co., June 21, 1888, p. 772.

Master and Servant—Blasting rock—Defective system of working.

10. In an action by a workman, who had been employed in blasting rock with gunpowder, against his employer for damages on account of personal injury sustained in the course of the employment through the alleged defective system on which the defender carried on the work, the pursuer averred that the gunpowder was stored in a magazine, about five minutes' distance from the work, in small barrels containing about twenty-five pounds of gunpowder each; that when it was desired to fill a charge a barrel of the powder was taken from the store and opened at the work and the required powder taken from it; that while the pursuer was engaged in firing a charge a gust of wind carried a portion of the fuse to the barrel from which the powder had been taken and caused the powder in it to explode, thereby injuring the pursuer; that the system was bad and unnecessarily dangerous; that the usual system was to take the gunpowder from the store in small flasks with narrow orifices, which practically obviated all danger; and that complaints had been made by the workmen to the defender's foreman of the danger of using barrels, which complaints had been unattended to. The Court (*diss.* Lord Rutherfurd Clark) *dismissed* the action as irrelevant. Mulligan v. M'Alpine, June 27, 1888, p. 789.

Master and Servant—Employers Liability Act, 1880.

11. An action of damages under the Employers Liability Act, 1880, cannot be maintained unless the relation of employer and employed has subsisted between the pursuer and the person against whom the action is laid. Nicolson v. Macandrew & Co., July 7, 1888, p. 854.

Master and Servant—Mason using joiner's scaffolding.

12. A labourer who was employed by Messrs A & B, a firm of masons, in the erection of certain buildings, brought an action of damages for personal injury against Messrs C & D, the principal contractors for the work, alleging that, in order to perform his duty of mixing lime, he had had occasion to fetch his shovel, which he had lent to another mason who was working at some distance from the ground; that in fetching it he ascended a ladder which led on to a scaffolding belonging to the defenders; that when he was passing over the scaffolding it gave way, and he fell to the ground, receiving severe injuries. *Held* that as it was not alleged that the scaffolding had been erected for the benefit of the masons, or that it had been used by them with the authority or sanction of the defenders, no relevant case was averred, and action accordingly dismissed. Nicolson v. Macandrew & Co., July 7, 1888, p. 854.

Nuisance—Neighbourhood.

13. The purchaser of a quantity of fallen timber in a plantation in the course

REPARATION—*Continued.*

of removing the timber dragged it across a stream which flowed through the plantation and fed a salmon-hatchery below. The result was that the stream became fouled, and that the ova in the hatchery were destroyed. In an action of damages by the proprietor of the hatchery against the purchaser of the timber, it was proved that the latter had continued his operations after he became aware of their probable consequences to the ova, but was willing to take any reasonable precautions which did not materially impede the removal of the timber, he being under contract with the proprietor of the plantation to remove the timber within a limited time. *Held* (*rev.* judgment of Lord M'Laren) that the pursuer was not entitled to damages, the defender having followed the ordinary method of carrying out an ordinary and legitimate operation. Armistead v. Bowerman, July 3, 1888, p. 814.

Precautions for safety of public—Pond in place accessible to public.

14. Harbour commissioners in reclaiming land from a river bed in the immediate vicinity of the harbour left a piece of water, about half-an-acre in extent and in some parts over six feet deep, unfenced at a place to which the public had free access. As a boy of sixteen was amusing himself at this place, by floating on a raft which he had made, he fell into the water and was drowned. In an action of damages raised by the boy's father against the harbour commissioners *held* that no fault had been proved on the part of the defenders, and, therefore, that they were not liable in damages. Forbes v. Aberdeen Harbour Commissioners, Jan. 24, 1888, p. 323.

Precautions for safety of public—Fencing of public road—Contributory negligence.

15. In an action against road trustees for damages for the death of a child about three years of age, which had crept under a fence on the public road and had been drowned in a burn, through the alleged fault of road trustees in not duly fencing the road, the only defence on record was that the road was sufficiently fenced, and that the child had been negligently allowed by the pursuer, her father, to wander about unattended at the place in question. The pursuer's evidence shewed that there had been other accidents to children at that place, and that he had felt apprehension with regard to it, but he did not prove that he had given any notice of the danger to the defenders. The jury found for the defenders "on the ground of contributory negligence on the part of the pursuer, who, while living in fear of the burn, made no complaint to any authority as to the danger." The pursuer moved for a rule for a new trial on the ground that the contributory negligence which the jury had found proved had not been averred, and that he had therefore been taken by surprise. The Court *refused* a rule. Murray v. County of Middle Ward of Lanark Road Trustees, June 12, 1888, p. 737.

Ship—Liability for collision.

16. Where a ship is placed in a position of peril and difficulty by the wrong manœuvring of another ship, and her captain in exercising his best judgment for the safety of his vessel commits an error which causes or contributes to a collision between them, he will not be held in fault. Hine Brothers v. Clyde Trustees, March 7, 1888, p. 498.

Slander—Innuendo.

17. In an action of damages for slander founded on words not in themselves libellous but innuendoed to be so, the Court will not allow an issue unless the words founded on will fairly bear the innuendo put on them. Fraser v. Morris, Feb. 24, 1888, p. 454.

Slander—Wrongous use of diligence—Publication of decrees of Court of Justice.

18. A debt collector was employed by a creditor to collect a debt. Having failed to do so he employed a law-agent, who used arrestments against the debtor on the dependence of an action subsequently raised in the creditor's name against him in the Sheriff Court. The debtor was then outwith the

REPARATION—*Continued.*

jurisdiction of the Sheriff, and was not duly cited. Decree in absence was obtained, and arrestments in execution used against him. The debt collector then published in a "Commercial Compendium," for which it was alleged he was responsible, a bare statement that the decree had been obtained against the debtor for the amount of the debt in question. The decree in absence was subsequently recalled on the ground of improper citation. In an action for damages at the instance of the debtor against the debt collector for wrongous use of diligence, and wrongful publication of the decree in absence in the knowledge that it had been improperly obtained, *held*, on the averments, (1) that the defender was merely an intermediary between the client and the law-agent, and was not responsible for the errors of the latter; and (2) that the defender not being responsible for the obtaining of the decree was not liable in damages for publishing the fact that it had been granted. Action *dismissed* as irrelevant. Taylor v. Rutherford, March 17, 1888, p. 608.

Slander—Privilege—Malice—Words prima facie slanderous spoken by member of public body pertinently to subject before it.

19. At a meeting of police commissioners of a burgh a member, who had heard complaints regarding the conduct of a sheriff-officer who had charge of collecting arrears of water-rates, said in supporting a motion which he made as to employing a different system for the collection of police-rates,—"What could be more repulsive than to demand rates of a dying woman. . . . Sheriff-officers are not always worshippers of the sober deity." On another member expressing his opinion that the sheriff-officer was a competent man, he said,—"A man who is drunk cannot be competent. . . . I would rather let loose a wild beast upon the community than a drunk man." In an action of damages against him by the sheriff-officer for slander the Court found that the defender used the language complained of in the course of his duty as a member of the police commission, and that it was not proved that he wittingly spoke falsely or that he was actuated by malice; and *held* that he was privileged in expressing himself as he did, in respect that he was *versans in officio*, and that he was entitled to absolvitor. Shaw v. Morgan, July 11, 1888, p. 865.

Slander—Nominal damages—Expenses.

20. Judge's certificate. Macmillan v. Wilsons, Oct. 25, 1887, p. 6.

Wrongous use of diligence—Lease.

21. A tenant of grazings agreed with his landlord in writing to have a certain amount of stock always on the ground while the rent remained unpaid. He also granted a bill for the rent. The bill having fallen due, and being unpaid, the landlord presented a petition to the Sheriff for warrant to sell the stock to an amount sufficient to pay the rent and expenses. The Sheriff,—no appearance being made for the tenant,—granted warrant to sell so much of the stock as would meet the debt and expenses of process and sale, and the sale was carried out, and the proceedings reported to the Sheriff by the person appointed by him as judge of the roup. The tenant thereafter raised an action of damages against the landlord, on the grounds (1) that the warrant of sale was illegal, as being granted while he was still tenant of the grazing and in possession of the stock; (2) that in any view it was illegally carried out since the stock had been sold in an improper manner, and to an extent greatly exceeding the amount of the debt; (3) that the defender had verbally agreed, before the sale began, to accept a certain sum as in full of his debt and expenses, which sum was to be sent for from a neighbouring bank by a friend of the tenant who was present, and had only to send for the money, but that the defender had broken this agreement and instructed the sale to be proceeded with, without allowing time for the money to be brought, the result being, as the pursuer averred, that his stock was sacrificed at a low price, and his credit much injured. The Court (*diss.* Lord Rutherfurd Clark) *dismissed* the action as irrelevant. Kennedy v. Creyk, Dec. 6, 1887, p. 118.

REPARATION—*Continued.*

Illegal imprisonment—School Board—Malice.

22. A father was convicted of failure to educate his children upon a complaint at the instance of the compulsory officer of a School Board, and in default of payment of a fine was sentenced to three days' imprisonment, and was imprisoned accordingly. The conviction was quashed by the Court of Justiciary on the ground that neither a certificate under the Act of 1872, nor a sufficient attendance order under the Act of 1883, had been produced to the Sheriff-substitute. The father then brought an action for damages against the School Board, but set forth no specific averments of malice. *Held* that the error having been committed by a public board in the performance of their duty it was necessary for the pursuer to set forth malice, and action *dismissed* as irrelevant.

Question (*per* Lord Rutherfurd Clark) whether malice can competently be averred of a public board. Macaulay v. North Uist School Board, Nov. 26, 1887, p. 99.

See *Agent and Client*, 3, 4.

RETENTION. *Retention of documents—Factor—Implied contract.*

1. A landed proprietor placed documents relating to his estates in the hands of the factor on his estates, to enable him to discharge his factorial duties. Thereafter he granted a trust-deed for behoof of his creditors. The trustees thereunder applied to the factor for the documents, but he refused to give them up till his salary and account for factorial outlays were paid. *Held* that he was entitled to retain the documents on the ground of implied contract. Robertson v. Ross, Nov. 17, 1887, p. 67.

Right to retain against a firm.

2. Company—Promotion Money—Payments to a firm, one of whom was a director. Pacific Coast Mining Co. Limited v. Falkner, Bell, & Co., Jan. 13, 1888, p. 290.

REVENUE. *Income-Tax—Income-Tax Act*, 1842, *sec.* 105, *and sec.* 88, *Schedule C, Rule Third—Exemption—"Charitable purposes only."*

1. The words "charitable purposes," as used in the exempting clauses of the Income-Tax Act, 1842, are to be interpreted in their ordinary and popular signification as meaning the relief of poverty, and do not cover purposes of general benevolence and public utility.

By trust-deed a truster provided a fund of £500,000 for the promotion of religion and the mitigation of the "spiritual destitution" which prevailed "among the poor and working population of Scotland." The income of the fund was principally applied towards the building and endowment of churches. *Held* that it was not exempt from the payment of income-tax as a "trust established for charitable purposes only," in the sense of the 105th section and sec. 88, schedule C, of the Income-Tax Act, 1842. Baird's Trustees v. Lord Advocate, June 1, 1888, p. 682.

Income-Tax—Property and Income-Tax Act, 1842, *Schedule D, First and Fourth Cases—Profits of trade—Interest on colonial securities.*

2. A Scottish limited company carried on the business of woolbrokers in Australia, and made advances of money, which were secured partly upon real property and partly by liens or charges upon wool and other produce in that colony, the advances and interest thence accruing being of fluctuating amounts. *Held* (distinguishing the case from those of the *Scottish Mortgage and Land Investment Company of New Mexico, Limited*, 14 R. 98, and the *Northern Investment Company of New Zealand, Limited*, 14 R. 734), that the company fell to be assessed for income-tax only in respect of its whole profits and gains, including the interest received from its investments in foreign and colonial securities, according to the rule contained in the first case of schedule D of the Property and Income-Tax Act, 1842, and was not chargeable for its income arising from interest on its foreign and colonial securities under the rule contained in the fourth case of schedule D, and for its profits and gains from transactions in the nature

REVENUE—*Continued.*

of trade under the first case of that schedule. Smiles v. Australasian Mortgage and Agency Company, Limited, July 12, 1888, p. 872.

Income-tax—Income-Tax Act, 1842—*Schedule D, Cases I. and II., Rule first—Bank premises occupied by manager.*

3. *A bank was charged with income-tax under schedule A of the Income-Tax Act,* 1842, *on certain premises belonging to it in which it carried on its business, and which were also to some extent occupied as dwelling-houses by the manager and agents, that accommodation being given by the bank to them as part of their emoluments. In assessing the bank for income-tax under schedule D, the Income-Tax Commissioners refused to allow deduction from the gross profits of the bank of the annual value of these premises, in so far as they were occupied as dwelling-houses.* Held (aff. *judgment of First Division*) *that the bank was entitled to deduct the annual value of the whole premises in question.* Russell v. Town and County Bank, April 26, 1888, H. L., p. 51.

Excise and Customs—Removal of uncustomed goods—Seizure of conveyance—Knowledge on part of owner—Customs Laws Consolidation Act, 1876, *sec.* 202.

4. *Held* that the mere use of a conveyance or of horses for the removal of uncustomed goods infers forfeiture under the above statute irrespective of the knowledge or consent of the owner thereof. Lord Advocate v. Crookshanks, July 19, 1888, p. 995.

Succession-Duty—Unlet shootings—Succession-Duty Act, 1853, *sec.* 21.

5. *Held* that a successor to landed property is subject, under sec. 21 of the Succession-Duty Act, 1853, to succession-duty in respect of unlet shootings. Lord Advocate v. Duke of Buccleuch, Jan. 26, 1888, p. 333.

Succession-Duty—Foreign domicile—Testament creating a British trust.

6. Although moveable property in Scotland belonging to a person domiciled abroad will not on his death be liable to succession-duty, yet if the deceased has directed part of his estate to be invested in this country in trust for a person in liferent and for another in fee, the fund so settled, as a fund to be administered according to the law of Scotland exclusively, will be subject to succession-duty when the fiar's right to possession emerges on the death of the liferenter. Duncan's Trustee v. M'Cracken, March 20, 1888, p. 638.

REVOCATION. See *Marriage-contract,* 3—*Succession,* 7, 8.

RIGHT IN SECURITY. *Drainage improvements—Personal action against possessor of subjects—Scottish Drainage and Improvement Company Act,* 1856.

1. *Held* that the Scottish Drainage and Improvement Company's Act of 1856 imposes no personal liability upon a landowner to whom advances are made under that Act, and that a personal action against such landowner for payment of the annual rent charge is incompetent. Scottish Drainage and Improvement Co. v. Campbell, Dec. 2, 1887, p. 108.

Public Harbour—Assignation of "works and property."

2. Statutory assignments for moneys borrowed by Harbour Trustees contained assignations to "the rates, duties, and other revenues of the trust, and the works and property of the trust." *Held* that the words "works and property of the trust" were of no practical effect, as it was obviously not contemplated by the Legislature to give a security which could not be made effectual without the use of real diligence. Greenock Harbour Trustees, Jan. 31, 1888, p. 343.

Preference—Uncompleted Security—Right to assignation of rates and duties.

3. The Greenock Harbour Trustees were authorised by their Acts to borrow money, and in security therefor to grant assignations of the rates and duties leviable by the trust. Some of the creditors of the trust held only interim receipts for their advances signed by the treasurer of the trust, with an undertaking that an assignment would afterwards be completed. The trustees became unable to meet all their liabilities. A question of preference

RIGHT IN SECURITY—*Continued.*

between the holders of the statutory assignations and the holders of the interim receipts having arisen, *held* that creditors holding assignations granted in terms of the statute had a preference over the interim receipt holders, who held no statutory security. Greenock Harbour Trustees, Jan. 31, 1888, p. 343.

Ex facie absolute disposition—Back-bond—Reconveyance.

4. After an action had been raised against a person infeft in certain subjects on an *ex facie* absolute disposition, concluding for implement of certain obligations alleged to be contained in his title, he recorded a back-bond and executed a reconveyance of the subjects to his debtor and obtained decree in absence ordaining him to register it.

Question, whether the recording of the back-bond and the registration of the reconveyance operated a divestiture of the feudal title as in a question with the pursuer. Marshall's Trustee v. Macneill & Co., June 19, 1888, p. 762.

Subject of security—" Parts, pertinents, and privileges thereof."

5. In 1878 the lessee of a theatre in Glasgow, holding letters-patent granted by the Crown (under the Act 43 Geo. III. c. 142) authorising him, "his executors, administrators, and assigns," to maintain a company of players in a certain theatre in Glasgow, or any other theatre in a suitable place in Glasgow, for a certain term of years, assigned the letters-patent to the proprietor of the theatre. Subsequently the proprietor granted a bond and disposition in security for £13,000, which conveyed the subjects with the "parts, pertinents, and privileges thereof." The bondholders having entered into possession, let the theatre to a new tenant. Their lessee having continued to produce stage plays, and having no licence to do so except in so far as he had right to the letters-patent, the proprietor brought an action against him and the bondholders to have them interdicted from producing stage plays in the theatre in virtue of the licence in the letters-patent, the right to which he maintained was still in him. The Court *held* that the pursuer had no title to sue, the Lord Justice-Clerk and Lord Young on the ground that the licence in the letters-patent was not a right of property separable from the theatre, and Lord Rutherfurd Clark on the ground that the pursuer had, by granting the bond and disposition in security, divested himself of his right to the letters-patent. Yuille v. Rushbury, July 4, 1888, p. 828.

Poinding of the ground—Assessments—Taxes Management Act, 1880, *sec.* 88 *—Poor-Law Act,* 1845, *sec.* 88.

6. *Held* that a collector of poor-rates had, under sec. 88 of the Poor-Law Act, 1845, and sec. 88 of the Taxes Management Act, 1880, a preference over a heritable creditor who had obtained decree in an action of poinding of the ground.

Observations by Lord Young on *Athole Hydropathic Co.* v. *Scottish Provincial Assurance Co.*, March 19, 1886, 13 R. 818. North British Property Investment Co., Limited, v. Paterson, July 12, 1888, p. 885.

Sale or Security—Mercantile Law Amendment Act, 1856, *sec.* 1.

7. A bleacher who was in embarrassed circumstances, being desirous to raise money, on 1st February 1886 entered into a "minute of sale" with his brother-in-law and son-in-law, which bore that in consideration of an advance of £400 by them, he sold to them absolutely certain pipes used for conveying water into his bleachfield, declaring that he should be entitled to use them so long as they considered proper on payment of a rent of £20 yearly. The pipes were worth much less than £400. The £400 was not instantly advanced, but the purchasers became parties to a cash-credit with a bank by means of which the bleacher drew out the £400 in instalments. On 5th August 1886 he executed a trust for creditors, without having paid the half year's rent due at Whitsunday for the pipes, and his trustee claimed them. *Held* that there had been a *bona fide* sale, and that the pipes were not part of the trust-estate. Darling v. Wilson's Trustee, Dec. 16, 1887, p. 180.

SECURITY—*Continued.*
›r security.
, for Creditors—Principal and Agent. Macphail & Son v. Maclean's
ıtee, Nov. 16, 1887, p. 47.
ly Society.
ʒnation of shares in security. Allan v. Urquhart, Nov. 16, 1887, p. 56.
cecutor, 2.
Public right of way—Alternative routes.
pursuer and the defender in an action for declarator of a public right of
maintained alternative routes for a part of the road. It was proved
; the route proposed by the pursuer had been closed, without remons-
ıce by the public, for nearly thirty years, and there was no evidence
t the one route was more convenient than the other. The Court *declared*
ight of way by the route admitted by the defender, and *negatived* the
suer's contention. Winans v. Lord Tweedmouth, March 10, 1888, p. 540.
: right of way—Public termini—Maintenance by road trustees.
ıember of the public in 1886 sued for declarator of a right of way, ac-
red by prescriptive use, for carriages, &c. over a road running westwards
m a village, through the avenue of an estate, past a disused mill, which
s not averred to be a public place, and on to join another alleged right
way. It was proved that for many years prior to 1858 public money
l been expended on the maintenance of the road by the road trustees
th the knowledge and occasionally at the request of the proprietor of the
ıate. After that date no money had been so spent, the road having been
›sed to the public and maintained by the proprietor on being made the
enue of the estate, and the road was not one of those scheduled and
ken over by the road trustees under the provisions of the Roads and
:idges Act, 1878. The Lord Ordinary (M'Laren) negatived any right of
ıy to the west of the old mill, but found that there was a right of way
ɔm the village to a point "hereafter to be determined" near the old mill,
ı the ground that by giving up the road to be maintained by the road
ustees the proprietor had dedicated it to public uses. The Court (*re-
rsing* the judgment of the Lord Ordinary) *held* that there was no evidence
: prescriptive use of a road from one public point to another, and that, on
ıe assumption that the road had at one time been a district road under
ıe management of the road trustees, on its abandonment by them it reverted
› the proprietor free of any public right of way over it. Winans v. Lord
weedmouth, March 10, 1888, p. 540.
lic right of way—Evidence of public use.
*ı an action of declarator that there existed a public right of way for
assengers on foot and on horseback, and for driving cattle and sheep through
ıe Glen of the Doll in Forfarshire, it was proved that the pass formed the
irect and natural access from Clova to Braemar, and that from time im-
ıemorial there had existed a well-known and well-defined track through the
len; that there had been a practice of drovers taking sheep by this track
rom the public market at Braemar in spring and autumn to a public
ıarket near Kirriemuir; that the track had been used by farmers in
he district going to Clova or to Braemar, and occasionally by tourists
ıoing between these places; that there had been a repute in the district,
›oth among the public and the proprietors of the ground over which the
rack passed, that there was a public right of way.* Held (aff. *judgment
›f the Second Division*), *on a consideration of the evidence, that having
regard to the nature of the district, the use proved was sufficient in amount,
ınd that it was to be attributed not to tolerance, but to the assertion of a
public right.* Macpherson v. Scottish Rights of Way and Recreation
Society, Limited, May 14, 1888, H. L., p. 68.
e *Entail*, 8—*Police*, 2—*Reparation*, 15.

. *Right in security—Delivery—Mercantile Law Amendment Act*, 1856.
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SALE—*Continued.*

money, on 1st February 1886 entered into a "minute of sale" with his brother-in-law and son-in-law, which bore that in consideration of an advance of £400 by them, he sold to them absolutely certain pipes used for conveying water into his bleachfield, declaring that he should be entitled to use them so long as they considered proper on a payment of a rent of £20 yearly. The pipes were worth much less than £400. The £400 was not instantly advanced, but the purchasers became parties to a cash-credit with a bank by means of which the bleacher drew out the £400 in instalments. On 5th August 1886 he executed a trust for creditors, without having paid the half year's rent due at Whitsunday for the pipes, and his trustee claimed them. *Held* that there had been a *bona fide* sale, and that the pipes were not part of the trust-estate. Darling v. Wilson's Trustee, Dec. 16, 1887, p. 180.

Warranty—Disconformity to Contract—Description—" Old Meldrum turnip seed."

2. A firm of seedsmen offered to take from W., N., & Co., a firm of wholesale merchants, 100 bushels of "Old Meldrum green top yellow turnip seed," if "of a really reliable stock." The merchants accepted the offer; the paper on which the acceptance was written bearing this notice:—"Terms of sale. —Messrs W., N., & Co. give no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned." The seed furnished turned out to be a mixture of Old Meldrum seed and that of another turnip, the two varieties of seed being quite indistinguishable. In consequence of this mixture the crops raised from the seed failed. *Held* (*rev.* judgment of Lord M'Laren), that the notice headed "Terms of sale" was effectual to protect the sellers against the buyers' claim for damages. Smith & Sons v. Waite, Nash, & Co., March 9, 1888, p. 533.

Sale or return—Bankruptcy of holder of goods on "sale or return."

3. Where goods are sent by a wholesale dealer to a retail dealer on a contract of "sale or return,"—that is to say, on an agreement that the retail dealer is to purchase, at an agreed-on price, such of the goods as he may sell to customers, but that he may return those unsold to the wholesale dealer, and that the latter may demand their return,—if the retail dealer becomes bankrupt the trustee in his sequestration has no claim to the unsold goods in his possession, which remain the property of the wholesale dealer. Macdonald v. Westren, July 19, 1888, p. 988.

See *Property*, 3, 4.

SCHOOL. *School Board—Reparation—Illegal imprisonment—Malice.*

1. A father was convicted of failure to educate his children upon a complaint at the instance of the compulsory officer of a School Board, and in default of payment of a fine was sentenced to three days' imprisonment, and was imprisoned accordingly. The conviction was quashed by the Court of Justiciary on the ground that neither a certificate under the Act of 1872, nor a sufficient attendance order under the Act of 1883, had been produced to the Sheriff-substitute. The father then brought an action for damages against the School Board, but set forth no specific averments of malice. *Held* that the error having been committed by a public board in the performance of their duty it was necessary for the pursuer to set forth malice, and action *dismissed* as irrelevant.

Question (*per* Lord Rutherfurd Clark) whether malice can competently be averred of a public board. Macaulay v. North Uist School Board, Nov. 26, 1887, p. 99.

Trust—Educational Endowments Act, 1882—Scope of Act.

2. Scheme framed by the Commissioners under the above statute *held* not to be within the scope of the statute, as the subjects had not been "dedicated

SCHOOL—*Continued.*
to charitable uses," the feu-contract on which they were held allowing them to be applied to other purposes. Magistrates of Greenock v. Commissioners on Educational Endowments, Feb. 24, 1888, p. 440.

SERVITUDE. *Real burden—Ground-annual.*
1. Where a disposition to a piece of ground conferred on the disponee a right to take water for manufacturing purposes from an adjoining canal on the disponer's ground, and to use the canal for navigation, it being stipulated that the disponee should be bound to bear jointly with the disponer the cost of maintaining the canal in good order in so far as it adjoined his ground, *held* that this obligation was a condition of the servitude, and that singular successors of the disponee could not retain the servitude without implementing the condition. Tennant v. Napier Smith's Trustees, May 31, 1888, p. 671.
Right of way—Mill.
2. *Opinion* (*per* Lord Mure) that where there is a servitude right of way to a mill for the purpose of grain being taken there to be ground, the right of way ceases when the use of the mill is discontinued. Winans v. Lord Tweedmouth, March 10, 1888, p. 540.
See *Property*, 8.

SHERIFF. *Jurisdiction—Action at instance of mother of bastard for custody.*
1. *Opinions* as to the competency in the Sheriff Court of an action at the instance of a mother concluding for the custody of her bastard child. Brand v. Shaws, Feb. 24, 1888, p. 449.
Power of Sheriff to remit to Sheriff-substitute to pronounce decree—Debts Recovery (Scotland) Act, 1867, *secs.* 9-12.
2. It is incompetent for a Sheriff in an action raised under the Debts Recovery (Scotland) Act, 1867, to remit to the Sheriff-substitute to pronounce decree. Bennet v. Wilson, June 9, 1888, p. 715.
Law-agent—Small-Debt Court—Small-Debt Act, 1837, *secs.* 14 *and* 15—*Law-Agents Act*, 1873, *secs.* 2, 13, *and* 16.
3. In a petition presented by an enrolled law-agent in a Sheriff Court for interdict against a person who was not an enrolled law-agent practising as a law-agent in the Small-Debt Court, *held* (*diss.* Lord Rutherfurd Clark) (1) that sec. 16 of the Law-Agents Act, 1873, had no application to persons allowed by the Sheriff to appear for others in the Small-Debt Court, and (2) that it was entirely within the discretion of the Sheriff to grant such leave to any person not an officer of Court. Milne v. Leslie, Feb. 29, 1888, p. 460.

SHIP. *Seaworthiness—Charter-party—Exceptions—"Errors or negligence of navigation."*
1. A charter-party of a steamship freed the owners from liability through the "act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and/or errors or negligence of navigation, of whatsoever nature and kind, during said voyage." The vessel was lost in consequence of the breakdown of her boiler through the presence of muddy water in it. In an action by the charterers against the shipowners for damages on account of the loss of the cargo, *held* (1) that it was proved that the muddy water had been put in the boiler before the commencement of the voyage; (2) (*dub.* Lord Young) that the presence of muddy water in the boiler when the ship started rendered her unseaworthy; and consequently (3) that the clause of exemption in the charter-party did not apply. Seville Sulphur and Copper Co., Limited, v. Colvils, Lowden, & Co., March 20, 1888, p. 616.
Bill of lading—Foreign—Proof.
2. In an action brought by the owners of a Danish ship against the indorsees of the bill of lading for freight on the cargo delivered to them at the port of discharge in Scotland, the defenders averred that they had not received the full cargo specified in the bill of lading granted by the master at Riga,

SHIP—*Continued.*

the port of shipment, and pleaded that they were entitled to retain from freight the value of the deficiency, alleging that by Danish law (the law of the flag) the bill of lading was conclusive against the owners. After a proof, which shewed that the indorsees of the bill of lading had only agreed to pay for so much of the cargo as was delivered to them, *held* that the defenders had only become indorsees of the bill of lading to the extent of the cargo actually on board the vessel, and were not entitled to retain any part of the freight.

Opinions (*per* the Lord Justice-Clerk, Lord Young, and Lord Craighill) that the owners were only liable for the cargo actually put on board, and that by the law of Scotland, which as the law of the *forum* must regulate the proof, the bill of lading was not conclusive evidence as to the amount of cargo shipped. Owners of the "Immanuel" v. Denholm & Co., Dec. 7, 1887, p. 152.

Demurrage—Discharge of mixed cargo in separate lots—Custom of the port.

3. A ship, chartered to carry to the United Kingdom a cargo of ash and bones, the discharge of cargo to be according to the custom of the port of discharge, received from the charterers and loaded 33 tons of ash, about 397 tons of bones, and about 20 tons of horns, hoofs, and piths (which last were partly intermixed with the bones, and partly loaded on the top of them). The master granted bills of lading for 33 tons of ash and 417 tons of bones. On arrival at the port of call the ship was directed to proceed to Aberdeen. The master having on the demand of the consignees there, but under protest, separated the hoofs, horns, and piths from the bones before giving delivery, brought an action against the consignees for four days' demurrage on account of the delay caused by this separation. The defenders pleaded that the hoofs, horns, and piths having been loaded separately, ought to be so discharged, and that in any case the custom of the port of Aberdeen was that they should be separated from the bones by the ship before delivery. After a proof, from which it appeared, *inter alia*, that the trade in bones at Aberdeen was of only about thirty years' standing, and almost entirely in the hands of the defenders themselves, *held* (1) that the hoofs, horns, and piths had been tendered in bulk as part of a cargo of bones; (2) that delay had been caused by the separation; (3) that the defenders had failed to prove any custom of the port entitling them to require the ship to effect such separation; and therefore (4) that the pursuers were entitled to deliver the cargo in bulk as they received it, and to have decree for the sum sued for as demurrage. Clacevich v. Hutcheson & Co., Oct. 28, 1887, p. 11.

Salvage or towage services—Measure of award.

4. In approaching a port which had a very narrow entrance, a steam-vessel ran for about one-sixth of her length upon a bank composed of loose stones and mud, at that time under water, it being high tide. In answer to signals of distress a tug which was passing outside with a sailing-vessel in tow cast the vessel off, and at some risk, and with the loss of her hawser and other damage, requiring her detention for two days in port, drew the steam-ship off the bank. In an action by the tug-owners against the owners of the steam-ship for payment of £500 as salvage, the Lord Ordinary (Fraser), although of opinion that the steam-ship had not been in a position of serious danger, awarded £50. On a reclaiming note by the defenders the Court *adhered*, holding that whether the services rendered were proper salvage services or not, they were at least towage services of an extraordinary kind, and that the award was not excessive. Lawson v. Grangemouth Dockyard Co., June 14, 1888, p. 753.

Salvage—Expenses—Merchant Shipping Acts, 1854 *and* 1862.

5. In a salvage case, in which the Lord Ordinary gave decree for £50 and certified under the above Acts that the case was one fit to be tried in a superior Court, the Court *held* that the certificate had been properly given.

SHIP—*Continued.*

Observed that the Inner-House will be slow to interfere with the exercise by the Lord Ordinary of his discretion in regard to the granting of such a certificate. Lawson v. Grangemouth Dockyard Co., June 14, 1888, p. 753.

Reparation—Liability for collision.

6. Where a ship is placed in a position of peril and difficulty by the wrong manœuvring of another ship, and her captain in exercising his best judgment for the safety of his vessel commits an error which causes or contributes to a collision between them, he will not be held in fault. Hine Brothers v. Clyde Trustees, March 7, 1888, p. 498.

STATUTES.

1469, *cap.* 36. See *Superior and Vassal*, 2.
1621, *cap.* 18. See *Bankruptcy*, 1, 2.
11 *Geo. III. cap.* 31. See *Fishings*, 4.
55 *Geo. III. cap.* 42. See *Process*, 16.
5 *Geo. IV. cap.* 87 (*Aberdeen Act*). See *Entail*, 2, 3.
6 *Geo. IV. cap.* 120 (*Judicature Act*, 1825). See *Process*, 26.
9 *Geo. IV. cap.* 58. See *Public-house.*
2 *and* 3 *Will. IV. cap.* 68 (*Day Trespass Act*, 1832). See *Justiciary Cases*, 8.
1 *Vict. cap.* 41 (*Small-Debt Act*, 1837). See *Administration of Justice.*
5 *and* 6 *Vict. cap.* 35 (*Income-Tax Act*, 1842). See *Revenue*, 1, 2, 3.
8 *Vict. cap.* 17 (*Companies Clauses Consolidation Act*, 1845). See *Judicial Factor*, 1, 3.
8 *Vict. cap.* 19 (*Lands Clauses Consolidation Act*, 1845). See *Expenses*, 4.
8 *and* 9 *Vict. cap.* 33 (*Railway Clauses Act*, 1845). See *Mines and Minerals.*
8 *and* 9 *Vict. cap.* 83 (*Poor-Law Act*, 1845). See *Poinding of the Ground—Poor.*
10 *and* 11 *Vict. cap.* 17 (*Water-Works Clauses Act*, 1847). See *Mines and Minerals.*
11 *and* 12 *Vict. cap.* 36 (*Entail Amendment Act*, 1848). See *Entail*, 1, 9.
13 *and* 14 *Vict. cap.* 92 (*Cruelty to Animals Act*, 1850). See *Justiciary Cases*, 10.
16 *and* 17 *Vict. cap.* 51 (*Succession-Duty Act*, 1853). See *Revenue*, 4, 5.
16 *and* 17 *Vict. cap.* 80 (*Sheriff Court Act*, 1853). See *Process*, 23.
17 *and* 18 *Vict. cap.* 91 (*Valuation of Lands Act*, 1854). See *Valuation Acts.*
17 *and* 18 *Vict. cap.* 104 (*Merchant Shipping Act*, 1854). See *Expenses*, 2.
19 *and* 20 *Vict. cap.* 60 (*Mercantile Law Amendment Act*, 1856). See *Sale*, 1.
19 *and* 20 *Vict. cap. lxx.* (*Scottish Drainage and Improvement Company Act*, 1856). See *Right in Security*, 1.
19 *and* 20 *Vict. cap.* 79 (*Bankruptcy Act*, 1856). See *Bankruptcy.*
23 *and* 24 *Vict. cap.* 50 (*Annuity-Tax—Edinburgh and Montrose—Abolition Act*, 1860). See *Church*, 3.
25 *and* 26 *Vict. cap.* 35 (*Public-Houses Amendment Act*, 1862). See *Justiciary Cases*, 3.
25 *and* 26 *Vict. cap.* 63 (*Merchant Shipping Act*, 1862). See *Expenses*, 2.
25 *and* 26 *Vict. cap.* 89 (*Companies Act*, 1862). See *Foreign*, 4—*Company.*
25 *and* 26 *Vict. cap.* 97 (*Salmon Fisheries Act*, 1862). See *Fishings*, 3.
25 *and* 26 *Vict. cap.* 101 (*General Police and Improvement Act*, 1862). See *Police.*
25 *and* 26 *Vict. cap. cciii.* (*Aberdeen Police and Water-Works Act*, 1862). See *Police*, 2.
29 *and* 30 *Vict. cap. cclxxiii.* (*Glasgow Police Act*, 1866). See *Justiciary Cases*, 24.
30 *and* 31 *Vict. cap.* 96 (*Debts Recovery Act*, 1867). See *Sheriff*, 2.
30 *and* 31 *Vict. cap.* 97 (*Trusts Act*, 1867). See *Trust*, 4.
30 *and* 31 *Vict. cap.* 101 (*Public Health Act*, 1867). See *Public Health.*

STATUTES—*Continued.*
31 *and* 32 *Vict. cap.* 100 (*Court of Session Act,* 1868). See *Expenses,* 1—*Process.*
31 *and* 32 *Vict. cap.* 101 (*Titles to Lands Consolidation Act,* 1868). See *Property,* 4—*Succession,* 2, 3.
31 *and* 32 *Vict. cap.* 123 (*Salmon Fisheries Act,* 1868). See *Fishings,* 3.
33 *and* 34 *Vict. cap.* 63 (*Wages Arrestment Limitation Act,* 1870). See *Arrestment,* 3.
33 *and* 34 *Vict. cap.* 87 (*Annuity-Tax Abolition Act Amendment Act,* 1870). See *Church,* 3.
36 *and* 37 *Vict. cap.* 63 (*Law-Agents Act,* 1873). See *Administration of Justice.*
37 *and* 38 *Vict. cap.* 82 (*Church Patronage Act,* 1874). See *Church,* 1, 2.
37 *and* 38 *Vict. cap.* 94 (*Conveyancing Act,* 1874). See *Superior and Vassal,* 1, 2.
38 *and* 39 *Vict. cap.* 61 (*Entail Amendment Act,* 1875). See *Entail,* 5, 6.
38 *and* 39 *Vict. cap.* 62 (*Summary Prosecutions Appeals Act,* 1875). See *Justiciary Cases,* 26, 27.
39 *and* 40 *Vict. cap.* 36 (*Customs Laws Consolidation Act,* 1876). See *Revenue,* 4.
39 *and* 40 *Vict. cap.* 75 (*Rivers Pollution Prevention Act,* 1876). See *Public Health,* 2.
40 *and* 41 *Vict. cap.* 29 (*Married Women's Property Act,* 1877). See *Husband and Wife,* 2.
41 *and* 42 *Vict. cap.* 49 (*Weights and Measures Act,* 1878). See *Justiciary Cases,* 9.
42 *and* 43 *Vict. cap. cxxxii.* (*Edinburgh Municipal and Police Act,* 1879). See *Justiciary Cases,* 7, 28—*Police,* 4—*Public Health,* 3.
42 *and* 43 *Vict. cap. ccxxi.* (*St Giles' Edinburgh Ancient Church Act,* 1879). See *Church,* 3.
43 *Vict. cap.* 12 (*Hypothec Abolition Act,* 1880). See *Lease,* 6.
43 *and* 44 *Vict. cap.* 19 (*Taxes Management Act,* 1880). See *Poinding of the Ground.*
43 *and* 44 *Vict. cap.* 34 (*Debtors Act,* 1880). See *Process,* 24.
43 *and* 44 *Vict. cap.* 42 (*Employers Liability Act,* 1880). See *Reparation,* 7, 8, 9, 10, 11.
43 *and* 44 *Vict. cap.* 47 (*Ground Game Act,* 1880). See *Justiciary Cases,* 8.
44 *and* 45 *Vict. cap.* 47 (*Presumption of Life Limitation Act,* 1881). See *Presumption.*
45 *and* 46 *Vict. cap.* 53 (*Entail Amendment Act,* 1882). See *Entail,* 5.
45 *and* 46 *Vict. cap.* 59 (*Educational Endowments Act,* 1882). See *Trust,* 20.
45 *and* 46 *Vict. cap.* 61 (*Bills of Exchange Act,* 1882). See *Bill of Exchange.*
45 *and* 46 *Vict. cap.* 77 (*Citation Amendment Act,* 1882). See *Process,* 4.
45 *and* 46 *Vict. cap. clxxxv.* (*Dundee Police and Improvement Act,* 1882). See *Delegation.*
46 *and* 47 *Vict. cap.* 57 (*Patents, Designs, and Trade-Marks Act,* 1883). See *Copyright.*
46 *and* 47 *Vict. cap.* 62 (*Agricultural Holdings Act,* 1883). See *Lease,* 4.
47 *and* 48 *Vict. cap.* 16 (*Bankruptcy, Frauds, and Disabilities Act,* 1884). See *Justiciary Cases,* 2.
47 *and* 48 *Vict. cap.* 63 (*Trusts Act Amendment Act,* 1884). See *Trust,* 4.
48 *and* 49 *Vict. cap.* 3 (*Representation of the People Act,* 1884). See *Election Law.*
49 *Vict. cap.* 15 (*Sporting Lands Rating Act,* 1886). See *Valuation Acts,* 3.
49 *and* 50 *Vict. cap.* 27 (*Guardianship of Infants Act,* 1886). See *Minor and Pupil,* 4—*Parent and Child,* 3, 4.
49 *and* 50 *Vict. cap.* 29 (*Crofters Holdings Act,* 1886). See *Lease,* 8, 9.
50 *and* 51 *Vict. cap.* 35 (*Criminal Procedure Act,* 1887). See *Justiciary Cases,* 1, 15, 21, 23.

SUCCESSION. *Legacy—Direction to trustees to pay on event happening which did not take place.*

1. By codicil to his will a testator left a legacy of £500, "which is to be handed over along with or at such time as legacies mentioned in clause D of this will are paid or handed over." The legacies in clause D were contingent on the testator surviving his mother, an event which did not occur. *Held* that the terms in which the direction was expressed did not import a condition into the legacy, and that the legatee was therefore entitled to payment. Grant v. Cowe, Nov. 18, 1887, p. 81.

Words importing bequest of heritage.

2. A testator left a holograph testamentary writing in these terms:—"In order to prevent all dispute after my death regarding the disposal of my property, I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession, or belonging to me at the time of my decease, to be absolutely at her disposal." At the date of the writing the testator had no heritable property but he subsequently acquired heritage. *Held* (*aff.* judgment of Lord Lee, *diss.* Lord Rutherfurd Clark) that the will carried the heritage. Forsyth v. Turnbull, Dec. 16, 1887, p. 172.

3. By antenuptial contract of marriage a husband conveyed to A, his intended wife, his whole household furniture and plenishing and the liferent use of a cottage, which belonged to him, along with the half of a plot of garden ground attached to it. He further took his heir bound to pay the wife an annuity of £15 out of certain other heritage belonging to him. He further gave his wife "full power and liberty, by *mortis causa* deed, to test upon and divide and apportion among my lawful children, whether by my first or this intended marriage, . . . my whole means and estate, . . . and to that end I hereby appoint the said A to be my executrix, with power to give up inventories of my estate, and all other powers competent to an executrix; and I hereby leave and bequeath my whole means and estate to her as executrix foresaid." The husband died intestate shortly afterwards, leaving children by a former marriage only. In an action of declarator brought by the widow against the testator's heir-at-law to have it found that the pursuer was entitled to make up a title in trust to the heritable property, and that the defender, who was in possession, was bound to remove therefrom, *held* that the terms of the will did not express or imply an intention on the part of the testator to convey the heritage to her. Campbell v. Campbell, Nov. 30, 1887, p. 103.

Charitable Bequest—Uncertainty.

4. A person born in the royal burgh of Irvine died in 1859 leaving a testament dated in the same year, by which he bequeathed a sum "to the Magistrates and Town-Council of Irvine" to be applied toward the support of aged poor persons, natives of Irvine. *Held* that the bequest was not limited to persons born in the royal burgh of Irvine, but extended to those born within the parliamentary burgh as it existed in 1859. Magistrates of Irvine v. Muir, Feb. 9, 1888, p. 396.

Condition—Substitution—Protected substitution.

5. A testator, in 1841, disponed his whole estates, including heritage, to his two sisters, Ann and Margaret. In 1842 he, by codicil, on the narrative that his sister Ann was at present provided for, in so far altered his disposition as to dispone his whole property to his sister Margaret should Ann be still provided for at his death, but under condition that if Margaret should "marry or predecease my sister Ann, then, in the first case, she, Ann Lyon, shall receive the half, and in the second, the whole property, &c.; provided always that if both die without marrying, the property shall go in equal shares to my two brothers, George and David, or their heirs and successors." Both sisters survived the testator but died unmarried, Ann being the predeceaser, and Margaret leaving a settlement disposing, *inter alia*, of the whole heritable property of which she might die possessed. In a competition between the heirs under Margaret's settlement and the representatives of the testator's brothers, George and David, *held* that an absolute and in-

SUCCESSION—*Continued.*

defeasible fee in the heritable properties left by the testator was conferred on Margaret, with a simple destination in favour of the testator's brothers, George and David, their heirs and successors, which had been evacuated by Margaret's settlement. Lyon v. Lyon, Feb. 8, 1888, p. 394.

Accretion—Liferent—Residue.

6. A testatrix directed her trustees as soon as they should think expedient after her death to realise her estate, and to hold the proceeds thereof for behoof of her two sisters in liferent, and to pay over the annual proceeds to "them equally during their joint lives, and in the event of either of my said sisters predeceasing me, or upon the death of either of them after my decease, my trustees shall pay over one half of the said free proceeds or income to her children equally, share and share alike, if more than one, during the lifetime of the survivor of my said sisters, and the other half to such survivor." She further directed that after the death of the longest liver of her sisters "my trustees shall pay over and divide the whole free residue" of the estate to and among their children. Both sisters survived the testatrix, but one of them subsequently died leaving a child. After the death of the child the surviving sister claimed the liferent of the other half of the residue, on the ground that it accresced to her under the settlement, or alternatively she maintained that it fell into intestacy, and that she was entitled to it as heir *in mobilibus* to the testatrix. *Held* that it did not accresce to her, but that it fell to be accumulated with the capital of the residue, and to be divided among the nephews and nieces in terms of the deed. Stobie's Trustees, Jan. 27, 1888, p. 340.

Revocation—Conditio si sine liberis testator decesserit.

7. A lady by antenuptial contract settled certain specific funds on any children who might be born of the marriage, reserving to herself a power of bequeathing the trust-estate by will in the event of there being no child of the marriage who should attain twenty-one years of age (or, if a daughter, should marry). Ten days after the marriage she executed a settlement "pursuant to the power reserved" in the marriage-contract, bequeathing the residue of her property equally between her husband and sister. Two years after the marriage she succeeded to certain heritable estate from a brother. Shortly thereafter she gave birth to a child, one month after whose birth she died. The legatees contended that the marriage-contract and the will were to be read together as one settlement, and that as express provision had been made for children of the marriage the condition *si sine liberis testator decesserit* did not apply to the will. *Held* that the will was subject to the condition *si sine liberis testator decesserit.* Dobie's Trustee v. Pritchard, Oct. 19, 1887, p. 2.

Revocation—Testament and subsequent marriage-contract.

8. In 1879 a lady, then a widow, executed a settlement by which she conveyed her whole estates to executors, directing them to pay certain legacies, specific and general, and to divide the residue among three charitable institutions named. In 1886 she entered into a second marriage, and by antenuptial contract on the occasion of that marriage she, on her part, conveyed her whole estate, heritable and moveable, then belonging to her, or which she might acquire during the subsistence of the marriage, to trustees, who were directed to hold the estate for her behoof in liferent, and to hold "the capital of the said estate for behoof of such person or persons and on such terms and payable at such periods as the second party may appoint by any writing under her hand, however informally executed, and failing such appointment the trustees shall hold the said capital for behoof of the second party's nearest heirs *in mobilibus* whomsoever." The lady died about a year after her marriage, survived by her husband, and leaving the settlement of 1879, but no other writing except the marriage-contract. The capital of the estate had been delivered to the marriage-contract trustees, but at her death the lady was in possession of a considerable accumulation of income, paid partly before and partly after her marriage, and of some

SUCCESSION—*Continued.*

jewellery and personal belongings. In a question between the beneficiaries under the deed of 1879 and the lady's heirs *in mobilibus*, as beneficiaries under the marriage-contract, *held* (*diss.* Lord Rutherfurd Clark) that the deed of 1879 was not effectual either as an independent settlement or as an appointment under the marriage-contract, but was absolutely revoked by the marriage-contract, which on a sound construction was to be taken as a settlement of the lady's entire estate as existing at her death, and that her heirs *in mobilibus*, as legatees under the marriage-contract, had right thereto. Bertram's Trustees v. Matheson's Trustee, March 10, 1888, p. 572.

Vesting—Effect of wife's repudiation of testamentary provisions by husband.

9. A truster directed his trustees to pay to his widow an annuity and to accumulate the balance of the income till her death, and "as soon after the death of my said wife as convenient," to distribute the estate among his children in a certain manner, declaring that if any of them should predecease the term of payment without leaving issue his or her share should fall into residue, which was to be divided among children surviving the term of payment and the issue of children predeceasing it. The widow repudiated her testamentary provisions and took her legal rights. *Held*, on a construction of the deed, that the object of the postponement of the distribution was the provision for the widow, and that this object having been defeated by her repudiation, the provisions for the children had vested *a morte testatoris*. Latta v. Muirhead, Dec. 23, 1887, p. 254.

Vesting—Marriage-contract.

10. In an antenuptial marriage-contract the husband bound himself to pay an annuity of £150 to his wife, if she survived him, and to pay £4000 to the children of the marriage at the first term after the death of the survivor of the spouses. In security of these provisions he bound himself to convey to trustees an insurance policy for £4000, declaring that if he should predecease his wife the trustees should have power to purchase an annuity of £150 for her, and that the children's provisions should in that event be restricted to the balance of the £4000, and be payable to them at majority or marriage. It was further provided that in the event of there being no children, or of all predeceasing the survivor of the spouses, without lawful issue, the sum should be held for the husband's own heirs and assignees. There were children of the marriage, which was dissolved by the death of the husband. *Held* that the right of the children vested at the husband's death. Murray's Trustees v. Bloxsom's Trustees, Dec. 22, 1887, p. 233.

Vesting—Parent and Child—Payment to father for behoof of pupil children —Alimentary provision.

11. A testatrix directed her trustees to "hold and apply, pay, divide, and convey" the residue of her estate to and for behoof of her lawful children, the lawful issue of a predeceasing child being entitled to the interest which such child would have taken had it survived; "declaring that the provisions, so far as in favour of or descending upon females," should be purely alimentary, and exclusive of the *jus mariti* and right of administration of any husbands they might marry. She further directed the trustees to hold the income of the children's shares, or such part as the trustees should think necessary, for the education and maintenance of the children, "and to retain the capital in their own hands under the trust hereby constituted until they can pay it over to trustees under a marriage-contract, or otherwise, appointed by my children respectively, under trust which shall prescribe that the said income and produce shall be alimentary for my said children and the capital provided to their issue; declaring that my said trustees and executors shall only be effectually discharged by the trustees under such last-mentioned trusts." The testatrix left three daughters. One of them predeceased her leaving a son and daughter, who were in pupillarity. *Held* (1) that the share which would have belonged to the predeceasing daughter if she had

SUCCESSION—*Continued.*

survived vested in her children at the death of the testatrix; (2) that so far as it belonged to the granddaughter it could not be regarded as alimentary; and (3) that the father of the pupils, as their tutor and administrator, was entitled to receive and discharge it, and the trustees of the testatrix were bound to pay it over to him on his receipt. Murray's Trustees v. Bloxsom's Trustees, Dec. 22, 1887, p. 233.

Vesting—Term of payment.

12. Terms of deed on which *held* (1) that a declaration that shares of residue should not vest till the time of payment should have arrived implied a declaration that vesting should then take place; (2) that by the time of payment the testator meant the time when the residue fell to be divided; and (3) that a direction that the shares of pupils and of unmarried minors should be retained till their marriage or majority did not suspend vesting. Hunter's Trustees v. Hunter, Feb. 9, 1888, p. 399.

Election—Provisions of father's settlement in lieu of marriage-contract provision to child.

13. A father in the marriage-contract of his daughter directed trustees, who held for him a policy for £3000 on his life, to assign it, to the extent of £2000, to the marriage-contract trustees for behoof of the daughter in liferent and her children in fee, and bound himself to pay the premiums during his life, and, failing his doing so, to pay to the marriage-contract trustees the sum of £2000 at the first term after his death. This and other provisions were declared to be in full of all the daughter could claim from her father's estate, except such provisions as he might make of his own free will by deed of settlement or otherwise. The policy was never assigned to the marriage-contract trustees. The father continued to pay the premiums till his death. He died leaving a settlement by which he directed one-third of the residue of his estate to be held for behoof of the daughter in liferent and her children in fee, declaring that the provisions for her should be in full of all his obligations under her marriage-contract remaining unimplemented, "which provisions shall by acceptance of the provisions hereunder be held to have been discharged." *Held* that if the daughter and her husband took the share of the residue, they were not entitled to any part of the policy fund. Crum Ewing's Trustees v. Bayly's Trustees, March 8, 1888, p. 507.

SUPERIOR AND VASSAL. *Infeftment in trust—Radical right—Conveyancing Act*, 1874, *sec.* 4.

1. In 1836 the heir then in possession of an estate under a fee-simple destination, dated in 1783, in favour of a series of heirs varying in some respects from the legal order of succession, on the narrative that he had resolved to execute a new settlement of his lands and estate, conveyed, *mortis causa*, the estate to his children *nominatim* and to the survivors or survivor of them in trust for the purpose of managing the estate and of dividing the rents among themselves so long as one or more of them existed, and at the termination of the trust "then to and in favour of my heir-at-law at that time in fee." It was further provided, that if it should happen that the last survivor of the children was also the truster's heir-at-law, then, or if that event should not happen, then on the death of that last survivor, the trust should come to an end, and the subjects fall and belong to the truster's heir-at-law at the time of that event. The trustees were further given ordinary powers of administration, but they were prohibited from burdening or selling the subjects. On the death of the granter in 1852 A, his eldest son, completed his title by precept of *clare constat* as heir of provision to his father under the deed of 1783. The trustees were also infeft under this trust-disposition in terms of the precept contained in the deed, which directed sasine to be given to them, "in trust as trustees for the ends and purposes, and under the declarations, burdens, conditions, and provisions before specified, and upon the termination of this trust . . . then to my heir-at-law at that time in fee." A having died in 1875, the

SUPERIOR AND VASSAL—*Continued.*

superior brought an action against the sole surviving trustee under the deed of 1836, concluding for declarator that on A's death a casualty of a year's rent became due by the defender as a singular successor of the last vassal and impliedly entered with the superior in virtue of the 4th section of the Conveyancing Act of 1874. *Held* that the trust which was created by the deed of 1836 was purely temporary in its nature, and a mere burden on the fee of the estate, which was vested on A, and on A's death passed into his *hereditas jacens.*

In another action by the superior founding upon a *mortis causa* disposition of other subjects granted by the vassal of even date with the former, where the trustees were empowered to sell the subjects conveyed for the benefit of creditors, with a direction, in the event of any of the lands remaining unsold, to convey them to the testamentary trustees in similar terms with the first, a similar judgment was pronounced. Lord Home v. Lyell, Dec. 20, 1887, p. 193.

Redemption of Casualty—Act 1469, *c.* 36—*Conveyancing Act,* 1874, *sec.* 15.

2. A vassal disponed a piece of pasture ground for building purposes in consideration of a ground-annual. The purchaser before building tendered to the superior the redemption price of the casualties of superiority which were untaxed, calculated on the agricultural rent of the land. The superior maintained that the price ought to be calculated on the annual value of the land as building ground. *Held* that the yearly maill of the subjects at the date, as defined by the Act 1469, cap. 36, was their agricultural value. School Board of Neilston v. Graham, Nov. 16, 1887, p. 44.

Personal or real—Ground-annual—Obligation to build within a certain period —Liability of singular successor.

3. A, a vassal under a feu-contract conveyed part of his feu by contract of ground-annual to B, with and under the burdens and conditions contained in the feu-contract, and further under an obligation to erect certain buildings on the ground within one year from the term of entry, in order to secure payment of the ground-annual and of the share of the feu-duty, &c. which had been allocated upon the ground disponed, and to maintain the buildings in good order and repair in all time. B bound himself and "his heirs, executors, and representatives whomsoever, and his assignees," to perform these conditions, and they were declared to be real burdens upon the subjects disponed, and appointed to be recorded in the Register of Sasines. B subsequently disponed the subjects to C, and six years after the date of the contract of ground-annual C disponed them to D, the disposition being in each case "with and under the real liens and burdens, conditions, provisions, and others specified and contained in said contract of ground-annual."

The trustee upon A's sequestrated estate having raised an action against D, to have it found that he was bound to implement the obligations in the feu-contract, and the obligation in the contract of ground-annual, as to the erection and subsequent maintenance of buildings, *held* (1) that as the pursuer was not a party to the feu-contract he had no title to sue upon it; and (2) that in so far as the contract of ground-annual was concerned it imposed no personal obligation to erect buildings which was enforceable against a singular successor in the lands, and defender therefore assoilzied.

Question, whether the obligation to erect buildings contained in the contract of ground-annual could be made effectual as a real burden. Marshall's Trustee v. Macneill & Co., June 19, 1888, p. 762.

Building restrictions—Common feuing plan—Loss of plan—Proof—Onus.

4. A feu-charter, dated in 1825, providing for the erection of a tenement in a town, declared that it should not be in the power of the feuar to make any deviation from or alteration of a plan of the tenement, signed as relative to the feu-charter, "all which it is hereby specially provided may be stopped, demolished, or removed by us or our foresaids, or by any of the feuars of

SUPERIOR AND VASSAL—*Continued.*

the said street, at the expense of the feuars offending." The tenement was erected in 1826. In 1887 the proprietor proposed to bring forward the front of the tenement to the line of the street by covering the area. Neighbouring feuars, with a title to object, objected on the ground that the proposed alteration was a deviation from the plan, but the plan itself was lost. *Held* that, as it was to be presumed that the existing buildings had been erected in conformity with the plan, the *onus* lay upon the proprietor to shew that the alterations proposed by him were not disconform to the plan. Sutherland v. Barbour, Nov. 17, 1887, p. 62.

Building restrictions.

5. By feu-contract dated in 1855, Allan, the vassal, bound himself to erect two villas of specified dimensions and style, and Dixon, the superior, bound himself to take the whole feuars of the remaining portions of his estate bound in similar terms, and to insert in their feu-rights the like clauses with reference to the erection of buildings. These obligations were appointed to be inserted in the infeftment, and to be validly referred to in all future conveyances of the feu. In 1862 Dixon granted a feu to Hunter by a feu-contract which contained clauses obliging him to erect villas only, and obliging the superior to take the feuars of the ground "immediately adjoining to the north" similarly bound. In 1883 Allan and Dixon executed a deed by which they discharged each other of the foregoing obligations, and in the same year Dixon feued to Allan an additional piece of ground to the north of Hunter's feu, but not adjoining it, under a contract which permitted the erection of tenements of dwelling-houses and shops. In 1887 Allan presented a petition to the Dean of Guild for warrant to erect tenements of dwelling-houses in flats and shops on his additional feu. The petition was opposed by Hunter, who objected to the erection of tenements and shops, founding, in the first place, on the feu-contract of 1855, which he maintained created a *jus quæsitum* in favour of the other feuars, rendering the unrestricted title of 1883 null, and, in the second place, on his own title. *Held* that Allan's title was not subject to any restrictions in favour of Hunter, and that as it was not alleged that he had taken it in the knowledge that it was in violation of any obligation by the superior in favour of Hunter, he was entitled to obtain the authority craved. Walker & Dick v. Park, Feb. 29, 1888, p. 477.

Building restrictions—Self-contained house.

6. The proprietor of a piece of ground fronting a street in which the buildings were of various descriptions, feued it by one feu-contract to one person in four building lots, a separate feu-duty being attached to each. The feu-contract prohibited the feuar from erecting or maintaining on the four lots feued any other building than one villa on each lot, and provided that "each of the said villa dwelling-houses shall be detached from the others, and shall be self-contained and occupied by one tenant only." This provision was declared to be a real burden, to be inserted or referred to in any subsequent dispositions or conveyances. A villa for the occupation of a single tenant was thereafter erected on each lot. The villas and lots were subsequently disponed to different persons (the above provision being incorporated in the dispositions). A petition to the Dean of Guild by one of the disponees for authority to alter his villa by erecting an outside stair for the upper floors and cutting off communication between them and the lower floor was opposed by another disponee. The superior was cited, but did not appear. *Held*, on appeal from the judgment of the Dean of Guild—(1) (following *Buchanan* v. *Marr*, June 7, 1883, 10 R. 936) that the proposed alteration being an alteration which would not preclude the villa being occupied by a single family, it did not involve a contravention of the feu-contract; and (2) *per* Lord Justice-Clerk and Lord Young, that even if there were, the objector was not *in titulo* to object. Miller v. Carmichael, July 19, 1888, p. 991.

See *School*, 2.

TEINDS. *Over and under-paying heritors—Prescription.*

1. *Held* that although in general prescription does not begin to run against a claim for repayment by an overpaying heritor in a locality against an underpaying heritor until a final decree of locality has been pronounced, it did operate where the overpayments by the heritor were caused by his own act in failing to produce a decree of valuation. Earl of Fife v. Duff, Dec. 23, 1887, p. 238.

Valuation—Cumulo or several—Division.

2. In a decree of valuation of, *inter alia*, the teinds of the lands and barony of K, comprehending the lands of A, B, C, D, and E, with the pertinents, the rent, stock, and teind of these lands was declared to be £157, 6s. $0^{4}/_{12}$d. sterling, the fifth part whereof being £31, 9s. $2^{5}/_{12}$d., was declared to be teind, and the usual decerniture followed. In the extract of the decree, which was in the old form, it was set forth that the decerniture proceeded upon a report by the Lord Ordinary, and conform to a particular scheme of the rental, stock, and teind of the lands, and this scheme was narrated *ad longum.* From this scheme it was possible to ascertain the rental, and the particular deductions, and so to arrive accurately at the teind of each separate parcel of land making up the lands and barony of K. In a question arising as to the surplus teinds of D and E—two of these several parcels—which had been disjoined and erected into a new parish *quoad omnia*, *held* that, as regarded the lands and barony of K, the valuation was a *cumulo* valuation, and that it was not competent to look beyond the decerniture for the purpose of ascertaining the several valuation of the teinds of D and E. Lord Advocate v. Stirling, Feb. 10, 1888, p. 424.

Cumulo valuation—Disjunction quoad omnia of part of lands—Surplus teind.

3. The teinds of the lands of K, in the parish of X, comprehending the lands of A, B, C, D, and E, with the pertinents, were valued *in cumulo.* D and E were afterwards disjoined, and erected into the parish of Y *quoad omnia.* In the locality of Y the teinds of D and E, as ascertained for the purposes of the locality, from data contained in the extract of the old decree of valuation, without process of division of the *cumulo* valuation, were exhausted. In consequence of the stipend having been modified in a year when the fiars prices were abnormally low, the heritor's subsequent payments from these teinds to the minister of Y considerably exceeded the valued teind on which the locality proceeded. He continued, however, to pay without surrendering to the minister of Y. In the parish of X, on the assumption that the teinds of the lands of A, B, and C were severally ascertained on the same basis, there was surplus teind. *Held* that the valuation of the teinds of the lands of K being a *cumulo* valuation, and no formal process of division having been brought, the titular was only entitled to claim surplus teind from the whole lands of K, after deducting the stipend paid in both the parishes of X and Y, and was not entitled to claim the surplus teind of the lands of A, B, and C, parts of the lands of K remaining in the parish of X, after deducting only the stipend paid to the minister of the parish of X. Lord Advocate v. Stirling, Feb. 10, 1888, p. 424.

Subvaluation—Dereliction.

4. Mere lapse of time is no bar to a subvaluation of teinds being approved, the right to obtain approbation being *res meræ facultatis.*

A subvaluation of teinds will not be held to be derelinquished unless there is evidence of an intention to abandon it.

Overpayments of stipend will not be evidence of the abandonment of a subvaluation if it appear that at the time of the overpayments the heritor making them was ignorant of the existence of the subvaluation. Lord Elibank's Trustees v. Hart, July 16, 1888, p. 927.

THEATRE. See *Property*, 2.

TITLE TO SUE. *Statutory Board—Salmon Fisheries Act,* 1862—*Salmon Fisheries Act,* 1868—*Interdict.*

1. In a note of suspension and interdict brought by a Fishery Board at

TITLE TO SUE—*Continued.*

common law to prevent persons fishing in a manner alleged to be illegal, *held* that the complainers, being merely a statutory board with statutory remedies, had no title to sue. Tay District Fishery Board v. Robertson, Nov. 16, 1887, p. 40.

Decree for expenses—Assignation.

2. A defender obtained a decree for expenses against the pursuer, and thereafter assigned his interest therein to a third party. The assignee raised an action for the amount of the expenses against persons who were not named in the decree, averring that they had been the true *domini litis* in the former action. *Held* (*reversing* judgment of Lord Lee, Ordinary) that he had no title to sue. Rose v. Stevenson, Jan. 27, 1888, p. 336.

Action for custody of bastard child—Personal and intransmissible.

3. *Held* that an action at the instance of a mother for custody of her bastard child could not be insisted in after her death by a person named by her in a testament as "tutor, curator, and guardian" to her child. Brand v. Shaws, Feb. 24, 1888, p. 449.

Inhibition—Trust.

4. When a heritable bond is granted in favour of certain persons as trustees, the assignation of the beneficial interest to other persons does not affect the title of the trustees to use inhibition in their own names against the debtor in the bond. Clarke v. M'Nab, March 10, 1888, p. 569.

Company—Shareholder.

5. Title of an original shareholder of a company to sue the vendor of company estate for damages on the ground that he had been induced to become a shareholder through the fraudulent misrepresentations of the defender. Dunnett v. Mitchell, Dec. 7, 1887, p. 131.

Law-agent to trust—Beneficiaries.

6. Title of beneficiaries, with a contingent interest merely, to sue action against the law-agent to the trust to have him ordained to restore trust-funds alleged to have been lost through illegal investment. Rae v. Meek, July 20, 1888, p. 1033.

TRADE NAME. *Interdict.*

In order to entitle a wholesale dealer to interdict against a retail dealer selling over his counter goods on the representation that they are of the pursuer's manufacture, when in point of fact they are not, it is not sufficient to prove that in a few instances, when goods of the pursuer's manufacture were asked for, other goods were supplied. Thomson & Co. v. Robertson, July 12, 1888, p. 880.

TRUST. *Foreign—Jurisdiction.*

1. A person carrying on business in Scotland granted a trust-deed for behoof of his creditors to two trustees, one of whom resided in Scotland and the other in England. In an action of accounting raised in Scotland against both trustees, the trustee residing in England pleaded no jurisdiction. The Court *repelled* the plea, on the ground that the trust-estate was in Scotland. Robertson's Trustee v. Nicholson, July 13, 1888, p. 914.

Adjudication—Diligence against trust-estate for expenses of litigation.

2. *Held* competent to adjudge a trust-estate for expenses decerned for against the trustees in a litigation in which the trust-estate was alone concerned. Stewart v. Forbes, Feb. 8, 1888, p. 383.

Bankruptcy Act, 1856, *sec.* 166.

3. *Question,* whether private trusts can be brought under the superintendence of the Accountant in Bankruptcy, in terms of the 166th section of the Bankruptcy (Scotland) Act, 1856. Raeburn's Trustees, June 12, 1888, p. 740.

Administration—Authority to sell—Judicial Factor.

4. A trust-deed conferred upon the trustees a power of sale, either by public roup or by private bargain. A judicial factor, who had been appointed on the estate, applied, under the Trusts Acts, 1867 and 1884, for authority to

TRUST—*Continued.*
sell privately for £2100 certain feuing ground belonging to the estate, which at that time yielded £18 a-year. The liferenter approved of the proposed sale, but the fiar objected, and urged delay until the demand for building ground improved. After a report from men of skill that the offer should be accepted, the Lord Ordinary (Trayner) granted the prayer of the petition. On a reclaiming note the Court recalled the Lord Ordinary's interlocutor and *refused* the petition, on the ground that the proposed sale might be prejudicial to the interests of the fiar. Molleson v. Hope, May 26, 1888, p. 665.

Administration—Inhibition—Title to sue.

5. When a heritable bond is granted in favour of certain persons as trustees, the assignation of the beneficial interest to other persons does not affect the title of the trustees to use inhibition in their own names against the debtor in the bond. Clarke v. M'Nab, March 10, 1888, p. 569.

Administration—Title to sue.

6. In a multiplepoinding brought by testamentary trustees for the distribution of an estate, one of the beneficiaries stated as an objection to the condescendence of the fund *in medio* that it did not include a sum of £600 said to be due to the estate by one of the trustees. In answer the trustees produced a discharge granted by the truster to the alleged debtor, and explained that they were satisfied they could not prosecute the claim with any hope of success, but they offered to allow the objector to sue in their names on his finding security for the expenses of the proceedings. The Court *repelled* the objection, holding that this was all the trustees could be required to do. Brown's Trustees v. Brown, March 13, 1888, p. 581.

Administration—Nobile officium—Allowances to minor children.

7. A testator left a heritable estate, the rental of which was £900 a-year, settled upon his only son in liferent and his children in fee. Of the income of the personal estate, which was £4600, the son received annually about £2300 as an alimentary payment for the support of himself, his wife, and children, the remaining £2300 of income being accumulated by the trustees for the children. In a petition at the son's instance, asking that the trustees should be ordained to contribute out of the free annual income for the suitable education and maintenance of the children (of whom there were seven under nineteen years of age), the Court *authorised* the trustees to pay a sum equal to one-half of the cost of such education in each year, including board when from home, and travelling expenses, the payment by the trustees not to exceed £500 in any one year. Muir v. Muir's Trustees, Dec. 10, 1887, p. 170.

Administration—Investments—Personal liability of trustee.

8. Circumstances in which a gratuitous trustee was found personally liable for trust-funds lent by him on the security of heritable subjects.

Observed that where trust moneys are lent on the security of heritable subjects, if any part thereof is in the occupation of the owner the trustee ought to take that fact into consideration in estimating the amount of the rental available for payment of interest on the loan.

Observed that where the primary purpose of a trust is to secure an alimentary provision, the trustee is bound to be specially careful that the security is sufficient to ensure payment of the interest on the loan. Maclean v. Soady's Trustee, July 19, 1888, p. 966.

9. A marriage-contract empowered the trustees acting under it (two of whom were the spouses) to lend on, *inter alia*, heritable securities, or personal securities or obligations, and declared that the trustees should not be answerable "for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." The greater part of the trust funds were lent by the trustees on the security of buildings in the course of erection, the rents of which, after their completion, turned out to be wholly insufficient to meet the interest on the loan, and the borrower became bankrupt. While both spouses were alive the

TRUST—*Continued.*

children of the marriage, whose interest under the contract was during the marriage contingent merely, brought an action against the trustees and the law-agent to the trust, "conjunctly and severally, or severally, or in such other way or manner as should seem just," to have them ordained to restore the money to the trust. The law-agent and one of the trustees lodged defences. The Court—while unanimously of opinion that the security was one which ought not to have been accepted by trustees—(*diss.* Lord Mure, Lord Shand, and Lord Rutherfurd Clark) *assoilzied* the trustee, and (*diss.* Lord Young) *assoilzied* the law-agents.

The Lord President, Lord Justice-Clerk, and Lord Adam *held* that gratuitous trustees are only liable for such diligence, prudence, and knowledge as they actually possess in the management of their own business, and that, judged by this standard, the evidence shewed there had been no negligence on the part of the trustee.

Lord Young *held* that the trustee was not liable, as he had acted on what he considered the best advice, that of the law-agent.

Lord Mure, Lord Shand, and Lord Rutherfurd Clark were of opinion that gratuitous trustees must shew the same reasonable care that a man of ordinary prudence would exercise in the management of his own business, and that the trustee was liable, as the evidence shewed he had failed in this.

Opinion (*per* the Lord President) that the indemnity clause in the marriage-contract protected the trustee—*Opinions contra per* Lords Mure, Shand, and Young. Rae v. Meek, July 20, 1888, p. 1033.

10. Testamentary trustees who had power to invest the trust funds "in any of the Government securities, or upon heritable security in Scotland, or in such other way, or on such other securities as my trustees shall think proper," and who were declared not to be liable "for loss or depreciation in the investments of the trust funds," (1) lent part of the trust funds on deposit-receipt to a heritable security company; and (2) with another portion purchased fully paid-up stock of a limited company. There was a loss on both transactions. *Held* (*aff.* judgment of Lord M'Laren) that the *first* was an investment within the powers of the trustees, and that they were not liable for loss upon it, but (*rev.* judgment of Lord M'Laren) that the *second* was not an investment but the employment of the trust funds in a trading company of which the trustees thereby became partners, and that they were liable for the loss of funds so employed. Ritchies v. Ritchie's Trustees, July 20, 1888, p. 1086.

11. *Circumstances in which family trustees, with the fullest powers of investment on such securities, heritable or personal, as they should think proper, were made liable for the loss of a sum lent to a member of the family on insufficient security.*

Opinion (per *Lord Watson*) *that there is no rule in the law of Scotland that the responsibility of a gratuitous trustee must (apart from any special dispensation by the truster) be tested by reference, not to an average standard, but to the degree of care and prudence which he uses in the management of his own private affairs.*

Opinion *further* (per *Lord Watson*) *that trustees authorised to lend on personal security are not justified in doing so unless they cannot find a safer investment.* Knox v. Mackinnon, August 7, 1888, H. L., p. 83.

Administration—Payments ultra vires—Acquiescence of beneficiary.

12. Spouses raised an action against the trustees under their marriage-contract for repayment, with interest, of sums expended out of the wife's estate on the ground that the payments were *ultra vires* of the trustees. *Held* that, even assuming the payments to have been *ultra vires*, the action was barred by the fact that the wife had been a party to an agreement which embodied a settlement of the whole transaction.

Opinion (*per* the Lord Justice-Clerk) that the question was one not between beneficiary and trustee, but between truster and trustee, and that

TRUST—*Continued.*

the wife being in the position of a truster, and having been in the knowledge of the action of the trustees, was not entitled to dispute it afterwards. Spence v. Boyd, Feb. 7, 1888, p. 376.

Administration—Borrowing ultra vires.

13. Circumstances in which *held* that while trustees had acted *ultra vires* in borrowing money to pay debt the beneficiaries had sustained no loss, and trustees therefore *assoilzied.* Binnie v. Binnie's Trustees, Feb. 10, 1888, p. 417.

Administration—Loan by trustees to one of their number.

14. Trustees advanced part of the trust funds to the liferenter—one of their number—on the security of a house which he was erecting for his occupation. *Held* that the transaction was *ultra vires,* and that the trustees were bound to replace the funds so lent. Ritchies v. Ritchie's Trustees, July 20, 1888, p. 1086.

Parent and child—Separate maintenance of child.

15. A truster directed his trustees to pay to his wife, if she survived him, a certain annuity, and to permit her to have the occupation during her lifetime of a dwelling-house and the use of the furniture therein, declaring that she "shall out of the foresaid provisions educate and maintain my children . . . in a way befitting their station in life, until they shall respectively attain the age of twenty-one years or, if daughters, be married." He was survived by his wife and by several sons and daughters of that and of a prior marriage. The settlement left undisposed of part of the income and most of the capital of his estate, which was of considerable amount. *Held* that one of the daughters of the first marriage, who was over twenty-one years of age and desired to live apart from the widow, was not entitled under the settlement to a separate maintenance out of the widow's annuity, it being sufficient implement of the widow's obligation that she offered to maintain the daughter in family with her in the dwelling-house left by the truster. Barry's Trustees v. Barry, March 2, 1888, p. 496.

Denuding—Renunciation of alimentary liferent—Marriage-contract.

16. By antenuptial marriage-contract trustees were directed to pay the income of the trust-estate (which amounted to £18,500, £16,000 being contributed by the husband's father, and £2500 by the wife) to the spouses during the subsistence of the marriage, and to the husband in the event of his wife's death. The income was declared to be "strictly alimentary." After the death of both spouses, if one child survived, he or she was to get £10,000 of the capital; if two survived, they were to get £12,000; if more, they were to get the whole. It was further provided that in the event of only one or two children surviving, "the residue of said trust capital shall be at the disposal of" the husband "or his heirs, executors, or assignees." Failing surviving children, the whole capital was to be paid over to the representatives of the spouses in the proportions advanced by or for them. After the death of the wife, and there being only two children of the marriage surviving the husband called upon the trustees to denude of the trust funds, in so far as they exceeded £12,000, upon his renouncing and discharging his liferent of the surplus. In a special case, *held* that the trustees were not entitled or bound to denude.

Question, whether if the children had consented to take immediate payment of their provisions the trustees could have refused to denude. Montgomery's Trustees v. Montgomery, Feb. 2, 1888, p. 369.

Nobile officium—Cy près.

17. In 1866 the funds realised by a charitable bazaar were appropriated in part to the establishment of a convalescent fever home in connection with the Royal Infirmary, Glasgow, which was at that time the only institution in the city for treating fever patients. Thereafter the Magistrates and Council of Glasgow, as Local Authority for the city, established a fever hospital for the city, and the Royal Infirmary ceased to treat fever patients. *Direction*

Trust—*Continued.*

by the Court as to the application of the funds. Glasgow Royal Infirmary v. Magistrates of Glasgow, Jan. 11, 1888, p. 264.

18. Circumstances in which it was *held* that a church which had belonged to the "Licensed Episcopal" congregation of a town (which had for many years ceased to exist), fell to be made over to the "Scottish Episcopal" congregation of the town. Burnett v. St Andrew's Episcopal Church, Brechin, June 12, 1888, p. 723.

Charitable trust—Administration—Discretion of trustees.

19. A truster directed his trustees to hold his estates, which were heritable, and apply the free yearly revenue thereof "for preserving the aged and infirm among the descendants of my father from want, or from the necessity of applying for public relief, and for obtaining for the young among the said descendants, boys and girls, such a good, sound, plain, and useful education as will enable them to earn a livelihood for themselves, . . . with power . . . to maintain the young among the said descendants either in family with their parents or otherwise while at their education, . . . "; declaring that the trustees should not be entitled to spend more than £20 annually for the relief of any one beneficiary, "and that only while, in the judgment of my said trustees, he or she stands in need of it in supplement of his or her own exertions." The truster directed the surplus revenue to be divided among certain of his relatives and their representatives *per stirpes.* At a time when the trustees, assumed and acting in the trust, were among the persons interested in the surplus revenue being as large as possible, a descendant of the truster's father, who was a widow with six children under seventeen, applied for assistance from the trust. The revenue of the trust exceeded £500, less than £50 of which was expended on descendants of the truster's father, the remainder having been applied as surplus revenue. The trustees offered the applicant 12s. 6d. per week, with school fees and boots for the four youngest children, and to pay a debt she had incurred for rent, amounting to £6. The Court *held* that this allowance was in the circumstances inadequate, and *directed* the trustees to make an allowance of £10 per annum for each of the six children, reserving to the parties to apply to the Court to alter the allowance in the event of any change of circumstances. Thomson v. Davidson's Trustees, June 9, 1888, p. 719.

Educational trust—Superior and Vassal—Educational Endowments Act, 1882—Scope of Act.

20. Scheme framed by the Commissioners under the above Act *held* not to be within the scope of the statute, as the subjects had not been "dedicated to charitable uses," the feu-contract under which they were held allowing them to be applied to other purposes. Magistrates of Greenock v. Commissioners on Educational Endowments, Feb. 24, 1888, p. 440.

Trust for Creditors. See *Bankruptcy*, 8.

Ultra Vires. See *Trust*, 8 to 14.

Valuation Acts. *Appeal—Competency.*

1. The Lands Valuation Act, 1854, enacts that any person whose name is entered by the assessor in the Valuation-roll shall be entitled to appeal to the Commissioners with reference to such entry, provided the appellant shall intimate in writing that he is to maintain the appeal, and "specify the amount of valuation which he alleges should be substituted for that stated by the assessor." The proprietor of K intimated in writing to the assessor "an appeal against your entering in the Valuation-roll the shootings of K at £5," and added that the lands were not shot over, and that if the shootings were let as assessed the rent of the lands would be diminished to a very much larger extent. Before writing the letter he had stated to the assessor verbally that he objected to the shootings being entered in the Valuation-roll at all. *Held* that there had been sufficient intimation of an appeal against the shootings being entered in the roll. Maitland v. Assessor for Midlothian, March 15, 1888, p. 592.

VALUATION ACTS—*Continued.*

Subject of Valuation—Right to prevent coal from being worked so as to cause surface damage.

2. The titles of a vassal reserved to the superior the coal in the lands feued, but gave the vassal the right to prevent the coal from being worked except on the "stoop-and-room" system, one object of which was to provide against the subsidence of the surface. The vassal entered into an agreement with the lessee of the coal under which, in return for annual payments, the amount of which was to be regulated by the coal won, the lessee became entitled to work the coal on the "longwall" or complete excavation system. *Held* that the vassal did not fall to be entered in the Valuation-roll as proprietor of collieries in respect of such payments. Assessor for Fifeshire v. Curror, March 20, 1888, p. 632.

Shootings—Unlet deer forest—Sporting Lands Rating Act, 1886, *secs.* 6 *and* 7.

3. Lands in the occupation of the proprietor were used as a deer forest only, there being neither other game nor farm stock thereon. *Held, per* Lord Fraser (agreeing with the determination of the Valuation Committee), that the lands fell to be entered in the Valuation-roll at their value as a deer forest only; *per* Lord Lee, that looking particularly to the terms of the Sporting Lands Rating Act, 1886, secs. 6 and 7, there ought to be a double entry of the lands at their value as grazing ground, and at their value as a deer forest. The Judges being divided in opinion, the determination of the Valuation Committee *stood.* Assessor for Argyllshire v. Stuart, March 15, 1888, p. 588.

Mines and Minerals—Lands Valuation Act, 1854, *sec.* 42.

4. A freestone quarry was let on a lease for eight years from Martinmas 1885, with a break in favour of the tenant at any term of Whitsunday or Martinmas after Martinmas 1886, at a fixed rent of £100, or a lordship in the option of the landlord. The tenant did not enter into possession till after the Valuation-roll for 1885-6 had been made up, and the quarry was not entered for that year. It was entered at £100 for 1886-7, in terms of the landlord's return. The lordship paid at Whitsunday 1886 was £92, 10s., and at Martinmas 1886 £89, 10s. The quarry ceased to be worked at Martinmas 1886, but the tenant remained in possession till Whitsunday 1887, when he took advantage of the break and brought the lease to an end. The excavations were filled up, and the ground restored. At Whitsunday 1887 the tenant paid the half-yearly fixed rent of £50. He had thus paid in all £232, but only £100 of that having been entered in the Valuation-roll, the assessor entered the balance of £132 in the roll for 1887-8, although the quarry had not been worked and nothing had been paid during that year. *Held* that under the Lands Valuation Act, 1854, sec. 42, the valuation was wrong. Lord Elphinstone v. Assessor for Middle Ward of Lanarkshire, March 20, 1888, p. 637.

Farm let for part of year as grazings and otherwise unlet.

5. A farm which was entirely laid out in grass was let annually for part of the year—from Whitsunday to Martinmas—as grazings, and during the rest of the year was in the proprietor's own hands. For the year 1887 the rent of the grazings was £301, and the valuation of the farm as fixed by the Valuation Committee £400. On appeal, *held per* Lord Lee that the valuation of the Valuation Committee was right, *per* Lord Fraser that the valuation ought to be reduced to £301, the rent received for the grazings. The Judges being divided in opinion, the valuation *stood.* Berwick v. Assessor for Fifeshire, March 20, 1888, p. 629.

Method of valuation—Hydropathic Establishment—Proof—Competency of compelling proprietor and occupant to disclose his profits—Valuation Act, 1854, *sec.* 10.

6. The valuation (on the basis of capital cost) of a hydropathic establishment in the occupation of its proprietor *reduced,* on a comparison with the valuation of similar establishments throughout Scotland, from £1120 to £850.

VALUATION ACTS—*Continued.*

Opinion (*per* Lord Fraser) that the proper method of valuing such an establishment, when in the occupation of its proprietor, was to ascertain the profits which he made, and that under the 10th section of the Lands Valuation Act, 1854, he might be compelled to disclose these profits, and to produce his books.

Opinion on this point reserved by Lord Lee. Philp v. Assessor for Rothesay, March 20, 1888, p. 627.

County Assessor or Assessor of Railways and Canals—Lands acquired for purposes of a railway but not yet so used.

7. In an appeal against a determination of the Valuation Committee sustaining a valuation by the assessor for the county of certain ground which had been acquired by a railway company (whose line was partly constructed) for the purposes of their undertaking, but which was still in grass and in no way used for these purposes, *held per* Lord Lee, that the ground had rightly been valued by the county assessor and not by the assessor for railways and canals, notwithstanding a provision of the company's Act of Parliament that the lands from time to time acquired by the company should, "for all purposes of tolls, rates, and charges, and for all other purposes whatsoever, be the undertaking, railway works, and property of the company"; *held per* Lord Fraser *contra*, that the ground in question ought to have been valued by the assessor for railways and canals as part of the undertaking of the company. The Judges being divided in opinion, the valuation *stood.* Forth Bridge Railway Co. v. Assessor for Linlithgowshire, March 15, 1888, p. 595.

Burgh Assessor or Assessor of Railways and Canals—Railway bookstall.

8. *Held* that the bookstall in a railway station, in the occupation of newsagents who paid the company a fixed sum annually for the privilege of supplying newspapers and books within the station, but who supplied not only passengers travelling on the railway but inhabitants of the town with newspapers and books, had been properly valued by the assessor of railways and canals as part of the undertaking of the company, and did not fall to be separately entered by the burgh assessor in his roll. Callander and Oban Railway Co. v. Assessor for Oban, March 20, 1888, p. 634.

WARRANDICE. See *Executor*, 2.

WRIT. *Testament—Signature on erasure—Onus.*

Where in a testamentary deed the signature bearing to be that of the testator was written on an erasure, but was otherwise *ex facie* duly tested, and the deed was challenged as vitiated *in essentialibus*, *held* that the deed was *ex facie* probative, and that the *onus* was consequently on the party challenging it to prove either that the signature was not genuine, or, if genuine, that it had not been duly tested. The proof on these points having failed, deed *sustained.* Brown v. Duncan, March 9, 1888, p. 511.

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